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邁向人權國家？陳水扁與馬英九的人權政策比較  
Towards a Human Rights State? A Comparison of Taiwan's  
Human Rights Policies under Chen Shui-bian  
and Ma Ying-jeou

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中華民國九十九年七月

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## Abstract

This thesis examines Taiwan's human rights development from 2000 until 2010. It looks at and compares the policies and action of Presidents Chen Shui-bian and Ma Ying-jeou in terms of three indicators of human rights: the implementation of the international human rights treaties (ICCPR and ICESCR), the establishment of a national human rights commission and the status of the death penalty. The case of Australia and its position in relation to the three key areas of this human rights study are analyzed for comparative purposes. Additionally, important historical human rights milestones and the beginnings of Taiwan's democratization are introduced by way of an overview but the focus of this thesis is on the events of the last decade. In doing so, the overall aim of this study is to assess whether Taiwan has achieved its stated goal of becoming a human rights state. ■

Keywords: *Human Rights; Taiwan; International Human Rights Covenants; National Human Rights Commission; Death Penalty*

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# 1. Introduction

The first decade of the new millennium has been significant for Taiwan in many ways. Taiwan saw its first change of ruling party with the election of Chen Shui-bian in 2000 and after two terms, a KMT president, Ma Ying-jeou was convincingly returned to that office. Building on the significant progress since the lifting of martial law and start of the path to democracy, this thesis will examine the human rights developments in Taiwan from 2000-2010 and compare the policies of the respective presidents. In a relatively short period of time, Taiwan has built up a considerable civil society and human rights awareness and as such, governments of both sides have voiced support for human rights and their continued promotion and protection in Taiwan. Indeed, the then-President Chen promised to lead Taiwan in becoming a human rights state. This thesis will attempt to evaluate this promise by comparing developments under Chen and Ma. By examining the human rights progress and pitfalls of the last decade, it is hoped to bring further attention to this very important area of Taiwan's legal development.

## 1.1. Purposes of the research

The purposes of this research are to explore Taiwan's human rights by analyzing the question whether Taiwan is moving towards becoming a human rights state. More specifically, its focus is to determine and evaluate the progress made in human rights in Taiwan from 2000-present and to compare the results of Chen Shui-bian's administration to President Ma's to-date. Therefore, I will compare the policies, attempts at implementation and achievements of Presidents Chen and Ma across three key areas of human rights during the period 2000-present. Taiwan and its achievements in democratization in recent decades and its emerging development of and interest in human rights merit further academic study. Taiwan's initial efforts in this area are commendable but further critical examination can only be of additional benefit to those interested in Taiwan's political development and the human rights of Taiwanese citizens. By looking at the three key areas of international human rights treaties implementation, the establishing of a human rights commission and the status of the death penalty, it is hoped that this research can determine the extent of progress in human rights throughout this decade and to assess the efforts and results of the respective administrations in these areas. In doing so, it is also hoped that this

research can contribute to and expand on the body of knowledge in the English language in this area.

## 1.2. Motivation

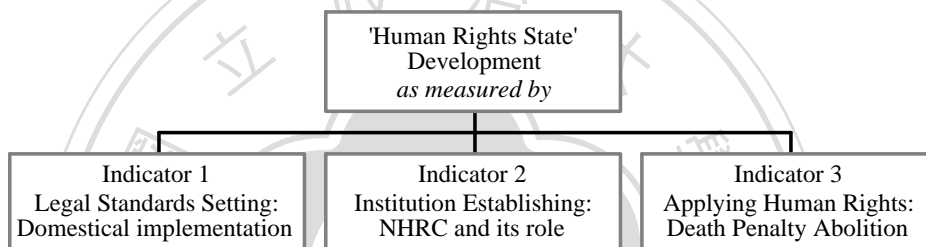
Taiwan is a unique country for many reasons. Its unique international status and the hurdles it faces as a result have not stopped it from achieving a peaceful end to authoritarianism and a smooth transition to democracy. The political pressure it faces from an authoritarian yet arguably culturally similar regional and world superpower just across the Taiwan Strait have fortunately not impeded these developments. Some have argued that East Asian values are incompatible with notions of human rights and liberal democracy but Taiwan has shown that this is not the case and that human rights can be achieved notwithstanding a Confucian cultural legacy. It is for these important reasons that Taiwan is the focus of my study in human rights. Moreover, I believe this study can be of use to other countries as they deal with democratization and assist in spreading these hard-fought freedoms.

## 1.3. Methodology

In order to assess Taiwan's progress in human rights development and whether it is moving towards becoming a human rights state, this thesis will examine three human rights 'indicators', described also above as key areas. For the purposes of this thesis, human rights 'indicators' are defined as objective criteria that can be used to measure human rights status. These indicators are numerous and can include such aspects as laws, institutions, NGO activity, positions on various issues and public awareness. Using indicators makes it clear how human rights progress is being measured and sets a framework that is easy to understand and objective. It has been decided to focus on three indicators: in the area of legal policy and standards setting, the implementation of the major international human rights standards as found in the ICCPR and ICESCR; in the area of institutions, the establishment of a National Human Rights Commission; and, as an example of applying human rights discourse, the controversial issue of the death penalty and its abolition. Human rights development across each three of these indicators will be, therefore, evaluated to arrive at conclusions as to the overall state of Taiwan's human rights development. Clearly, other indicators could be examined but it is important to find a balance in number and a sufficient breadth to be able to

best evaluate the research question. It is for this reason the three indicators, which explore diverse areas such as the setting of human rights standards, establishing a means of enforcement and promotion and, an application of human rights in criminal justice, have been chosen. Coomans, Grünfeld and Kamminga discuss the ‘methodological deficit’ in much human rights research to date and outline some useful suggestions to avoid such ‘methodological sloppiness’.<sup>1</sup> These recommendations have been followed in arriving at the above-mentioned methodology.

Table 1. Methodological Approach



The examination of these three indicators will be divided into three main areas: foreign comparison, historical background and the domestic situation under Chen and Ma. This thesis will begin by examining the three indicators in a foreign setting. The case of Australia and its human rights development and consideration of the three indicators will be explored. As a country that has considerable experience in dealing with all three indicators, it will provide an example of how these issues have been treated. Taiwan’s general human rights development (or lack thereof) prior to 2000 will be explored in Chapter 3. The lack of progress across the chosen three indicators will be examined and possible reasons given. Other indicators of human rights suppression and progress will be briefly introduced to provide a background to human rights in this country. The major focus of this research will then turn to an analysis of the three indicators in contemporary Taiwanese politics. The progress and shortcomings of human rights development across the three indicators will be studied under Chen Shui-bian’s term in office and then under that of Ma Ying-jeou. Although

<sup>1</sup> Coomans, F., Grünfeld, F. and Kamminga, M.T. 2009. A Primer. In Coomans, F., Grünfeld, F. and Kamminga, M.T. (Eds). *Methods of Human Rights Research*. Antwerp: Intersentia. p. 12-13

Chen's time in office (two terms) was significantly longer than Ma, still in his first term, Chen was limited by an obstructive legislature while Ma has a KMT super majority. Nevertheless, this time difference will be taken into account and projections as to future developments will be considered.

#### 1.4. Overview of the three indicators

Human rights are not a new concept. Earlier annunciations of human rights standards can be found in such famed documents as the *French Declaration of the Rights of Man and of the Citizen* and the *American Declaration of Independence*. Overtime, more and more states considered it important to make reference to the principles of human rights in their constitutions. The events of World War II, however, resulted in an international effort to ensure the protection of human rights and from this time, the international legal regime through the United Nations have vigorously pursued this. Some states were quick to adopt and implement this newly internationalized concept, while others ignored these international developments. As for Taiwan, Neary states: "Until 1987/88 merely to mention human rights was equivalent to criticizing the government, practically the language of traitors, an attitude which has not completely disappeared."<sup>2</sup> Thus, in any study of human rights in Taiwan it is important to be aware of its historical background and political development.

Under the international human rights regime, there exists a set of universal standards that must be met by governments. These universal standards – human rights – should apply to all and protect the weakest in each state but this is often not the reality. The international human rights standards, set out in the ICCPR, its protocols and the ICESCR require states to carry out implementation of the treaties and ensure protection of the human rights set out within those documents. National human rights bodies are an effective means of protecting these standards. Furthermore, considering the death penalty as an extreme denial of the fundamental right to life, efforts to abolish capital punishment are enshrined in the ICCPR and the Second Protocol.

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<sup>2</sup> Neary, I. 2002. *Human Rights in Japan, South Korea and Taiwan*. London: Routledge. p. 113

#### 1.4.1. Implementing international human rights standards

“The ICCPR is more than just a listing of rights” cites the American Bar Association. “The drafters – delegations of states’ representatives – agreed that a central obligation of the ICCPR would be the implementation of its provisions at the national level.”<sup>3</sup>

The present international system relies heavily on state enforcement of these principles. Some states have positively acted to ensure the protection of human rights in their jurisdictions while others, have not acted and continue to flaunt international law and violate their citizens’ human rights. Notwithstanding, Taiwan’s unique international status and exclusion from many international bodies, there are no limitations on the unilateral domestic implementation of international human rights standards. While historically, Taiwan’s record on human rights particularly under its authoritarian regime was a blight, Taiwan’s isolation has arguably contributed to its democratic improvements in the last twenty years. Indeed, Chen states: “Many areas of human rights law and practice have been reformed in Taiwan in the era of democratization, including criminal procedure, police powers, administrative procedure, and the freedoms of speech, assembly and association.”<sup>4</sup> Therefore, it can be seen that Taiwan has moved towards the promotion and protection of human rights within its borders in several areas, albeit in incremental steps and in the absence of comprehensive human rights policy prior to 2000. Although Lin considers Taiwan’s non-recognition an incapacity to participate in the international system for the protection of human rights, Taiwan is not domestically so limited and can unilaterally implement international standards.<sup>5</sup>

#### 1.4.2. The importance of NHRCs

Smith states: “[National Human Rights Institutions] play a crucial role in promoting and protecting human rights in a wide variety of ways.”<sup>6</sup> She cites their abilities to monitor rights situations, handle complaints, audit laws, make recommendations to the government, train personnel and create public awareness as among their

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<sup>3</sup> Central European and Eurasian Law Initiative, 2003. *ICCPR Legal Implementation Index*. Washington: American Bar Association. p. 1

<sup>4</sup> Chen, A.H.-Y. 2006. Conclusion: Comparative reflections on human rights in Asia. In Peerenboom, R., Petersen, C.J. and Chen, A.H.-Y. (Eds) *Human Rights in Asia: A comparative legal study of twelve Asian jurisdictions, France and the USA*. London: Routledge. p. 497

<sup>5</sup> Lin, F.C.-C. 2006. The Implementation of Human Rights Law in Taiwan. In Peerenboom, R., Petersen, C.J. and Chen, A.H.-Y. (Eds) *Human Rights in Asia: A comparative legal study of twelve Asian jurisdictions, France and the USA*. London: Routledge. p. 315

<sup>6</sup> Smith, A. 2006. The Unique Position of National Human Rights Institutions: A mixed blessing? *Human Rights Quarterly*, 28:4 904-946. p. 905

noteworthy features. Furthermore, Smith points out their distinctive role in society, which she sees as a position in between government and civil society, independent of both and critical to their success.

International guidelines that outline a minimum set of standards for national human rights commissions (hereafter, NHRCs and also known as national human rights institutions NHRIs) have been agreed to by the United Nations. The ‘Paris Principles’ as they are known<sup>7</sup> state that a mandate as broad as possible is desired. Specifically, NHRCs should possess the following capabilities: the capacity to monitor the domestic human rights situation, the duty to advise the government on human rights proposals and/or violations, powers to link with international human rights bodies and, a role to educate and inform the public of human rights obligations. There exists also the option of having quasi-judicial powers; however of these, Kjaerum states: “Whereas an institution can hardly be recognized as fulfilling the Paris Principles if one of the first four elements is left out of its mandate, it is facultative to give it the mandate to hear and consider individual complaints and petitions.”<sup>8</sup> Therefore, this fifth power is technically optional, yet the Human Rights Commission states it is increasingly seen as the norm and preferred for NHRCs to possess this mandate as well.<sup>9</sup> The Paris Principles set out comprehensive guidelines for country’s planning to establish a NHRC. In 1990, only eight countries possessed such bodies but by 2002, this number has risen to 55.<sup>10</sup>

Mohamedou states:

“An NHRI has the possibility of effecting positive change. Even national institutions established for cosmetic purposes can transcend the limitations initially imposed upon them. This transformative effect on the broader society

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<sup>7</sup> Approved by General Assembly Resolution 48/134 (20 December 1993)

<sup>8</sup> Kjaerum, M. 2003. *National Human Rights Institutions Implementing Human Rights*. Copenhagen: Danish Institute for Human Rights. p. 7

<sup>9</sup> Declaration and Programme of Action. 2000. UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, paragraph 90

<sup>10</sup> Kjaerum, M. 2003. p. 5

is in fact vital to the inculcation and perpetuation of human rights awareness.”<sup>11</sup>

Given that NHRCs have such potential, they clearly have a valuable role to play. Such a role, though, is not secure without certain conditions being met. These include legitimacy, accessibility, networking ability and importantly, independence, factors which Mohamedou has examined extensively.<sup>12</sup> Furthermore, Smith supports this argument and states: “These questions of independence go to the very heart of the debate about the effective functioning of a NHRI and highlight the difficulty for NHRIs in defining and protecting their space.”<sup>13</sup> Particularly, in countries in periods of political change, those undergoing democratic transition and those trying to consolidate such reforms a NHRC can be a very effective tool.

#### 1.4.3. International death penalty trends

Internationally, the situation of the death penalty and its continued use is one of decline. A majority of the world’s states have considered it necessary to prohibit its use and it is considered possible that international opinion and pressure could eventually bring an end to executions throughout the world;<sup>14</sup> however, this issue still sparks controversy and is by no means settled. Dieter states:

“Gradually, in the course of social evolution, a consensus forms among nations and peoples that certain practices can no longer be tolerated. Ritual human sacrifice is an example; slavery, too, has been largely abandoned; physical torture is widely condemned by most nations. Vestiges of these practices may continue, but those are aberrations that further underscore the fact that the world has turned against these practices.”<sup>15</sup>

Clearly, Dieter is an abolitionist but his view draws on a common conception that capital punishment is barbaric and antiquated and scholars draw on statistics that

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<sup>11</sup> Mohamedou, M.-M. 2000. The Effectiveness of National Human Rights Institutions. In Lindsnaes, B., Lindholt, L. and Yigen, K. (Eds) *National Human Rights Institutions: Articles and Papers*. Copenhagen: The Danish Centre for Human Rights. p. 58

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

<sup>13</sup> Smith, 2006. p. 912

<sup>14</sup> Dieter, R.C. 2002. The Death Penalty and Human Rights: U.S. Death Penalty and International Law. *Oxford Roundtable*. [Online] [www.deathpenaltyinfo.org/Oxfordpaper.pdf](http://www.deathpenaltyinfo.org/Oxfordpaper.pdf) [Accessed 7 May 2010] p. 1

<sup>15</sup> *Ibid.*

indicate a movement away from the death penalty. Hood states: “The average rate at which countries have abolished the death penalty has increased from 1.5 (1965-1988) to 4 per year (1989-1995), or nearly three times as many.”<sup>16</sup> From 1989 to 1998, change in the number of abolitionist states was impressive. Dieter recalls that while in 1989 a mere 45 states had abolished capital punishment, that figure has risen to 88 in 1998 and when added to those *de facto* abolitionist at the time, it reached 110 states around the world.<sup>17</sup> These statistics reveal a trend but fail to take into account three significant exceptions: the United States, Islamic countries and Asia. Johnson and Zimring state: “Asia should be important to students of capital punishment, therefore, for the same reason that Hawaii is of interest to volcanologists: because that is where the action is.”<sup>18</sup>

Under international law, the status of the death penalty is divided. The ICCPR does not categorically prohibit the death penalty. Article 6 protects against the arbitrary deprivation of life and does expressly ban the carrying out of executions on pregnant women and those whose crimes were committed under the age of 18. For countries, which have not yet abolished the death penalty, the ICCPR restricts it to ‘the most serious of crimes’. Moreover, the ICCPR provides that the right to pardon or commutation of the death sentence must exist.<sup>19</sup> Significantly, the Second Optional Protocol to the ICCPR, which does unequivocally prohibit the death penalty, has not been as widely adopted as the ICCPR generally.

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<sup>16</sup> Hood, R. 1996. *The Death Penalty: A World-wide perspective*. Oxford: Clarendon Press. p. 8

<sup>17</sup> Dieter, 2002. p.2

<sup>18</sup> Johnson, D.T. and Zimring, F.E. 2006. Taking Capital Punishment Seriously. *Asian Criminology*, 1. 89-95, p. 91.

<sup>19</sup> Art. 6 (1),(2),(4),(5) ICCPR



## 2. The Australian model of human rights development

### 2.1. Introduction

In order to better understand Taiwan's human rights position, an examination of human rights in a foreign setting will be undertaken. A good starting point to evaluate human rights (or any other standard for that matter) is to set a benchmark – a point of reference. Bearing this in mind, it is not the objective of this thesis to find a perfect human rights model and it is questionable as to whether one that can be applied to all situations even exists. Using Australia as a point of reference, we will be able to understand how human rights have been dealt with. Accordingly, Australia and its human rights development across the three indicators will be studied to provide an example.

#### 2.1.1. Why Australia?

Australia, a country with strong democratic traditions and commitment to the rule of law,<sup>1</sup> protects human rights using various measures. Significantly, for the purposes of this thesis, it has ratified the international human rights treaties, established one of the earliest national human rights institutions (NHRI) and has abolished capital punishment. Given that Australia has already addressed these issues over a significant period time and has shown a solid commitment, a study of Australia's treatment of these indicators will provide both useful and insightful guidance to measure Taiwan's progress. Besides population and economy, Australia and Taiwan may appear to have little in common. Nevertheless, human rights cannot be looked at in a vacuum and, in terms of human rights regimes, I believe Australia is one of several that could be examined to highlight these issues.

Both countries are in the Asia-Pacific region, both countries have had strong links to the United States and both are committed democracies. Australia's history as an immigrant country, its dealings with indigenous peoples and the human rights issues that have therein arisen can also be particularly useful for Taiwan. Various European

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<sup>1</sup> Australia is recognized as one of the world's longest continuing democracies. See further at: Department of Foreign Affairs and Trade, 2008. Australia's System of Government. *About Australia*. [Online] [www.dfat.gov.au/facts/sys\\_gov.html](http://www.dfat.gov.au/facts/sys_gov.html) [Accessed 11 May 2010]

states, seen by many as model human rights states,<sup>2</sup> have much of their human rights protections in pan-European systems, which although very effective, an analysis of the European regime and its implementation is outside the scope of this research. Moreover, there is little chance of a regional-level human rights mechanism being established in Asia in which Taiwan could benefit from in the near future. The US has also been excluded for study, as the abolition of the death penalty has not yet been effected and its commitment to human rights across the other two indicators<sup>3</sup> is questionable. It is, therefore, for these reasons and after this process of elimination has been carried out that Australia has been chosen from among the remaining countries suitable for comparison. Australia, with its lengthy experience in dealing with human rights across these three issues, is thus a suitable and interesting subject of comparison for this research.

## 2.2. Australia's progress in the first indicator

The ICCPR and ICESCR form a major component of the so-called 'International Bill of Rights' – the bundle of documents that set out internationally recognized human rights standards. Both Covenants were adopted by the United Nations General Assembly on 16 December 1966<sup>4</sup> and from this date became available for signature and ratification; however, it was to be another decade before both human rights treaties were to come into force. Both documents have been ratified by Australia and implemented to varying degrees. It is important to note, from the beginning, that Australia does not have any bill of rights and this sets it aside from all other western democracies, which have constitutional or statutory bills of rights. It does not follow, however, that Australia does not uphold human rights standards. Human rights in Australia are valued and, in the eyes of many Australians, for the most part well respected. Australians enjoy high living standards and have strong democratic institutions<sup>5</sup> that enable a positive human rights environment, notwithstanding the lack of a bill of rights. In the absence of such, human rights are protected through a variety of means including a wide array of legislation both at federal and state levels. This section will examine how the ICCPR and ICESCR have been implemented in

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<sup>2</sup> European states are frequently rated highest. See Freedom House, 2010. *Freedom in the World 2010 Survey* [Online] [www.freedomhouse.org](http://www.freedomhouse.org) [Accessed 5 April 2010]; Kekic, L., 2007. *The Economic Intelligence Unit Index of Democracy*. [Online] [www.economist.com](http://www.economist.com) [Accessed 5 April 2010]

<sup>3</sup> The US, although having signed the ICESCR, is not a party to it as it has not been ratified.

<sup>4</sup> United Nations General Assembly Resolution 2200A (XXI)

<sup>5</sup> In the 2009 UN HRI Index Australia ranks second and is frequently rated top 10 in democracy rankings.

Australia, given that they have not been directly incorporated domestically into the Australian legal system and Australia does not have any other legal or constitutional enactment enunciating the assortment of human rights recognized in those documents.

### 2.2.1. Ratification

Under Australian law, treaties are not automatically incorporated into Australian law. Various attempts have been made to incorporate internationally recognized human rights (as found in the covenants) into Australian law. The first such attempt began with the signing of the human rights covenants. After two decades of conservative rule, the Australian Government of Prime Minister Gough Whitlam signed the ICCPR and ICESCR on 18 December 1972 within two weeks of coming to government and before even his full ministry had been decided. Neither of the treaties was ratified until the next government led by Malcolm Fraser of the Liberal Party came to power in exceptional circumstances in November 1975.

### 2.2.2. The ICESCR

The ICESCR was ratified on 10 December 1975 arguably, as it was more aspirational in value and had less stringent requirements for implementation. At the time, the newly appointed government would have been wanting to ensure its legitimacy and garner support following the dismissal of the socially reformist Whitlam government. In Australia, the governor-general under royal prerogative has the power to revoke a prime minister's commission and this occurred for the first and only time to-date in 1975. Although ratified, the ICESCR is not enforceable and is only the subject of reporting requirements by Australia. The Australian Human Rights Commission states: "The ICESCR does not, however, form part of Australia's domestic law and is not scheduled to, or declared under, the AHRC Act."<sup>6</sup> The ICESCR, which mandates the 'progressive realisation' of economic, social and cultural rights, committed the government at the time to follow the spirit of the treaty and arguably appease the electorate. Successive governments have been bound by their commitments in areas such as education, health, and family matters and, Australia has been widely lauded for its progress in this regard. While not requiring the passage of legislation, the ICESCR mandates state action to achieve these aspirational rights. The same could

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<sup>6</sup> The Australian Human Rights Commission, 2010. The International Bill of Rights. *Human Rights Explained*, 5. [Online] [http://www.hreoc.gov.au/education/hr\\_explained/5\\_international.html](http://www.hreoc.gov.au/education/hr_explained/5_international.html) [Accessed 5 April 2010]

not be said for the ICCPR, which requires States to take measures to respect the outlined rights and to provide individuals with 'effective measures' to enforce those rights. For this reason, the ICCPR and Australia's efforts to implement it will be the main focus of this section on the domestic implementation of human rights standards.

### 2.2.3. Direct implementation of the ICCPR

The ICCPR was eventually ratified by Australia on 13 August 1980. Earlier attempts to implement (and ratify) the covenant had proved unsuccessful. In 1973, the previous Labor government of Whitlam had tried to pass legislation implementing the ICCPR. Federally, this was Australia's first government attempt at implementing a legislative bill of rights, a debate that continues to this day. Whitlam's Attorney-General, Lionel Murphy introduced the *Human Rights Bill* into Parliament and argued its case. In Senate debates, he argued: "Although we believe these rights to be basic to our democratic society, they now receive remarkably little legal protection in Australia."<sup>7</sup> His proposed law would have enshrined the rights contained in the ICCPR into a domestic statute and provided for a Human Rights Commissioner to investigate infringements. This Bill, however, was never put to a final vote and lapsed before it could be passed.

One year after ratification, implementation of the ICCPR was first effected with the passage of the *Human Rights Commission Act* of 1981. Attaching the covenant as a schedule to the Act and including a statement as to the desirability of federal laws to conform to the ICCPR (among others), the Act established a human rights commission to examine laws to ensure conformity to human rights standards. This control was, however, not binding and mainly involved reporting inconsistencies of already passed laws. It also must be said that mere scheduling of a treaty does not domestically incorporate it into Australian law. Attaching the ICCPR as a schedule intended to provide guidance to those enforcing the Act but did not have any legal effect. Thus from 1981, the Australian Parliament had addressed the domestic implementation of the ICCPR albeit in a minimalist manner by using it as a 'point of reference' for the newly formed Human Rights Commission without direct legal effect.

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<sup>7</sup> Commonwealth of Australia, 1973. *Australian Parliamentary Library Records* [Online] <http://www.aph.gov.au/library/intguide/law/rights19732ndR.htm> [Accessed 10 April 2010]

The next attempt to implement the ICCPR into Australia came in 1985. Bob Hawke's Labor government had come to power and his Attorney-General Lionel Bowen introduced the *Australian Bill of Rights Bill*. This proposed law yet again attempted to implement the ICCPR by enshrining the human rights standards it contained in a bill of rights. This far-reaching law would have given human rights enforceability. Specifically, statutes that breached the bill of rights could be ruled inoperative to prevent inconsistencies. Furthermore, a revised and more powerful human rights commission was proposed that would have the power to hear individual complaints of infringements. The Bill was strongly opposed and was dropped as it was considered a major constraint on Australia's Westminster form of government.

The following year, the Hawke government succeeded in passing revised human rights legislation. In 1986, the *Human Rights and Equal Opportunity Act* was passed and established the Human Rights and Equal Opportunities Commission (HREOC). This set up the body that was proposed in the previous year's bill; however, it did not make binding ICCPR rights nor limit Parliament's legislative authority. Similar to the 1981 *Human Rights Commission Act*, the 1986 Act attached the ICCPR as a schedule and defined human rights as to be those outlined in the international treaties. Those rights could not be enforced through court action against others or the government; however, it did allow the Commission to investigate human rights infringements and to facilitate conciliation between parties as the only dispute resolution mechanism. The legislation also provided for the commission to report its findings and conciliation results to the Attorney-General, giving further oversight to the government.

The 1986 Act has served as the basis for specific human rights protection at a federal level in Australia for over two decades and is assisted by various state anti-discrimination laws. As a federation, which divides legislative power between the states and Canberra, the states also have a significant role in human rights protection. Each state has adopted legislation protecting human rights and associated human rights commissions. Indeed, such state protections usually cover a wider range of rights and are more readily available to Australians. Two domestic jurisdictions have gone on to incorporate domestic bills of rights, notwithstanding a reluctance by

successive federal governments. The Australian Capital Territory (ACT) and Victoria introduced the *ACT Human Rights Act* (2004) and the *Victorian Charter of Rights and Responsibilities Act* (2006) respectively. These two statutes, similar to the UK and Canadian human rights acts, enshrine human rights into domestic legislation and allow a court to issue a statement of incompatibility where it finds an act infringes human rights. They also provide for the enhanced scrutiny of legislation to ensure conformity to the outlined human rights standards. Therefore, we can see that human rights protections in Australia are covered to varying degrees at state and federal levels.

Without a bill of rights, Australia's implementation of the ICCPR is unique. In areas such as privacy and protection from racial, sexual, age and disability discrimination, rights are well protected. While in other areas, legislation is lacking. Although many experts advocate a bill of rights for Australia, this is the subject of much debate and ongoing controversy. In 2008, the Federal Government commissioned a committee to conduct the National Human Rights Consultation and investigate community views on human rights and their protection in Australia. The Consultation committee's final report recommended the government introduce a bill of rights, among others and this generated much opposition.<sup>8</sup> Australia prides itself on its democracy and system of government. Indeed, human rights are fundamental to that system of government but the enshrining of human rights protections binding on Parliament are considered a limitation on popular sovereignty. Parliamentary supremacy is a cornerstone of the Westminster system and a bill of rights is seen as shifting the power to regulate human rights away from elected representatives and into the hands of judges, who are appointed and unelected. It is within this context that the debate rages on the suitability of introducing a bill of rights in Australia. It is not generally a question of support for human rights but one of how best to protect them and who (whether the courts or legislature) should have the final say.

On 21 April 2010, the Australian Attorney-General announced changes to Australia's human rights regime with important ramifications for the implementation of ICCPR in Australia. Significantly, the Rudd government refused to implement its

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<sup>8</sup> Commonwealth of Australia, 2009. *National Human Rights Consultation*. [Online] [www.humanrightsconsultation.gov.au](http://www.humanrightsconsultation.gov.au) [Accessed 10 April 2010]

commissioned committee's recommendations and legislate a bill of rights, recognizing the lack of consensus on the issue. The Framework, however, does outline increased protections for human rights should it become law. Significant changes proposed include legislating to establish a Joint Parliamentary Committee on Human Rights, which would be charged with scrutinizing bills to ensure compliance with international obligations. Furthermore, legislation is proposed which would require every new bill before Parliament to be accompanied by a statement of compatibility with the seven core UN human rights treaties to which Australia is a party.<sup>9</sup> If the framework is implemented, its effect on Australia's ICCPR compliance would be significant, bringing in a direct parliamentary role for the first time.

#### 2.2.4. Indirect compliance

Successive Australian governments have confirmed their support for human rights and stress Australia's compliance with international human rights instruments. Australia, as a liberal democracy, 'has a long tradition of supporting human rights around the world, and was closely involved in the development of the international human rights system'<sup>10</sup> and contends that human rights are protected under two different categories. In addition to the human rights mechanisms, Australia also contends that its system of law and the processes this liberal democratic tradition provide, ensure in part compliance with human rights standards.<sup>11</sup> These are referred to as the 'existing institutionalized processes' in government reports and include the protections inherently present in Australia's system of government, which can be considered indirect compliance. Australia's democratic and parliamentary concepts of responsible government and committee scrutiny of legislation, constitutional guarantees (four express constitutional rights and several implied rights as recognized by the High Court) and the common law all uphold various civil and political rights. The judiciary and administrative law remedies provided through tribunals, under Freedom of Information requests and by Ombudsmen's decisions also form part of this 'existing institutionalized' complementary in-built rights protections. Thus, Australia's strong democratic traditions, commitment to the rule of law inherent in its

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<sup>9</sup> Attorney-General's Department, 2010. *Australia's Human Rights Framework*. [Online] [www.ag.gov.au/humanrightsframework](http://www.ag.gov.au/humanrightsframework) [Accessed 21 April 2010]

<sup>10</sup> Attorney-General's Department, 2006. *Common Core Document comprising Fifth ICCPR Report and Fourth ICESCR Report*. [Online] [www.ag.gov.au/humanrights](http://www.ag.gov.au/humanrights) [Accessed 21 April 2010] p. 10.

<sup>11</sup> *Ibid*, p. 11

system of law and government are often used, with or without justification, as a reason for the absence of comprehensive adoption of international human rights treaties into Australian law.

#### 2.2.5. Reporting and individual complaints

The ICCPR was reinforced by Australia adopting the First Optional Protocol on 25 April 1991. It has been stated by the High Court of Australia that: “The opening up of international remedies to individuals pursuant to Australia’s accession to the Optional Protocol to the ICCPR brings to bear on the common law the powerful influence of the Covenant and the international standards it imports.”<sup>12</sup> In addition, the individual complaints process has resulted in some important changes in Australian law. The first successful complaint was by a Mr Toonen of Tasmania whose complaint concerned the illegality of homosexuality in his state. He contended this breached his right to privacy under Article 17 and also Article 26 – the right to equality before the law and non-discrimination. The committee accepted this complaint and the federal government subsequently passed the *Human Rights (Sexual Conduct) Act* 1994. This law successfully overruled the *Tasmanian Criminal Code* as confirmed by the High Court in *Croome v. Tasmania*.

Unfortunately, however, the Australian government has not always responded so positively to the UN Human Rights Committee’s rulings. Various complaints that the Committee has found Australia to be in breach of its obligations have been rebutted and ignored especially in immigration cases. Without an effective means of enforcement, this complaint system cannot be seen as a firm guarantee but does highlight issues and put the government on notice to at least justify its conduct. Similarly, the reporting requirements that the ICCPR provides in Article 40 also provide means for further scrutiny of Australia’s human rights record and conformity to its international obligations. However, in practice, criticism has surrounded this process. Australia has been criticized for filing late and minimalist, website ‘cut and paste’ style reports.<sup>13</sup>

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<sup>12</sup> *Mabo v State of Queensland* (1992) 175 CLR 1, at 42, per Brennan J (Mason and McHugh JJ concurring)

<sup>13</sup> Celermajer, D. 1996. Overdue and Understated: Australia’s draft third ICCPR report. *Human Rights Defender*, 22.



## 2.2.6. Concluding remarks on the ICCPR in Australia

Although ratified, due to the nature of the Australian legal system, the ICCPR in its entirety is not strictly enforceable in Australia in the absence of enabling legislation. Legislation safeguards various rights and other protections are in place but to date, a comprehensive domestic incorporation of the ICCPR has not been effected. Instead a piecemeal approach exists, where the level of protection depends on specific rights. For the large part though, many Australians are proud of their political system and its inherent safeguards to human rights, which clearly make Australia a unique human rights state.

## 2.3. The second indicator – Australia’s national human rights institutions

### 2.3.1. Establishment of NHRCs

Australia has been at the forefront of NHRC development.<sup>14</sup> Australia’s commitment to human rights has been evidenced through the establishment of various human rights bodies and their development has gone hand and hand with Australia’s attempts to implement international human rights standards, though the former has been more successful. The first human rights commission was formed in 1981 and five years later, the current body, the Human Rights and Equal Opportunities Commission [HREOC] (now renamed the Australian Human Rights Commission [AHRC]) came into being. While the first commission had a limited role and was merely a part-time body, it did enable commissioners to investigate and report human rights inconsistencies to the Government under section 9(1) *Human Rights Commission Act* of 1981. Like the majority of national human rights institutions, the Australian HREOC was established by an act of parliament. The Paris Principles support giving such bodies wide-ranging scope and reinforce that such a mandate should have constitutional or legislative force. In the case of Australia, with rigid procedures in place, which minimize amendments to the constitution, the Hawke government in 1986 passed the *Human Rights and Equal Opportunities Commission Act* and provided for a new body with increased powers. The institutional framework of the

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<sup>14</sup> Lindsnaes, B. and Lindholt, L. 2000. National Human Rights Institutions: Standard-setting and achievements. In Lindsnaes, B., Lindholt, L. and Yigen, K. (Eds) *National Human Rights Institutions: Articles and Papers*. Copenhagen: The Danish Centre for Human Rights. p. 13

current Australian Commission has been commended ‘as a model and source of inspiration for the development of the Paris Principles’.<sup>15</sup>

### 2.3.2. Composition of the NHRC

The Australian Human Rights Commission is composed of members known as commissioners and along with its president, is based in Sydney. Although the government of the day appoints its members, commissioners are appointed on their expertise, not political considerations, and are required to act independently.

Pluralistic in nature, specific commissioners are appointed to various positions including Sex Commissioner, Race Commissioner and Aboriginal and Torres Strait Islander Commissioner and focus their efforts on preventing discrimination in those vulnerable areas. Later, roles in age discrimination and disability rights have been added to the commissioners’ duties. Currently, there are four people who occupy the various positions and as such, serve dual mandates.<sup>16</sup> For example, the president is both president and human rights commissioner and the sex discrimination commissioner also has responsibility for age discrimination. In late 1990s, the HROEC had a staff of around 100 but such numbers can be prone to budgetary fluctuations.<sup>17</sup>

### 2.3.3. Powers and duties

The AHRC can hear individual complaints and in cases of race, sexual, age and disability discrimination promotes conciliation to solve disputes. Since findings are not legally binding and as both parties must consent to any resolution, ARHC complaints that are terminated or do not result in satisfactory outcomes may require proceedings in the federal courts and this is available under section 46PO.<sup>18</sup>

Previously, the former HREOC served as a quasi-judicial body and had powers of enforcement but these were ruled invalid by the High Court in *Brandy v HREOC*.<sup>19</sup>

In addition to the conciliation of complaints, the AHRC can also intervene in court proceedings as an *amicus curiae* or friend of the court.

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<sup>15</sup> *Ibid*, p. 46

<sup>16</sup> Australian Human Rights Commission, 2010. *About the Commission*. [Online] [www.hreoc.gov.au](http://www.hreoc.gov.au) [Accessed 11 May 2010]

<sup>17</sup> Lindsnaes and Lindholt, 2000. p. 23

<sup>18</sup> Australian Human Rights Commission Act (Cth) 1986

<sup>19</sup> High Court of Australia. [1995] HCA 10.

Further powers are available to the AHRC, which go beyond the role of dispute resolution and with its conciliation mechanisms are the major functions of the commission. With a focus on non-discrimination, equal opportunities (especially in employment) and vulnerable groups, the AHRC is not just a complaints-based institution but one which also conducts education, information and promotional activities.<sup>20</sup> Lindsnaer and Lindholt state that somewhat unique among NHRCs is the AHRC's rich focus on conducting public inquiries and extensive research into the rights of vulnerable groups<sup>21</sup> and this is evidenced by such reports as the same-sex couples rights report of 2007 and many indigenous rights surveys.<sup>22</sup>

#### 2.3.4. State and Territory NHRCs

Furthermore, in addition to the NHRC that exists on a federal level, each state and territory has its own human rights commission to protect human rights on a state basis. The state commissions generally have wider roles than the AHRC given Australia's constitutional framework. As stated above, the legislative powers of the Commonwealth (federal) Parliament are provided for under the specific constitutional heads of powers with residual powers remaining with the states.<sup>23</sup> Therefore, there are various areas in which the federal government has no basis to legislate and as such, human rights legislation at a federal level has been dealt with under the foreign affairs power<sup>24</sup> (as human rights derived from a treaty are so considered). Without such foundations in an international agreement, the federal government must rely on the states to legislate and it is for this reason, and arguably the different political orientation of the various state governments that human rights protections under state laws are often more broad and comprehensive. For example, the Queensland Anti-Discrimination Commission can hear a wider range of complaints such as those for discrimination on the grounds of gender identity and, political and religious activity.<sup>25</sup>

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<sup>20</sup> Section 11A(g)(h)(j), Australian Human Rights Commission Act (Cth) 1986

<sup>21</sup> Lindsnaes and Lindholt, 2000.

<sup>22</sup> Australian Human Rights Commission, 2010. *Human Rights Publications*. [Online] [http://www.hreoc.gov.au/human\\_rights/publications.html](http://www.hreoc.gov.au/human_rights/publications.html) [Accessed 11 May 2010]

<sup>23</sup> Sections 51 and 52, Australian Constitution.

<sup>24</sup> Section 51 (xxix)

<sup>25</sup> Section 7, Anti-Discrimination Act 1991 (Qld)

### 2.3.5. Assessment of Australia's NHRCs

Overall, Australia's introduction of NHRCs has been very successful. There exists a major federal body and corollary state or territory commissions with powers to hear complaints and conduct education, promotion and awareness. Although such bodies do not have binding decision-making powers, as this would impinge of the separation of powers under the Australian Constitution, where complaints cannot be resolved through conciliation, an alternative route to resolution is available through the courts. The commissions are well served by their independent and professional commissioners and especially, with regards to their functions in the areas of human rights promotion and community awareness; NHRCs in Australia fulfill a vital role in Australia's human rights framework.

## 2.4. The third indicator – death penalty in Australia

### 2.4.1. Abolition in Australia

The abolition of the death penalty in Australia has been effected gradually since 1922. As criminal law is generally under state, not federal, jurisdiction in Australia, formal abolition was not uniformly introduced across Australia. Queensland was the first state to abolish the death penalty in 1922 and its last execution took place in 1913. For the offence of murder, the last state to formally repeal capital punishment was Western Australia in 1984 and in 1985, New South Wales legislated against the possible death penalty that still existed for the crimes of treason and piracy, becoming the last state to remove the death penalty from its law books, although executions had not occurred in those states since 1964 and 1940 respectively. The last execution carried out in Australia was in Victoria in 1967 and is still the subject of much debate. At a federal level, the *Death Penalty Abolition Act* of 1973 abolished capital punishment for federal crimes, notwithstanding executions had not ever been carried out federally.

Table 2. Death Penalty Abolition in Australia<sup>26</sup>

| <b>Jurisdiction</b> | <b>Last Execution</b> | <b>Abolished</b>                          |
|---------------------|-----------------------|---|
| Queensland          | 1913                  | 1922                                      |
| Tasmania            | 1946                  | 1968                                      |
| Commonwealth        | No executions         | 1973                                      |
| ACT                 | No executions         | 1973                                      |
| NT                  | 1953                  | 1973                                      |
| Victoria            | 1967                  | 1975                                      |
| South Australia     | 1964                  | 1976                                      |
| Western Australia   | 1964                  | 1984                                      |
| New South Wales     | 1940                  | 1955 (murder) / 1985 (treason and piracy) |

As can be seen above, the date of abolition and last execution never occurred in the same year. There was usually a period of around ten to twenty years between the last execution and formal abolition in each jurisdiction. A period of *de facto* moratorium was used and in Australia's case, this meant the sentences of those sentenced to death were commuted to life imprisonment by the government under the prerogative of mercy.

#### 2.4.2. Recent Developments – opposition confirmed

Further significant developments post-abolition include accession to the Second Optional Protocol to the ICCPR<sup>27</sup> on 5 October 1990 and the recent passage of federal legislation. Early in 2010, the federal government approved Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act, which has reinforced Australia's opposition to the death penalty and prevents the states from reintroducing the death penalty. On the international stage too, Australia has also shown its support for the worldwide abolition of the death penalty. In 2007, Australia was a sponsor and supporter of a significant United Nations General Assembly

<sup>26</sup> Brynes, A. 2007. The Right to Life, the Death Penalty and Human Rights Law: An international and Australian perspective. *UNSW Faculty of Law Research Series*, 66.

<sup>27</sup> Walton, M. 2005. Second Optional Protocol to the ICCPR. *NSW Council of Civil Liberties Background Paper*, 4.

resolution opposing the death penalty. The resolution sought an immediate moratorium on executions as a preliminary effort to end capital punishment globally.<sup>28</sup> Furthermore, Australia co-sponsored a resolution ‘On the Question of the Death Penalty’ before the Human Rights Council in 2005 and refuses to extradite defendants to jurisdictions in which they may be subject to capital punishment without guarantees to the contrary, as a matter of policy.

#### 2.4.3. Public opinion on the death penalty

Although abolition has been effected, it is interesting to explore public opinion on this issue in Australia. Potas and Walker state: “Whenever a particularly vicious crime is committed, members of the public, police, politicians and the press ‘re-open’ the debate on the death penalty.”<sup>29</sup> However, such populism has not been acted upon. Indeed, the response to the Port Arthur Massacre in 1996, in which 36 people were murdered by a single gunman in Australia’s worst ever killing spree, was not to reintroduce capital punishment but to tighten gun control laws<sup>30</sup>, notwithstanding calls for the mass-murderer’s death.

It is significant to note that the death penalty retained widespread public support at the time of its abolition and indeed, in the preceding years in which executions were commuted in most Australian jurisdictions. Statistics reveal that support for the death penalty in Australia was relatively strong: 67% in 1947, 68% in 1953 and 53% in 1962.<sup>31</sup> At these times, executions had already been abolished in one state and moratoriums had begun in others. During the 1970s and 1980s, figures of around 40 percent were still in favour of the death penalty; however, these statistics come from a survey that also makes available the option of life imprisonment, which recorded around an equal number.<sup>32</sup> Undoubtedly, questionnaires without this option, merely a direct yes or no question would reveal higher support. Support for the death penalty

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<sup>28</sup> Law Council of Australia, 2010. *Death Penalty Background*. [Online] [http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/death-penalty/death-penalty\\_home.cfm](http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/death-penalty/death-penalty_home.cfm) [Accessed 29 April 2010]

<sup>29</sup> Potas, I. and Walker, J. 1987. Capital Punishment. *Issues and Trends in Crime and Criminal Justice*, 3. Canberra: Australian Institute of Criminology. p. 2

<sup>30</sup> McPhedran, S. and Baker, J. 2008. The Impact of Australia’s 1996 Firearms Legislation: a research review with emphasis on data selection, methodological issues, and statistical outcomes. *Justice Policy Journal*, 5:1.

<sup>31</sup> Roy Morgan Research, 2009. Australians say penalty for murder should be Imprisonment (64%) rather than the Death Penalty (23%). [Online] <http://www.roymorgan.com/news/polls/2009/4411/> [Accessed 17 June 2010]

<sup>32</sup> *Ibid*

spiked in the early 1990s with over half of Australians preferring capital punishment, yet by this stage abolition had been affected. Furthermore, Williams cites statistics, which reveal a majority of Australians still support the death penalty as of 2006 and that 44 per cent support its reintroduction as of 2007.<sup>33</sup> This shows that the issue of the death penalty in Australia has not been dominated by opinion polls. While there was support for its abolition, at the same time there was strong opposition as well. In spite of calls for its reintroduction and polls in its favour, major political parties in Australia support the current position and reject such populist calls when they arise.

## 2.5. Overview of Australia's human rights

The Australian example demonstrates that human rights issues are not static. The process of implementing human rights standards and protections has been an on-going process for over 40 years and continues to this day. Australia has been a leader in human rights across various indicators, notably as one of the first countries to establish a NHRC and as the first country to formulate a national action plan. In Australia's experience, it can be pointed out that human rights developments have occurred across the political spectrum and no one party has dominated the issue. Progress has taken time and frequently, policy and proposed legislation have not been implemented. Continued effort has been required. Bipartisan support for human rights has been instrumental given the very incremental nature of development in this area. Although at times, one side has favored issues the other opposed, the key point is that human rights protections have not been weakened upon changes in government. This acceptance has greatly contributed to human rights progress in Australia.

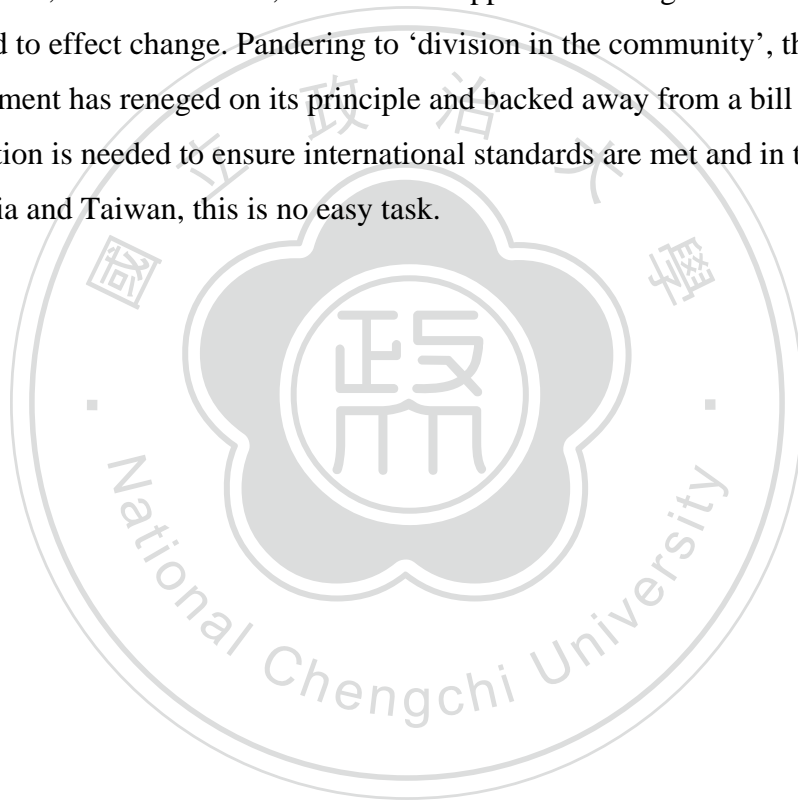
Australian efforts in and commitment to human rights are particularly evident in its strong institutional framework and its position on the death penalty. The Australian Human Rights Commission and corollary bodies in each state and territory are often seen as exemplars in their field. In its opposition to the death penalty, Australia's commitment is steadfast even in the face of public opposition.

Although such progress is commendable, Australia provides us with an illustration of the difficulties in implementing international human rights standards, which can be useful to other countries in the process of or considering such implementation.

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<sup>33</sup> Williams, G. 2010. No Death Penalty, No Shades of Grey. *The Sydney Morning Herald*, 2 March.

Australia's piecemeal approach to implementing international human rights standards, while comprehensive, is not ideal. The absence of a bill of rights or equivalent and the ongoing opposition to one are remarkable. Fortunately, however, as a signatory to the first optional protocol to the ICCPR, the individual complaints process has served as a protection of last resort alleviating in parts the lack of direct enforcement of international human rights treaties. As has been witnessed in the latest efforts to introduce a bill of rights, although again unsuccessful, Australian human rights protections have been lifted in the process. The commitment to human rights is not black and white. Although methods on how best to uphold human rights in Australia are debated, across the board, Australians support human rights but leadership is required to effect change. Pandering to 'division in the community', the Australian Government has reneged on its principle and backed away from a bill of rights. Conviction is needed to ensure international standards are met and in the case of both Australia and Taiwan, this is no easy task.





### 3. Human Rights in Taiwan before 2000

We now move to our consideration of human rights in Taiwan. For much of the ROC's history on Taiwan, human rights have been overlooked, undervalued and abused and as such, before looking at the contemporary situation, an overview of past events will be provided. This chapter will provide an overview of Taiwan's historical treatment of human rights prior to the election of Chen Shui-bian. It will explore the period of human rights atrocities known as 'White Terror' and, the eventual easing of political oppression. The purpose of this chapter is to attempt to contextualize the social and political climate that exists in Taiwan today by providing a brief and selected historical overview. It is not the objective of this research, however, to outline a complete background. Accordingly, the focus will be on post-war history and human rights under the Japanese, Qing and earlier periods will not be addressed.

#### 3.1. The Martial Law period and 'White Terror'

A year before the Nationalists were forced to flee the Mainland and just six months after the ROC Constitution took effect, the Temporary Provisions abrogating much of the Constitution's protections were introduced.<sup>1</sup> Intended to assist in efforts to defeat the Mainland Communists, these provisions increased the President's powers and upon the KMT's retreat to Taiwan, they were subsequently 'amended four times to serve the arbitrary needs of Chiang Kai-shek and his regime'.<sup>2</sup> With the Temporary Provisions in place, Hwang, Liao and Chang state that the Constitution only served to maintain 'a democratic façade' and it was under this state of affairs that Taiwan's human rights situation descended further.

On 20 May 1949, martial law was declared on Taiwan by the then Governor-General Chen Cheng 'on the grounds that Taiwan was under imminent threat of attack from CCP forces'.<sup>3</sup> What then did this martial law involve? It was not martial law in the strict common law sense. The enacting provisions, known as the 'Temporary Provisions Effective During the Period of Communist Rebellion', established military jurisdiction over specified crimes.<sup>4</sup> The civil law courts were not completely

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<sup>1</sup> Hwang, J.-Y., Liao, F.-T. and Chang, W.-C. 2003. *Development of Constitutional Law and Human Rights in Taiwan Facing the New Century*. Chiba: Institute for Developing Economies, p. 11

<sup>2</sup> *Ibid*, p. 12.

<sup>3</sup> Roy, D. 2003. *Taiwan: A political history*. Ithaca: Cornell University Press, p. 78

<sup>4</sup> Hsiung, J. 1981. *The Taiwan Experience 1950-1980*. New York: Praeger, p. 310

abrogated as in the case during martial law as one might suspect. It could, therefore, be likened to the concept of a 'state of siege' found in civil law systems. Crimes that came under the martial law provisions included offences relating to sedition and military affairs, but were actually much wider.<sup>5</sup> Specifically, the provisions gave the military jurisdiction over such crimes as: offences against the internal and external security of the state and against public order, public safety, forgery, counterfeiting, interference with personal liberty, theft, robbery, piracy, intimidation, kidnapping, and malicious mischief.<sup>6</sup> Moreover, the military body, the Taiwan Garrison Command controlled by Chiang Ching-kuo, was given responsibility for enforcing martial law.<sup>7</sup>

It has been stated that the introduction of martial law gave the period of White Terror a 'legalistic gloss'. There was clearly a law in place, which could be relied on to support such an argument. Indeed, there were written protections against summary trial and unwarranted arrest that provided a public defender to be made available to defendants and the right of a spouse or blood relative to attend any trial.<sup>8</sup> Although these protections appeared on paper, the Garrison Command as prosecutor, judge and jury, denied due process to many of the victims of this period. Strauss states: "The key documents of reference for the early years of the White Terror are dry, legalistic, and formal [...] but they were at best general guidelines for action on how to punish."<sup>9</sup> Secrecy and extra-judicial actions were common and military proceedings when used were frequently for appearance only. Kang-i Sun Chang recalls how her father was arrested secretly in the middle of the night and his whereabouts remained unknown for a month. Alleged offenders were detained and held for months and sometimes years before conviction and sentencing. Such procedures were common.<sup>10</sup>

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<sup>5</sup> *Ibid*, p. 338

<sup>6</sup> *Ibid*, p. 310

<sup>7</sup> Moody, P. 1992. *Political Change in Taiwan: A study of ruling party adaptability* New York: Greenwood, p. 68

<sup>8</sup> Hsiung, 1981. p. 310

<sup>9</sup> Strauss, J. 2005. *Comparative Terror and Regime Consolidation on the Two Sides of the Taiwan Straits in the 1950s: Suppression of counterrevolutionaries and White Terrors* [Online]

[political.foxpro.com.tw/annpolitical1/files/1/1/Comparative.doc](http://political.foxpro.com.tw/annpolitical1/files/1/1/Comparative.doc) [Accessed: 20/12/2008]

<sup>10</sup> Chang, K. 2006. *Journey through the White Terror: A daughter's memoir*. Taipei: National Taiwan University Press, p. 16

### 3.1.1. Oppression

“People dared not criticize the government, make comments on public policies, or voice any grievances to strangers,” states Wang.<sup>11</sup> For those that did or more commonly so, those that posed a threat or fell foul of the government for any reason were often dealt with by the Garrison Command. The fear of being labelled a ‘Communist spy’ was widely held in society and such allegations could have serious consequences. Whether such accusations of being a ‘*feidie*’<sup>12</sup> (spy) or ‘*panluan*’<sup>13</sup> (subverter) were true or false, the threat was constant<sup>14</sup> and the KMT used this to silence and eliminate any real or potential opposition. It has also been estimated that the KMT maintained a network of some 50,000 full-time and up to half a million part-time informants during this time.<sup>15</sup>

In 1952-53, the KMT discovered a group of communists in Luku. Their treatment is an example of the horrors of White Terror. Much of the population was encircled by military forces and held up in a temple, hall and school where they were tortured into revealing the leaders and members of the communist base. Of the population of Luku, 35 men were subsequently executed, 97 imprisoned and 32 went into hiding.<sup>16</sup> In this small rural area, the active male population had been decimated and many lives greatly suffered as a result. The stigma against such victims was high, no support was offered and denial of family members associated with any illegal acts was the norm. In addition to pursuing dissenters and opposition under martial law, close supervision and surveillance was used to keep a close eye on organizations that could potentially challenge KMT control such as the churches.<sup>17</sup> Furthermore, the press was heavily controlled by both the Government Information Office and Garrison Command and, propaganda was widespread. Censorship was also strict. Books from the Mainland were often banned and newspapers could not escape political influence. Indeed, the major newspaper was a KMT-owned paper and two main ‘independent’ papers were

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<sup>11</sup> Wang, P. 2007. Bastion Created, Regime Reformed, Economy Reengineered. In Rubinstein (Ed.) *Taiwan: A New History*. New York: ME Sharpe.

<sup>12</sup> In Chinese, 匪諜.

<sup>13</sup> In Chinese, 叛亂.

<sup>14</sup> Feuchtwang, S. 2007. ‘Communism’ in Taiwan and the Mainland: Transmission of the Great Leap Famine and of the White Terror. *Taiwan in Comparative Perspective*, 1 November. pp 1-22 at p.5

<sup>15</sup> Roy, 2003. p. 91

<sup>16</sup> Feuchtwang, 2007. p. 2

<sup>17</sup> Moody, 1992. p. 68

published by members of the KMT.<sup>18</sup>

### 3.1.2. Government crackdowns

An example of the press overstepping its mark is the case of Lei Chen. Though it must be stated that this incident involves not only media freedom but also political organization, which was in breach of laws on the formation of new political parties. Lei Chen was the editor of *Free China*, a magazine started in Shanghai to challenge communism but one that had moved to a stance critical of KMT rule in Taiwan. *Free China* advocated such positions as electoral reform, adoption of a cabinet system and less KMT influence in the military. Of course, such calls did not go unnoticed.<sup>19</sup> Yang states: “In martial law times, the media had two choices: either play the mouthpiece of the KMT, or get eradicated.”<sup>20</sup> Obviously, Lei Chen did not follow the party line. To make matters worse, he and like-minded liberal opponents tried to form the Chinese Democratic Party. Lei Chen was arrested for harbouring a ‘communist spy’, whom the authorities had determined one of his employees to be. *Free China* was shut down and Lei was given a term of 10 years imprisonment by court martial.<sup>21</sup>

Years later, another publication was to further flame tensions and lead to an historic event. *Meilidao*, a magazine critical of the government, began carrying out political functions such as organizing meetings and political rallies. A rally planned for International Human Rights Day on 10 December 1979 drew a crowd of thousands demanding political rights and self-determination. Met with riot police, violence broke out and the eight rally organizers were arrested and charged with sedition.<sup>22</sup> The Kaohsiung Eight, as they became known, were tortured, forced into signing confessions and at their courts-martial were sentenced to lengthy prison sentences. The Kaoshiung Eight included prominent activists, one of which was Annette Lu whose defence attorney in the proceedings was Chen Shui-bian. Opposition to the government and any threatens to its power were not tolerated.

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<sup>18</sup> *Ibid*, pp 68-69

<sup>19</sup> *Ibid*, p.74

<sup>20</sup> Yang, P.-C. 2004. *The Road to Freedom*. Taipei: Dr Chen Wen-chen Memorial Foundation, p. 39

<sup>21</sup> Moody, 2002. p. 75

<sup>22</sup> Roy, 2003. p. 168

### 3.1.3. The extent of the terror

It is very difficult if not impossible to provide accurate figures of those affected by White Terror. Records were not always meticulously kept; falsifications and intentional distortions were not uncommon and the passage of time has made things all the more difficult. White Terror evoked a fear in the general population; however, while it may be said it directly affected only a small percentage of the population, its limitations and restrictions were widely felt. Estimates upwards of 10,000 have been made as to the number of cases seen during the White Terror period from 1949 to 1987<sup>23</sup> and it cannot be understated that there has been an unwillingness and official inconsistencies that do not assist an accurate estimation of figures. Statistics from the Internal Security Division do confirm that between September 1949 and December 1954 a figure of around 6000 individuals as a minimum faced charges of sedition, of which up to around 20% were executed.<sup>24</sup> Overall, over the period of White Terror in its entirety an average execution figure of 9% has been reported.<sup>25</sup> It must be emphasized that such figures are estimates. It is likely full and completely accurate statistics will never be attained. In this chapter, these figures are provided at least as a rough picture of the extent of White Terror. As a percentage of the total population of 7 million in Taiwan in 1949, the interpretation of the numbers mentioned is open to the reader and I will not attempt to value such figures.

### 3.1.4. Reflections on this period

Evaluations of the period of Taiwanese history known as White Terror evoke the emotions of many Taiwanese. In the partisan Pan-Blue / Pan-Green political environment that exists in Taiwan, opinions on this topic vary widely. To some, White Terror was a regrettable episode that shames and typifies an evil dictatorship. To others, it was a necessary means to maintain control in the face of an even worse communist threat. Former KMT governor-general of Taiwan and later exile, Wu Kuo-chen is quoted in George H. Kerr's book, *Formosa Betrayed*<sup>26</sup> as saying:

“The present methods adopted by the Kuomintang government are entirely devoted to the purpose of perpetuating its power. It is directly contrary to the

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<sup>23</sup> Strauss, 2005. p. 9

<sup>24</sup> *Ibid.*, pp 10-11

<sup>25</sup> *Ibid.*

<sup>26</sup> Kerr, G.H. 1965. *Formosa Betrayed*, Boston: Houghton Mifflin.

principles of modern democratic government. The [secret police] made numberless illegal arrests. They tortured and they blackmailed. [...] Formosa has become virtually a police state.”

Many expressed serious concern at the KMT's action of the time. Yang Pi-chuan, a former political prisoner under White Terror, states: “During the thirty-eight years of martial law under the Kuomintang everyone regarded political prisoners as poisonous snakes and wild beasts.” His life was not made easier by White Terror but he is not bitter. “The greatest pride for us political prisoners is our commitment to justice. Violence was once used to oppress us, but we did not yield. My only hope is that we victims of violence will become its witnesses, so that the next generation will remember and live with dignity.”<sup>27</sup>

On the other hand, there are those who continue to view martial law as a necessity and downplay the ‘White Terror’. The period and its strict rule are credited with fending off the communists and bringing about Taiwan's current prosperity and liberal democracy. Marks says of White Terror: “Taiwan has surely been rewarded.” He continues: “For as the years passed, order and development resulted in increasing prosperity and a gathering trend towards democratization.”<sup>28</sup>

Such polar assessments of White Terror cannot be reconciled in this chapter and the prospects of such in society are slim too. Misinformation and politicization no doubt play a major part in this. Interpretations of history are always open but any interpretation is better than ignorance. Until 1996, standardized textbooks in Taiwan did not devote any space to a consideration of the above events. Since this time a variety of textbooks in schools is available but few devote much attention to the White Terror period. As little as one page of information of these events is reported as being in the main middle and high school texts.<sup>29</sup> Human rights in this period were clearly not prioritized.

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<sup>27</sup> Yang, P.-C. 2004. p.7

<sup>28</sup> Marks, T. 1998. *Counterrevolution in China: Wang Sheng and the Kuomintang*. London: Frank Cass, p. 181

<sup>29</sup> Feuchtwang, 2007. p. 12

## 3.2. The path to democratization

### 3.2.1. Civil and political rights

The path to democratization began in the late 1980s. Wu states: “Political liberalization was launched in the late 1980s, the last few years of the rule and life of Chiang Ching-kuo, who had dictated over Taiwan’s politics for more than two decades, beginning even before he succeeded his father, Chiang Kai-shek, as national leader.”<sup>30</sup> Credited by some as ‘the initiator of Taiwan’s democracy’, Wu recalls Chiang as a political repressor and human rights violator notwithstanding his final acts. On 14 July 1987, martial law was finally lifted and marked an end to the world’s longest period of such rule.<sup>31</sup> In 1989, opposition political parties were formally legalized under the Civil Organization Act and the DPP and other opposition parties gained legal status.<sup>32</sup> The Temporary Provisions were removed on 1 May 1991 and the Period of Mobilization and Suppression of Communist Rebellion was abolished one year later. Significant constitutional revisions resulted in the electoral reform for the main legislative bodies at the time as well as the presidency.

The 1991 constitutional amendments resulted in both democratization and Taiwanization.<sup>33</sup> The removal of Mainland representatives, a historical relic from decades prior and direct elections for Legislative Yuan members from Taiwan-based constituencies, as opposed to Mainland ones, was an important step forward. Furthermore, in 1992 it was decided that from 1996 the President and Vice-President would both be directly elected.<sup>34</sup> With the abolition of the Temporary Provisions, constitutional term limits would be followed and as such, eight years became the maximum consecutive mandate for the office of President. In 1996 and in the face of increased military tensions from China, the first direct elections were held using a simple plurality vote and incumbent, Lee Teng-hui was democratically elected President.<sup>35</sup> Significantly, the KMT retained the presidency in the first opportunity to oust it at the ballot box. These reforms and particularly, the establishment of elected

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<sup>30</sup> Wu, N.-T. 2005. Transition without Justice, or Justice without History: Transitional justice in Taiwan. *Taiwan Journal of Democracy*, 1:1 77-102, p. 86

<sup>31</sup> Roy, 2003. p. 175

<sup>32</sup> *Ibid*, p. 176

<sup>33</sup> Hwang, Liao and Chang, 2003. p. 44

<sup>34</sup> *Ibid*, p. 65

<sup>35</sup> Roy, 2003. p. 202

bodies and offices contributed immensely to Taiwan's democratization yet still the consolidation of this process would require more efforts.

### 3.2.2 Absence of human rights policy

Mention must be made of the fact that during these crucial democratic reforms, human rights policy was virtually non-existent at government levels. Although improvements in civil and political rights were made, Roy states: "[P]ersistent suspicion surrounded Lee's motivations," and he continues: "Lee's campaign to increase the powers of his office and his decision to run for reelection in 1996 served his ambition more than the goal of expanding democracy in Taiwan's political system."<sup>36</sup> From 1996 onwards, although ensuring economic development and a smooth passage of the 1997 Asian financial crisis, Lee's term was eventually plagued by the domestic issues of crime and corruption. Human rights policy was not prominent and by no means, was it used to consolidate Taiwan's recent democratic reforms.

## 3.3. Historical consideration of the three indicators

### 3.3.1. International Human Rights Standards

The ROC's role in the establishment of the international human rights regime is interesting for several reasons. It was contradictory in the sense that domestic actions did not concord with what was said on the international stage and, it was limited. With the ROC's retreat to Taiwan, its legitimacy to represent all of China was challenged and eventually, resulted in its forced withdrawal from the United Nations in 1971. Nevertheless before this occurred, ROC delegates participated in several significant international commissions on human rights.

The first of these was the United Nations Commission on Human Rights, which had been tasked with drafting of the Universal Declaration of Human Rights. Comprised of representatives of 17 nations, the ROC was represented by Dr. P.C. Chang, a western-educated Chinese academic who at the time was resident in New York as China's ECOSOC representative. Scholars suggest that his appointment was decided by the ROC's dire financial position and inability or non-volition to spend money on

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<sup>36</sup> *Ibid*, p. 226.



sending another diplomat abroad.<sup>37</sup> Will states: “The Nationalist Government [...] that was in the middle of a civil war with its old enemy the Communist Party, was famously indifferent to and routinely flouted human rights in its practices at home.”<sup>38</sup> It was in this climate and as a matter of ‘keeping up appearances’ on the international stage that Chang was appointed the ROC’s representative to the drafting committee. Chang was appointed vice-chairman of the drafting committee and was an active participant in the drafting negotiations. Given the ROC’s low priority it afforded human rights, Chang was given few instructions and relative free reign in the discussions and was principally renowned for his contribution in seeing references to ‘God’ and ‘nature’ (as sources of human rights) not included in the declaration.<sup>39</sup>

In 1967, the ROC signed the two international human rights covenants: the ICCPR and ICESCR; however, it took no action towards ratifying or implementing them before its withdrawal from the UN four years later. Cohen and Chen state: “That was part of Chiang Kai-shek’s attempt to convince the world that his dictatorial regime in Taiwan was actually ‘Free China’, in contrast to Mao Zedong’s China, which was then convulsed by the Cultural Revolution.”<sup>40</sup> Thus, signature alone was a mere act of international deception rather than any sincere wish to accept human rights domestically. With Taiwan’s isolation imposed in 1971, Taiwan was cut off from the international human rights regime and further consideration of these covenants by authorities remained dormant for decades to come.

### 3.3.2. A national human rights commission

While under Sun Yat-sen’s five-branch separation of government that exists under the ROC constitutional framework, there is a body devoted to the investigation of government actions, there has not at any time been a body devoted to human rights. The ROC Constitution provides that the Control Yuan shall exercise the powers of impeachment, censure and audit.<sup>41</sup> It serves a role similar to that of ombudsmen, courts of audit and accountability offices found in other jurisdictions. Although it

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<sup>37</sup> Will, P.-E. 2008. The Chinese Contribution to the Universal Declaration of Human Rights, 1947-48: A re-examination. *The Academica Historica Newsletter*, 1. p. 13.

<sup>38</sup> *Ibid*, pp 16-17

<sup>39</sup> *Ibid*, p. 26.

<sup>40</sup> Cohen, J. and Chen, Y.-J. 2009. Jerome A. Cohen and Yu-Jie Chen on Taiwan’s Incorporation of the ICCPR and ICESCR into Domestic Law. *US Asia Law NY*. [Online] [www.usasialaw.org](http://www.usasialaw.org) [Accessed 24 April 2010]

<sup>41</sup> Article 7, Constitution.

contends that its role should include human rights protection, this has not been the case historically and this body cannot be seen as having served the purpose of a NHRC.

### 3.3.3. Death Penalty

As discussed above, the death penalty was widespread during Taiwan’s authoritarian period and its use continued following political liberalization and the democratic reforms of the late 1980s and early 1990s. Liao states: “Although democratization in Taiwan did not go so far as to render it an abolitionist state, the number of executions per annum declined in the first 20 years after democratization.”<sup>42</sup>

Table 3. – Death penalty since political liberalization<sup>43</sup>

| Year                 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 |
|----------------------|------|------|------|------|------|------|------|------|------|------|------|
| Number of Executions | 69   | 78   | 59   | 35   | 18   | 17   | 16   | 22   | 38   | 32   | 24   |

The above table represents the number of executions per year from 1989 and although it shows a general reduction over the period, 24 executions in 1999 must still be considered a significant figure in a country with a population of 22 million at the time. Significantly, the lifting of martial law resulted in improvements in this area. Furthermore, the removal of the mandatory death sentencing imposed for various offences gradually began in the 1990s and this will be discussed further in our examination of death penalty in Chapter 4.

### 3.4. Historical overview

Over the second half of the Twentieth Century, the human rights situation in Taiwan was for much of it appalling, notwithstanding the gains made under democratization. The authoritarian regime that existed well into the 1980s ruled over many human rights abuses, atrocities and injustices. Oppression and terror remained for decades and lives were lost and destroyed in the name of maintaining political power. At the same time, the ROC attempted to present its so-called democratic ‘free China’ image

<sup>42</sup> Liao, F.-T. 2008. From Seventy-eight to Zero: Why executions declined after Taiwan’s democratization. *Punishment and Society* 10:2 153-170, p. 154

<sup>43</sup> The Death Penalty Issue Research Group, 2000. *The Taiwan Death Penalty Issue in International Perspective, Taiwan Human Rights Report 2000*, Taipei: Taiwan Association for Human Rights

to the world. Domestically, the situation was far from it. Gradually, reforms were initiated, which resulted in political liberalization: the removal of martial law, elections for the legislature and presidency, etc. These reforms incidentally improved the civil and political rights of the Taiwanese; however, human rights policy remained lacking. Overlooked and under-prioritized, the situation of human rights in Taiwan, although having improved on its past performance, was still in need of further improvements, especially in terms of consolidating democracy and guaranteeing the protection of human rights.



## 4. Human rights under Chen Shui-bian

### 4.1. Introduction – a new era of human rights

On 18 March 2000, Chen Shui-bian made history by becoming the first non-KMT member elected president of the ROC. His election as president of the ROC was significant for various reasons and purported to usher in a period of human rights consolidation and progress. With only 39 per cent of the popular vote<sup>1</sup>, Chen Shui-bian came to power on the tide of a split in the Pan-Blue ranks. In his inaugural speech, the newly elected Chen outlined a robust human rights agenda. He stated: “The Republic of China cannot and will not remain outside global human rights trends,”<sup>2</sup> and pledged to abide by international human rights covenants and implement them into the domestic law of Taiwan. He further voiced his new government’s intention of legislating a ‘Taiwan Bill of Rights’, setting up an independent national human rights commission (NHRC) and inviting major international human rights organizations to play a role in Taiwan’s human rights development. Clearly, human rights progress was to be a major political goal of Chen’s term as president.

The newly elected president got off to a remarkable start and on the back of his positively received inauguration speech his ratings soared; however, it was not to be all smooth sailing for Chen. As the first DPP leader and from a party that had still been officially banned less than two decades prior, Chen was faced with a largely skeptical bureaucracy, one still notionally loyal to its former master.<sup>3</sup>

Many government officials felt that Chen’s reign would be short lived and did not want to hurt their chances of promotion on the KMT’s return to power. In addition to this institutional bias at a bureaucratic level, the Legislative Yuan was still controlled by the KMT. Without a majority, ease of passage of Chen’s initiatives was not guaranteed and laws would require KMT or other blue party support. With this in mind and owing to a lack of ruling experience in the DPP, Chen appointed a KMT

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<sup>1</sup> Copper, J.F. 2009. The Devolution of Taiwan’s Democracy during the Chen Shui-bian Era. *Journal of Contemporary China*, 18:60 463-478. p. 465

<sup>2</sup> Chen, S.-B. 2000. *Taiwan Stands Up: Presidential Inauguration Address*, 20 May.

<sup>3</sup> It was widely considered many government officials did not want to hinder chances of promotion in widely expected future KMT governments. See Schafferer, C. 2008. State of Democracy in Taiwan: Tracing the obstacles to further democratic development. Presented at *Prospects of Democracy in East Asia for the 21<sup>st</sup> Century: Issues, threats and challenges*. 28-29 November, Jakarta.

Premier and a mixed cabinet.<sup>4</sup> Given these circumstances, effective leadership and bipartisanship would be the key to the accomplishment of Chen's agenda, especially in the area of human rights.

This chapter will explore Chen's initiatives across the three indicators. Party views, policy and proposed laws will be examined alongside the institutions and mechanisms that played a role in their development and eventual stagnation. Chen's attempts to implement those policy objectives will be analyzed as well as the hurdles he faced. Before looking at progress across the three indicators, I will turn to two significant developments, which deserve special mention and will clarify Chen's position and cause of action across the three indicators. These are: (1) the setting up of the Human Rights Advisory Group under the Presidential Office and, (2) the 2002 Human Rights Policy White Paper of the Republic of China (Taiwan).

#### 4.1.1. The Presidential Human Rights Advisory Group

This body was set up on 24 October 2000 in the first year of Chen's presidency. Chaired by Vice-President Annette Lu, the group had 21 expert members and included victims of government human rights abuses and members of women's and aboriginal community groups.<sup>5</sup> The advisory group's purpose was to bring Taiwan's human rights up to international standards. The group included six sub-committees to effect its goals which focused on specific points such as the domestic implementation of international human rights standards and, the establishment of a national human rights commission. This and other human rights mechanisms will be discussed further below.

#### 4.1.2. The Human Rights White Paper

Entitled 'Human Rights Infrastructure – building for a Human Rights State', the White Paper was released in February 2002 and set out an elaborate and progressive human rights policy.<sup>6</sup> The document's main goal, as mentioned in its title and a major source of inspiration for this thesis, was building a human rights state which was

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<sup>4</sup> Diamond, L. 2001. Anatomy of an Electoral Earthquake: how the KMT lost and DPP won the 2000 presidential election. In Alagappa, M. (Ed.) *Taiwan's Presidential Politics: Democratization and Cross-Strait relations in the Twenty-first Century*. Armonk, New York: M.E. Sharpe. p.82

<sup>5</sup> Wu, S. 2000. Trans. by Barnard, J. Human Rights Advisory Group Formed. *Sinorama*, 25:11. p. 49.

<sup>6</sup> Executive Yuan, 2002. *Human Rights Infrastructure-building for a Human Rights State*. Human Rights Policy White Paper of the Republic of China (Taiwan)

drawn from various considerations among which two themes feature prominently, notably, a need for reconciliation with past injustice and, Taiwan's international isolation. The White Paper outlines: "Guided by this principle [building a human rights state], it has proposed a series of human rights policies and measures designed to remedy the consequences both of our negative legacy of authoritarian rule and our unjust international isolation." Pursuing human rights as a means to 'right some of the wrongs' of the past and consolidate Taiwan's transition to democracy was clearly a main motivation for this policy. Similarly, Taiwan's international status and its diplomatic isolation was another motivating factor. By promoting human rights, Chen saw this as a means of bringing into line with world values and in doing so, a part of the international community by another route.

The policy consisted of a two-fold approach: the first being the direct implementation of human rights through legislation, 'institution-building' and education and research and; the second, recognizing the international nature of human rights, to increase international linkages in this regard. Nine major policy goals were clearly outlined and what will follow below is an evaluation of the success at implementing those goals in terms of the three indicators of human rights progress we are concerned with.

#### 4.2. First indicator progress – attempts to implement international standards domestically

On President Chen's coming to power in 2000, international human rights standards as enumerated in the treaties had not been incorporated into Taiwan's domestic law. A history of authoritarian rule and international isolation had undoubtedly played its part. Nevertheless, the ROC was in an anomalous situation. Going back to the days when Taiwan's diplomatic status saw it recognized as the legitimate China, the ROC was an active participant in the emerging field of international human rights. While domestically human rights were overlooked and indeed hindered by the nationalist government, on the international stage, the ROC was fully committed to upholding human rights and pointing out its superior status to its mainland rival. Accordingly, in 1967, the Republic of China became a signatory to the ICCPR, its first optional protocol and the ICESCR – the covenants that make up the international bill of

rights.<sup>7</sup> In the events that followed, specifically Taiwan's dramatic exit from the world stage and in the absence of the rule of law and democratic governance domestically, further steps to implement and ratify those documents did not occur and it was to be several decades before the issue would be revived.

#### 4.2.1. Initial intentions and actions

The momentous victory of opposition candidate and the Democratic Progressive Party leader, Chen Shui-bian was significant for human rights supporters in Taiwan. A new era of democracy and a break from Taiwan's 'dark past' was heralded and in his inauguration speech of 20 May 2000, Chen declared: "The new government will request the Legislative Yuan to pass the International Bill of Rights as a domestic law of Taiwan, so that it will formally become the 'Taiwan Bill of Rights'."<sup>8</sup> From his first day in power, Chen expressed his goal of improving Taiwan's human rights and bringing Taiwanese law into line with international standards, notwithstanding Taiwan's international isolation.

Early in first term, Chen hit the ground running. He established the Presidential Human Rights Advisory Group in October 2000, chaired by Vice-President Annette Lu and appointed various scholars and experts to assist in human rights policy formation and the drafting of legislation, including Taiwan's Bill of Rights.<sup>9</sup> In July 2001, the Executive Yuan's Human Rights Protection and Promotion Committee was also established. This group, headed by the Premier, consisted of the fourteen ministerial heads and thirteen non-government human rights experts.<sup>10</sup> Prior to this in February 2001, the President had ordered the Ministries of Foreign Affairs and Justice to come up with a draft law to be based on the 'International Bill of Rights' that would implement international human rights norms as found in the two covenants into domestic law in Taiwan.<sup>11</sup>

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<sup>7</sup> Executive Yuan, 2002. p. 45

<sup>8</sup> Chen, 2000.

<sup>9</sup> Huang, M. 2008a. Retrospective and Prospective Human Rights in Taiwan. (In Chinese) *Taiwan Democracy Quarterly*, 5 181-187. p.183.

<sup>10</sup> *Ibid.*

<sup>11</sup> Han, L.-B. 2004. Review of the Draft Basic Law on Human Rights. (In Chinese) *Wu Feng Institute of Technology Journal* 12 1-8, p. 2.

#### 4.2.2. The White Paper on international human rights standards

The white paper, referred to above, was released the next year. Chapters Three and Four of the document outlined the issues of Taiwan's ratification and domestication of international human rights standards. The white paper states: "Although many years have elapsed, by ratifying the Covenants, which have the guiding status of parent law for international human rights law, we would be putting into practice our identification with and commitment to universal human rights and international human rights."<sup>12</sup> Even outside of the international system and foreseeing difficulties in the deposit procedures that ratification requires, Chen made it a goal to belatedly follow through on the signing of the covenants by the ROC decades prior and pursue ratification. To do this, in Taiwan's case, the White Paper set out that it would require the Executive Yuan to send the covenants to the Legislative Yuan for approval, after which the President could then issue to the formal ratification instrument. A third step outlined in the covenants requires deposit of the said ratification instrument to the UN Secretariat in New York at which stage the treaties becoming legally binding on the State party. Thus, it must be asked why then did President Chen attempt to pursue ratification when it seemed practically (and debatably also legally) impossible from an international perspective? The answer lies in the significance that attaches to the covenants when ratification is effected. Ratification renders a law binding not only domestically but also internationally and, even though international enforcement of any ratified law may be problematic especially in Taiwan's situation, giving human rights protections international status and linking Taiwan to the international human rights regime was clearly a worthy objective. Moreover, Chen was hoping for a diplomatic victory on this point. Ratification and deposit at the United Nations could have spawned support against Taiwan's international isolation.

The issue of reservations was also raised in the white paper and whether or not Taiwan should register any if at all. It states: "Domestically the majority of scholars on the issue advocate registering no reservations whatever."<sup>13</sup> The white paper left this question to the Legislative Yuan's discretion, although it did mention a preference for ratification without reservation. In any event, whether ratified with reservation or without, the effectiveness of such ratification is subject to debate. As

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<sup>12</sup> Executive Yuan, 2002. p. 50

<sup>13</sup> Executive Yuan, 2002. p. 51



mentioned, Taiwan's exclusion from the United Nations and the problems this creates for the deposit of ratification brings into question whether ratification in such circumstances will be recognized domestically. The white paper addressed the concern that a treaty may not have binding domestic effect where the deposit of ratification is not properly effected. In the absence of an interpretation by the Council of Grand Justices, specific legislative action giving binding effect would be prudent.

There exists three options for the incorporation of international human rights standards into domestic law. The first and, usually most difficult but also most secure, is constitutional amendment. The second and third both take the form of domestic legislation. The second option would be in the form of special legislation that would have a higher status than ordinary domestic laws as has been enacted in New Zealand's *Bill of Rights Act 1990* and Hong Kong's *Bill of Rights Ordinance 1991*. The third is ordinary domestic legislation, which can be overruled easily by subsequent legislation. The white paper indicated that domestic implementation by constitutional amendment is the most ideal and 'most suited to the principles of the functioning on the legal system';<sup>14</sup> however, the policy document was realistic in its expectations. It states: "Unfortunately, conditions for revising the constitution are not yet mature, so all we can do is continue to search for a consensus," and it went on to mention its hope that the human rights standards as enunciated in the covenants do go on to eventually receive 'explicitly articulated guarantees' in the Constitution.<sup>15</sup> Given this, the paper set out another option, that of, relying on interpretations of the Council of Grand Justices to achieve the 'constitutionalization' of international human rights norms. This option though could not be guaranteed nor rushed and would require 'a long process of development and evolution'. The third and recommended method of action, as set out in the white paper, was to establish a '*Human Rights Basic Law*'.

A '*Human Rights Basic Law*' would incorporate the articles set out in the ICCPR and ICCSCR or the 'parent laws' as the white paper referred to them. The intended effect of such a law would be to serve as a document of both declarative and educational significance and positively influence judicial decisions. Although it must be clear, the

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<sup>14</sup> Executive Yuan, 2002. p. 55

<sup>15</sup> Executive Yuan, 2002. p. 56

policy enumerated in the white paper is just that – it is policy, not draft legislation. It clearly states: “The questions of content, legislative process, and the Basic Law’s articulation with the effects on the broader legal system still require further debate and deliberation.”

#### 4.2.3. Legislative attempts

Various human rights bills were prepared under Chen Shui-bian’s administration. The first of which was the *Draft Basic Law on the Protection of Human Rights*, prepared by the Justice Ministry in mid-2001. This law does not, however, seem to have made it past the Executive level nor appear to have ever been deliberated by the Legislative Yuan during the remainder of its term. Later in the year, elections took place to decide the composition of the next Legislative Yuan. In December 2001, the DPP became the largest party in the legislature but still lacked an overall majority, even alongside its Pan-Green allies.<sup>16</sup> With opposition parties still holding control, albeit by a reduced margin, would the legislative passage of Chen’s human rights agenda be made any easier?

In 2003, the Presidential Human Rights Advisory Group released its proposal, the *Draft Basic Law on Human Rights* and it is this overarching bill that is seen as Chen’s major attempt to implement international human rights standards in his first term. Lu Bing-Han, in his article, *A Review of the Draft Basic Law on Human Rights* states that the contents of this bill were more substantial and complex than the Justice Ministry’s draft law<sup>17</sup> and called for political parties and legislators to adopt a serious attitude towards implementing the human rights protections contained in the basic law. The draft law was a comprehensive document that contained 54 articles and purported to implement the ICCPR and ICESCR but it was not without controversy.

Chen’s motivation for ratifying these international documents and implementing them domestically was clearly outlined in the White Paper. Ridding Taiwan of its authoritarian legacy and consolidating Taiwan’s democracy were obvious motivating factors. Other key reasons included a stated attempt to bring Taiwan back into the

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<sup>16</sup> Hammond-Chambers, R.J. 2001. *Analysis of Taiwan’s December 1, 2001, Elections*. US-Taiwan Business Council Fact Sheet [Online] [www.us-taiwan.org](http://www.us-taiwan.org) [Accessed: 24 March 2010]

<sup>17</sup> Han, 2004. p. 2

international human rights fold. Implementing human rights developments could also serve other political motives and help combat Taiwan's diplomatic isolation and show the international community Taiwan's commitment to global standards.

With these motivations in light, the draft law was an all-encompassing bill that attempted not just to bring Taiwan into line with international human rights trends but also be a trendsetter in the progressive introduction of new, so-called 'third-generation' human rights. Article 26 of the draft law concerned the right to marry and form a family and specifically states homosexual men and women have the right to form a family and legally adopt children.<sup>18</sup> This would have been a first for an Asian country and guarantee rights that many Western countries had still not accepted. Furthermore, Article 5 purported to abolish the death penalty under the right to life, going beyond the requirements of the ICCPR, which commit states that have not yet abolished the death penalty, to only impose it 'for the most serious of crimes'.<sup>19</sup> Perhaps its most unpalatable article though, especially for the many KMT legislators whose votes were necessary for its passages, was Article 2 on the right to self-determination. As stated above and found in both the ICCPR and ICESCR as the first article in each, the right to self-determination in any circumstances other than Taiwan's would generally not be controversial, however; given Taiwan's international position and fears of Chen's pro-independence bias, this article, ostentatiously positioned as Article 2 of the draft law, did not make its passage through the legislature any easier, in fact, the opposite was more likely true.

Criticism of the draft law was forthcoming on various fronts. Opposition even came from Chen's own party members. DPP Legislator, Hou Shui-sheng, decrying the extent of the proposals, went as far to say that if homosexual marriage was legalised 'Taiwan would perish'.<sup>20</sup> The draft law also drew criticisms in academic circles. Chen and Lin opined that the draft law would create rights 'on paper' only and lack effect in practice.<sup>21</sup> Without improved constitutional and human rights awareness, they stated: "If the *Basic Law on Human Rights* becomes law, we fear it will only serve as

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<sup>18</sup> Draft Basic Law on Human Rights, 2003.

<sup>19</sup> Article 6 (2) ICCPR

<sup>20</sup> Chang, Y.-K. 2006. Out of the Closet and into the Political Arena: Can the internet become a location for queer movements? *Journal of Cyber Culture and Information Society*, 10 165-204. p. 185.

<sup>21</sup> Chen, L.-T. and Lin, C.-S. 2007. A Critique of the Taiwanese Basic Law of Human Rights in Light of the International Bill of Human Rights. (In Chinese) *Journal of Humanities and Social Sciences* 3:6.

a ‘dead letter’ or as a tool for the declaration of policy and believe it will not have any real benefit in protecting human rights in Taiwan.”<sup>22</sup> They also stated their concern that without follow-up legislation the draft law would be ineffective and create judicial uncertainty, and cited the example of marriage rights, which would require changes to the *Civil Code* and other laws to have any impact for the gay community.

It must also be mentioned that there are various express rights and guarantees contained in the Constitution of the ROC. Chapter Two enumerates the rights and duties of the people, as the chapter is so called. Rights to equality before the law, personal freedom, the non-trial of civilians in military courts, freedoms of speech, religion and assembly and the right to privacy of correspondence as well as the right to elections and referenda among others are specifically mentioned therein.<sup>23</sup> These, however, have been largely ignored and sidelined for much of the ROC’s history on Taiwan and could be easily be referred to as the ‘dead letter’ that Chen and Lin feared the *Human Rights Basic Law* could have been. Direct abrogation in the past and the catch-all Article 23, which provides that these constitutional rights can be restricted by law in rather generous terms,<sup>24</sup> have meant that these constitutional provisions offer limited legal protections (if any) for Taiwanese. As stated above, although perhaps preferable to amend the constitution and place human rights protections in the ‘supreme law’, politically this was not possible. Referring to the fears of what could happen if constitutional changes were mooted with Chen in the presidency, Kennedy states: “The will to open what many view as a Pandora’s box is just not there.”<sup>25</sup>

In October 2003, Chen announced: “Taiwan wants to be founded on the basis of human rights. I hope that Taiwan's human-rights standards can catch up with those of the world as soon as possible.”<sup>26</sup> In public, Chen was widely supporting the passage of the *Basic Law on Human Rights* through the Legislative Yuan. Yet behind the scenes, the draft law’s support was fading. Huang cites political and social battles in the legislature and general stalemate as problems the bill faced.<sup>27</sup> With presidential

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<sup>22</sup> Chen and Lin, 2007. p. 17 (translated from Chinese)

<sup>23</sup> Constitution of the Republic of China, Chapter II, Articles 7-18

<sup>24</sup> Article 23 states that these rights can be restricted by law to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare.

<sup>25</sup> Kennedy, B. 2002. Taiwan Raises the Bar of Human Rights Higher. *Taiwan Journal*, 26:20.

<sup>26</sup> President Vows to Put an End to the Death Penalty. 2003. *Taipei Times*, 3 October, p.4 [Online] [www.taipeitimes.com](http://www.taipeitimes.com) [Accessed: 17 May 2010]

<sup>27</sup> Huang, 2008. p. 184

elections approaching in the following year, the draft law failed to make it onto the Legislative Yuan's agenda and disappointingly was neither debated nor voted on during Chen's first term.

#### 4.2.4. Difficulties encountered

As fast as Chen made attempts to implement human rights standards, his attempts were met with stiff opposition. In December 2003, both the ICCPR and ICESCR were submitted to the Legislative Yuan for ratification; however, at the time, the KMT Party dominated the legislature.<sup>28</sup> Article 1 of both covenants contains the right to self-determination and KMT legislators were intent on submitting reservations to this article. Huang states: "It was reliably reported that the Legislative Yuan was suspicious that the new Administration would use Article 1 to promote moves towards Taiwanese independence."<sup>29</sup> Additionally, Liao asserts that there was also a reservation under Article 6 of the ICCPR (right to life) declared.<sup>30</sup> Furthermore, objections were raised to Articles 8 and 12.<sup>31</sup> One can only assume that legislators (especially, the Nationalists) did not want any ambiguity over the legality of the death penalty, compulsory military service or the residence of Mainland Chinese citizens. The DPP sought a rehearing in the Legislative Yuan to attempt to get around these reservations but the legislature was not cooperative and as such, the ratification of the two covenants did not proceed. Chen's ratification of the covenants would not turn out to be the effortless process that one might have predicted.

#### 4.2.5. Efforts post-2004

After a fierce election battle for a second term, Chen was narrowly re-elected in 2004. Yet this second term was not to turn out any more productive in terms of completing Chen's human rights agenda. Copper declared: "As it turned out civil and political liberties faded as a topic of conversation in the Chen administration and disappeared as a political goal."<sup>32</sup> Other issues began to dominate Chen's presidency and human rights action waned. Huang refers to the corruption cases surrounding the President

<sup>28</sup> Hwang, S.-D. 2004. A Comparison of Voting Coalitions in the Legislative Yuan Before and After Party Turnover of the Year 2000 (In Chinese) *Journal of Electoral Studies*, 11:1

<sup>29</sup> Huang, M. 2008b. The 'Human Rights Diplomacy' Campaign of the Chen Shui-Bian Administration 2000-2004. Presented at the *International Conference on Human Rights Protection and Practice in Taiwan*, National Cheng Kung University, Tainan, 3 October.

<sup>30</sup> Liao, F.-T. 2008. From Seventy to Zero: Why executions declined after Taiwan's democratization. *Punishment and Society*. 10:2 153-170, p. 156

<sup>31</sup> Legislative Yuan, 2003. (In Chinese) *Gazette of the Legislative Yuan*, 92:5. p. 694 and p. 737

<sup>32</sup> Copper, 2009. p. 471

and a gradually reduced concern for human rights.<sup>33</sup> Although a later *Bill of Rights* in 2005 and *Human Rights Law* in 2006 were mooted by the Executive Yuan's Human Rights Protection and Promotion Committee and the Research, Development and Evaluation Commission respectively, these draft laws were never pursued through the legislature. Faced with a non-majority in the Legislative Yuan over the terms of both his presidencies, Chen was not able to ratify or implement international human rights standards into ROC law. His grand plans created initial optimism but over the course of his eight years, focus shifted and the protection of international human rights standards remained wanting.

#### 4.3. Plans for a National Human Rights Commission

We will now move to an analysis of Chen Shui-bian's plan for a National Human Rights Commission (NHRC) for Taiwan, which similar to his intention to implement the international human rights treaties into a Taiwan human rights law featured as a keystone in Chen's overall human rights agenda – building a human rights state to showcase Taiwan's democratic credentials to the world. In the 2000 presidential election campaign, after a coalition of human rights NGOs had endorsed the idea, a group led by human rights campaigner, Peter Huang effectively lobbied all three main candidates to support a NHRC for Taiwan.<sup>34</sup> The KMT candidate Lien Chen, Pan-Blue independent Hsu Hsin-lang and Chen during their candidacies all made campaign pledges in favour of a NHRC. Plans for an independent human rights body were confirmed in Chen's inaugural address. He stated: "We hope to set up an independent national human rights commission in Taiwan, thereby realizing an action long advocated by the United Nations."<sup>35</sup>

This pledge was significant. It was the first time a ruling president had discussed establishing a NHRC and by initial indications, it appeared Chen truly wanted to act on his word. In just his second press conference, Chen confirmed his pledge for a NHCR, stating that the problems of where to place the commission under Taiwan's constitutional framework must be overcome. This was to be a reoccurring problem for Taiwan's NHRC. He stated: "Most importantly, we must push for the establishment

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<sup>33</sup> Huang, 2008. p.184

<sup>34</sup> Liao, F.-T. and Hwang, J.-Y. 2002. Think Globally, Do Locally – Internationalizing Taiwan's human rights regime. *Taiwan's Modernization in Global Perspective*, Chow, P. Ed. New York : Praeger. 79-102, p. 91

<sup>35</sup> Chen, 2000.

of a national human rights commission,” and followed it by announcing his plans to establish the aforementioned Presidential Human Rights Advisory Group.<sup>36</sup> Later that year in September, the president’s support for a NHRC was stated in unequivocal terms:

“I want our country to be built on human rights. We must promote the establishment of a national human rights commission, so human rights in the ROC will become a new standard in the 21<sup>st</sup> Century. These are not slogans.”<sup>37</sup>

The following year, Taiwan hosted an international conference on NHRCs, which Chen personally attended. There he argued that the NHRC remained the ‘priority’ among the human rights policies he outlined in his inauguration.<sup>38</sup> It was clear Chen attached great importance to the setting up of such a committee, realizing its fundamental role in any human rights regime.

#### 4.3.1. The White Paper’s proposals

The 2002 Human Rights White Paper outlined the establishment of a NHRC in Chapter 2. It recognized that several competing draft laws had been prepared on the topic since 2000.<sup>39</sup> Among these was an organic law draft from a coalition of NGOs, the Chen administration’s organic bill, a Ministry of Justice-drafted *National Human Rights Commission Investigative Powers Enactment Law* as well as a bill by a KMT Legislative Yuan member. Foreseeing that there would be ‘multiple competing drafts’ before the legislature, the white paper set out various principles Chen envisioned for Taiwan’s NHRC. On the question of such a body’s necessity, it states: “This is something our country needs in terms of human rights infrastructure at its current stage of human rights development.”<sup>40</sup> The white paper put forward the view that an NHRC should be institutionally situated under the Office of the President, with a similar status to that of Academia Sinica. Institutional independence was seen as a top priority and, in the absence of constitutional amendments, this status was considered

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<sup>36</sup> Liao, F.-T. 2001. Establishing a National Human Rights Commission in Taiwan: The role of NGOs and challenges ahead. *Asia-Pacific Journal of Human Rights and the Law*, 2:2 90-109. p. 101

<sup>37</sup> Ibid.

<sup>38</sup> Liao, 2001. p. 102.

<sup>39</sup> Executive Yuan, 2002. pp. 39-40

<sup>40</sup> Executive Yuan, 2002. p. 40

the preferred option. The conflict between the Control Yuan and a NHRC was also dismissed in the document. It outlined that the Control Yuan's functions as articulated under the constitution are different and more limited than the role of a human rights body. A NHRC's duties include human rights promotion, education, awareness, advising the government in matters of human rights protection as well as the investigation of human rights violations. Such violations would not inherently always involve government agencies and this along with the above mentioned duties clearly go beyond the government monitoring functions of the Control Yuan. The white paper adds: "As far as the objective of guaranteeing human rights is concerned, the investigative powers of the Commission [NHRC] and those of the Control Yuan should be complementary, not mutually antagonistic."<sup>41</sup> Furthermore, the paper envisioned the NHRC's investigative powers to be of a similar kind to those of the Fair Trade Commission and to have the purpose of establishing the truth of a situation but such results would not be legally binding. The white paper, thus, outlined clear guidelines for the future NHRC expected in Chen's first term.

#### 4.3.2. Draft legislation

With a myriad of competing draft legislation on this issue, it appeared as though agencies were working against each other. In 2001 the Presidential Human Rights Advisory Group, after much discussion, released two draft laws: the *Draft Organic Law on the National Human Rights Commission* and the *Draft Law on the Powers of the National Human Rights Commission*. These bills were known as the 'Presidential Version'.<sup>42</sup> The Draft Organic Law sought to conform to the 'Paris Principles' on model NHRCs. It proposed a NHRC to be set up under the Office of President with a wide scope of functions. Set out in Article 1 of the law, the proposed functions included developing and reviewing human rights promotion and protection policies and laws; producing an annual national human rights report; human rights education and public awareness; implementing international human rights norms and overseas human rights co-operation; and, other related matters. The supplementary draft law on the commission's powers was to further clarify the proposed commission's role and the contents contain provisions delineating the competencies of the NHRC so as not to impede on the powers of the Control Yuan, but still allowing the NHRC to

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<sup>41</sup> Executive Yuan, 2002. p. 42

<sup>42</sup> Huang, M. 2003. Advocacy, Debate and Prospects of Taiwan's National Human Rights Commission: the view of NGOs. (In Chinese) [Online] [www.scu.edu.tw/hr/articles/mab/mab\\_20031221.doc](http://www.scu.edu.tw/hr/articles/mab/mab_20031221.doc) [Accessed 20 May 2010]



investigate human rights violations. Opposition from the Control Yuan and its supporters ensued.

Although Chen had indicated his strong support for a NHRC and much attention had been given to legislative drafting in this area, the Legislative Yuan did not echo the president's sentiments. Schafferer (referring to KMT legislators) contends: "They did not see the need for such a commission and mainly argued that the Control Yuan as the 'sole' investigative body was responsible for investigating human rights abuses."

<sup>43</sup> Even as these two draft laws failed to gain momentum in the legislature, all attempts to implement such a body had still not ceased. The above-mentioned *Draft Human Rights Basic Law* of 2003 also made allowance for the establishment of a NHRC in its Chapter 4, Article 51. Such continued attempts were to meet the same fate. With the presidential election of 2004 approaching, Huang stated that political parties of both sides were concerned not with policy formulation and implementation, but with winning the election and under these circumstances; it was declared 'impossible to achieve a breakthrough before the election'.<sup>44</sup>

#### 4.3.3. Second term and hopes of a NHRC fade

As was seen in the case of Taiwan's *Human Rights Act*, the second term of Chen's presidency was not to prove any more fruitful in establishing a NHRC. Surely, what Schafferer referred to as the 'Han nationalists' staunch opposition to the establishment of a NHRC,<sup>45</sup> did not help. With other priorities at hand, focus shifted elsewhere. Ye stated that after 2004, government lobbying the legislative passage of a NHRC gradually disappeared.<sup>46</sup> Was Chen's support for a human rights institution genuine? Commentators have suggested that pro-human rights positions were used for campaigning purposes and that talk of 'human rights' was just a mantra and lacked commitment.<sup>47</sup> Looking back on his time in office, in a press release in 2007, Chen expressed that it was unfortunate that opposition parties did not support the legislation

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<sup>43</sup> Schafferer, 2008. p. 2

<sup>44</sup> Huang, 2003.

<sup>45</sup> Schafferer, 2008. p. 2

<sup>46</sup> Ye, T.-C. 2009. 以機構作為規範的配套:兩公約與國家人權委員會 [Online] TAHR. [www.tahr.org.tw/files/newsletter/201003/014.pdf](http://www.tahr.org.tw/files/newsletter/201003/014.pdf) [Accessed: 10 April 2010]

<sup>47</sup> Schafferer, 2008 at 3 and Copper, 2009. p. 471

he put forward on such initiatives as the establishment of a NHRC. He states: “It dealt a significant blow to Taiwan’s efforts to becoming a nation based on human rights.”<sup>48</sup>

#### 4.4. Policy towards the death penalty and progress towards abolition

Arguably, it is in this indicator that Chen’s administration had the most success in the human rights arena. The above two mentioned indicators deal with what Chen referred to as ‘creating the infrastructure for a human rights state’, this next section moves away from this and looks at the topic of implementing human rights in a specific area – the right to life and the right against cruel, inhumane and degrading punishment. The abolition of the death penalty needed no further infrastructure development, amending the *Criminal Code* and legislation would suffice and this was considered in Chapter 8 of the white paper under the heading ‘The Short-term Agenda’. In keeping with his goal of building a human rights state, Chen’s administration did not fail to address the issue of the death penalty; however, support for its immediate abolition was not found, notwithstanding signs of optimism in this regard too upon Chen’s election. Chiang states: “Hence while the government is declaring the importance of human rights, it is only a matter of time before the death penalty is abolished.”<sup>49</sup> Faced with unsupportive opinion polls on the issue and after initially appearing to be not high on Chen’s agenda, we will now consider the progress that was eventually achieved in reducing the scope of the death penalty in Taiwan.

##### 4.4.1. The administration’s position on abolition

The 2002 white paper called for ‘step by step’ measures to reduce the scope of its application. It states: “The death penalty reflects the erroneous traditional concept of using severe penalties to rule in times of chaos.”<sup>50</sup> This policy paper informed the reader that there is no evidence that justifies the death penalty on the grounds of deterring violent crime, and mention was made too of international trends that show over half the world’s states have abolished capital punishment. Nevertheless, the Taiwanese public’s view on the matter was used to justify a ‘go-slow’ approach. “As

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<sup>48</sup> Government Information Office, 2007. *President Chen Shui-bian Meets Dutch Human Rights Expert Dr. Theodoor C. Van Boven* [Online] [www.gio.gov.tw](http://www.gio.gov.tw) [Accessed: 10 April 2010]

<sup>49</sup> Chiang, S.-F. 2001. Ryden, E. (Tr.) *Abolition of the Death Penalty: a review of scholarship in Taiwan*. *Peace Papers* 6, Taipei: John Paul II Peace Institute. p. 13

<sup>50</sup> Executive Yuan, 2002. p. 84

a consequence [of the concept of retribution and lack of human rights education], it is probably still impossible to entirely abolish the death penalty,”<sup>51</sup> it states. Thus, it was not the policy goal of Chen’s administration to abolish the death penalty, but to reduce its high incidence by various measures, including the removal of mandatory sentencing and the reduction of capital crimes. For Liao, this was a policy of ‘gradual’ abolition in line with the limitations of public opinion.<sup>52</sup>

#### 4.4.2. Legislation and the death penalty

The process of legislative amendments aimed at achieving these goals had already begun prior to the release of Chen’s policy. At the instigation of the DPP government in January 2002, the Legislative Yuan repealed the *Act for the Control and Punishment of Banditry* (a law which contained 10 offenses whose punishment was mandatory death).<sup>53</sup> Liao outlines a further five categories of offences in addition to the above-mentioned case of banditry that also attracted the death penalty and which people were being sentenced to death at the time of Chen’s election to office. These were: kidnapping for ransom, rape with homicide, drug dealing, robbery (occasioning death) and murder.<sup>54</sup> The death penalty was at the time available for two offences in which no death was necessitated, as many foreigners would be aware (in the case of drug offences) from the explicit warning one sees in English on arrival at Taiwan’s main airport. Under the anti-drugs legislation, the death penalty is available (though not mandatory) for the selling, trafficking and production of drugs as well as forcing another to use a class-1 drug.<sup>55</sup> Prior to Chen’s election, the penalty for the offence of ‘rape with homicide’ had changed from a mandatory death sentence to a discretionary one with the option of life imprisonment.<sup>56</sup> By January 2002, the mandatory death penalty for the offence of ‘kidnapping for ransom occasioning death’ was made discretionary, with again the option of life imprisonment and, for kidnapping for ransom where the victim is released without taking any ransom, the option of the death penalty was removed completely.<sup>57</sup> Also in 2002, the punishments for robbery causing death (felony murder) were widened to include a minimum sentence of 12

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<sup>51</sup> *Ibid.*

<sup>52</sup> Liao, 2008. p. 158

<sup>53</sup> Liao, 2008. p. 159 and Executive Yuan, 2002. p. 85

<sup>54</sup> Liao, 2008. p. 158

<sup>55</sup> Liao, 2008. p. 161

<sup>56</sup> Liao, 2008. p. 160

<sup>57</sup> *Ibid.*

years imprisonment, a change from the previous life sentence or death penalty option. As for murder, the death sentence remained as an option for the courts. The only significant legislative change to this during this period was the removal of the discretionary death sentence in January 2005 that had been available to minors for the offence of killing one's parents or grandparents.<sup>58</sup>

A further significant legislative development came in December 2006. Mandatory death sentencing was removed for the last of the crimes in Taiwan that still mandated it. Those crimes were contained in the currency counterfeiting legislation and *Criminal Code of the Armed Forces* respectively. The mandatory death penalty had thus been removed from Taiwan's law books at last but as Liao points out, "Fifty crimes remained subject to the death penalty on a discretionary basis."<sup>59</sup>

Attempts to abolish the death penalty through general human rights legislation, as discussed in the first indicator, must also be looked at. The failed attempts to incorporate international human rights standards into Taiwanese law, the Taiwan bill of rights attempts included articles on the abolition of the death penalty. Article 5 of the *Draft Basic Law on Human Rights*<sup>60</sup> specifically provided that the death penalty should be abolished. These draft laws, however, did not receive a welcome reception in the Legislative Yuan and did not pass.

#### 4.4.3. Executive action

Besides legislative changes, executive action had a strong impact on the practice of the death penalty. In 2001, DPP Justice Minister Chen Ding-Nan expressed his desire to see the death penalty abolished in the president's first term; however, this was qualified by the typical sentiment at the time that the government would only pursue such legal changes with the public's support.<sup>61</sup> Taiwan government opinion polls on the topic still indicated considerable support for the retention of the death penalty. In 2001 and 2002 the figures were 71 and 77 per cent respectively.<sup>62</sup> Surprisingly though,

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<sup>58</sup> Liao, 2008. p. 162

<sup>59</sup> Liao, 2008. p. 158.

<sup>60</sup> Presidential Human Rights Advisory Group, 2003.

<sup>61</sup> Johnson, D.T. and Zimring, F.E. 2009. *The Next Frontier – National development, political change and the death penalty in Asia*. New York: Oxford University Press. p. 214

<sup>62</sup> Chiu, H.-Y. 2006. Deterrence, Dignity, and the Death Penalty: Analyzing Taiwanese attitudes toward the abolition of the death penalty. *Taiwanese Journal of Sociology*, 37

figures that indicated overall pro-abolition sentiment were not more heavily relied on by the purportedly abolitionist government. When respondents were asked, also in Taiwan government opinion polls, whether or not they would still support the death penalty given the option of life imprisonment without parole for offenders, the numbers supporting abolition markedly increased. Chiu shows that 53 and 47 percent were for abolishing the death penalty in these circumstances, against 38 and 43 percent still insisting on the death penalty over the same time.<sup>63</sup> Prefacing abolition on consensus among the public, whether incidental or not, did not however speed up legislative moves to end capital punishment.

Improvements in criminal procedures laws were a more positive contribution to reducing death sentences. Liao points out that from 1990 to 2006 there were 17 amendments to the *Criminal Procedure Law* that overall played a large part in lowering the number of capital punishment sentences handed down.<sup>64</sup> Furthermore, gains were to be made through an unintended application of the execution process. Under the death penalty provisions in Taiwan, the minister of justice is required to sign a death warrant before an execution can proceed. Beginning in 2006, the newly appointed Justice Minister Shih Mao-lin stated his refusal to sign any death warrants during his term.<sup>65</sup> This marked the start of the *de facto* moratorium on the death penalty in Taiwan. The general view on the position of the death penalty was that it was on its way out. Johnson and Zimring state: “In 2007, Taiwan finished its second consecutive year with zero executions; and...seem[ed] to be well on [its] way toward formal abolition.”<sup>66</sup> While death sentences were still delivered by the courts and though not guaranteed in law, Taiwan was to witness no further executions for the remainder of Chen’s term.

#### 4.4.4. Conclusion – Gradual abolition

While legal abolition of the death penalty was not achieved under Chen’s eight years in the presidency, several positive steps were taken during this time culminating the *de facto* moratorium. Legislative changes, notably the reduction in number of capital offences and the removal of the mandatory death penalty made a significant

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<sup>63</sup> *Ibid.*

<sup>64</sup> Liao, 2008. pp. 162-163

<sup>65</sup> Schafferer, 2009. p. 3

<sup>66</sup> Johnson and Zimring, 2009. p. 191

contribution to the lowering the number of death sentences and executions. Compared to the other two indicators, it is in this area that Chan made the most progress.

Johnson and Zimring, comparing Chen to his South Korean contemporary, Roh Moo Hyun stated:

“Both were born poor, worked as left-leaning lawyers before entering politics, served time in prison for anti-regime activities, became president because other candidates split the conservative vote, and were plagued during their presidencies by scandal, political defections, and low approval ratings. Yet both remained committed to ending executions and, in rhetoric and reality, to abolishing the death penalty.”<sup>67</sup>

Although Chen could not effect such abolition in law, for the final three years of his presidency, Taiwan recorded zero executions and this is to be commended.

#### 4.5. Overall Conclusions – Chen’s human rights legacy

In 2004, Chen stated:

“We have had a long wait for democracy. It has been well over half a century and I’m glad to say we have taken the right path from authoritarianism to democracy and this is a road of no return. This is also a correct path that we have taken. The road to democracy may be winding and is like a river taking many curves, but eventually the river will reach the ocean.”<sup>68</sup>

The same may be said of human rights development. Human rights and democracy are clearly connected and Taiwan has waited a long time for both. Once the process of human rights development has begun, it must continue. Without these protections in place guaranteed by law, by independent institutions and government commitment, more is needed. Chen spoke at length of his plans to make Taiwan into a human rights state. His election was momentous. The KMT regime had been defeated by an outsider, a democracy advocate and a human rights campaigner but in eight years,

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<sup>67</sup> Johnson and Zimring, 2009. p. 203

<sup>68</sup> BBC, 2004. Interview: Chen Shui-bian, 2004. *BBC News*. March 30. [Online] [news.bbc.co.uk](http://news.bbc.co.uk) [Accessed: 15 March 2010]

human rights action faltered. Policy objectives were highly credible but on an implementation level, the human rights progress that was expected did not eventuate. The major stumbling block to much of Chen's attempts to build his human rights state was a hostile Legislative Yuan. Throughout his entire eight years in office, Chen lacked a majority in the legislature. This, no doubt, impeded his capabilities of implementing his human rights policies particularly in the cases of introducing a human rights law and establishing a NHRC. Partisanship and opposition suspicion of his motives hindered Chen's ability to pursue his legislative agenda.

Another hurdle, in my opinion, that prevented Chen's human rights policies being implemented was the sheer amount of legislation being put forward. Particularly throughout the first term, the vast quantity of human rights legislation being put forward did not result in any being successful. Competing bodies were throwing around their draft laws and it is hard to see how this did not hinder their chances of successful passage. If the president had directed drafting efforts to be focused in one body, instead of several organs in the Executive Yuan and Presidential Office, perhaps their efforts then could have been concentrated on producing a draft acceptable to the Legislative Yuan.

This brings us aptly on to the next point and that is of Chen's leadership and commitment to his human rights positions. Various scholars criticize Chen for his position on human rights and contend democratization (and human rights development) worsened during his time in office. Copper, in a highly critical article, points out that Chen was 'preoccupied' with localization and independence and strongly contends: "He made little effort to expand upon the civil and political rights guaranteed and practiced in Taiwan and there was not only little or no progress in this realm but also a significant deterioration in some important areas."<sup>69</sup> These comments certainly give little weight to the policy objectives Chen espoused in his initial years in office. Copper does though concede that Chen's focus on past human rights abuses, capital punishment and national identity contributed to Taiwan's democratization.<sup>70</sup> Schafferer raises the issue of dissatisfied human rights campaigners, who had strongly supported Chen's election only to be disappointed and felt that human rights were

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<sup>69</sup> Copper, 2009, p. 471

<sup>70</sup> Copper, 2009, p. 478

only being given ‘lip-service’ by Chen’s administration.<sup>71</sup> Others are more supportive. Huang indicates that although Chen’s overall master plan did not get the expected results, there were other areas that had greater success.<sup>72</sup> He cites bringing NGOs into greater prominence, the passage of legislation in gender equality and indigenous rights and, most successfully, implementing human rights education policies as examples of human rights progress under Chen.

Overall, Chen set himself high targets in improving the human rights situation in Taiwan. Inspired by righting the wrongs of the past and bringing Taiwan up to international standards (and attempting to gain the support of the global community in the process), Chen’s human rights policy goal, ‘the building of a human rights state’ seemed to be a priority. Despite much initial effort, the desired results were not forthcoming. The reasons as per above contributed to this state of affairs. Disappointment among those in Taiwan’s human rights community was the result. Except for the *de facto* moratorium of the death penalty and gradual improvements towards reducing capital punishment, the expected gains across the three indicators did not follow. The international human rights treaties were not implemented, nor was a human rights commission established. It would be up to the next president to complete what Chen had failed.

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<sup>71</sup> Schafferer, 2008. p. 3

<sup>72</sup> Huang, 2008a. p. 184



## 5. Human Rights under Ma Ying-jeou

Former Taipei Mayor and KMT-stalwart, Ma Ying-jeou was elected president with an over-whelming majority on 22 March 2008. This coming on the back of recent success in the legislative elections two months prior saw the KMT truly back in its traditional position. The legislative elections were a disaster for the DPP, which was reduced to 27 seats in the Legislative Yuan.<sup>1</sup> The KMT won a two-thirds majority and the overall Pan-Blue seat count reached an astonishing three quarters.<sup>2</sup> Ma was very much the preferred candidate in the opinion polls over his DPP rival, Frank Hsieh and won the election with almost 59 per cent of the vote, the largest margin since direct presidential elections were introduced in 1996.<sup>3</sup> This chapter will address Ma's human rights policies and achievements over his term thus far. His term at date of publication may only be just over half way but there have been significant developments in human rights nonetheless. We look first at the expectations of Ma and initial indications of his human rights policies before moving on to our consideration of the three indicators.

### 5.1. Ma's presidency and overview of his human rights policy

Prior to his election, Ma released a nine-point declaration on human rights. In it he pledged his support for various rights, both civil and political and, social and economic in nature. Clean government, fair trials, anti-discrimination, immigrant integration and poverty alleviation were among those rights contained in his declaration.<sup>4</sup> His declaration, although espousing noble international human rights standards, was scant on policy detail and failed to explicitly state how these rights would be protected but nevertheless, human rights did feature in his election campaign.

Ma's inaugural speech on 21 May 2008 was telling. Taiwan, 'the beacon of democracy' had re-found its way, returned to its 'core values' and set an example for all ethnic Chinese communities in electing the KMT back to the presidency, Ma highlighted. He revealed his faith and optimism in the ROC Constitution by stating:

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<sup>1</sup> Copper, 2008. p. 9

<sup>2</sup> *Ibid.*

<sup>3</sup> Copper, 2008. pp. 60 and 72

<sup>4</sup> Government Information Office, 2009a. *A Government that Respects Human Rights and Freedom of the Press*. [Online] [www.gio.gov.tw](http://www.gio.gov.tw) [Accessed 10/11/2009]

“We can rely on the Constitution to protect human rights, uphold law and order, make justice independent and impartial, and breathe new life into civil society.”<sup>5</sup> Although it had failed in the past, the Harvard graduate and doctor of law held the constitution in high regard and as the means to ‘better Taiwan’s democracy’. He stated: “As President of the Republic of China, my most solemn duty is to safeguard the Constitution,” and following its spirit to the letter and respecting the separation of powers were his stated priorities. Significantly, he saw it as the role of the judiciary to ‘guarantee the rule of law and protect human rights’. Unlike Chen’s inauguration eight years earlier, there were no bold human rights policy objectives outlined and no further mention to human rights was made.

## 5.2. Implementation of international standards

In his first year in office, Ma outlined his support for a significant human rights development. He expressed his hope that the ICCPR and ICESCR would be soon ratified by the Legislative Yuan. Delivering a speech at the 2008 Asia Democracy and Human Rights Award Ceremony, as two peaceful protestors were forcefully evicted, the president declared that he would instruct the Executive Yuan to forward the covenants to the legislature for ratification.<sup>6</sup> The Presidential Office stated: “The president said that he is confident that a society that upholds human rights and democracy will surely be able to more effectively address the many challenges facing mankind in the 21<sup>st</sup> century than an autocratic, authoritarian one.”<sup>7</sup> In an interview in the *New York Times*, Ma overlooking the poor human rights record of his party stated: “[The ROC] didn’t have the chance to ratify them because we lost our representation in the U.N. in 1971.”<sup>8</sup> Taiwan’s diplomatic isolation was blamed, not the KMT’s scant historical commitment to international human rights standards, as the reason for the forty-year lapse between signature and ratification.

Interestingly, Ma’s objective was the same as Chen’s eight years earlier and while the KMT blocked the attempts under Chen, 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 again was a fundamental part in Chen’s motivation.

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<sup>5</sup> Ma, Y.-J. 2008. *Taiwan’s Renaissance: Presidential Inaugural Speech*, 21 May.

<sup>6</sup> The author attended the ceremony and witnessed these events.

<sup>7</sup> Presidential Office, 2008. *President Ma Attends 2008 Asia Democracy and Human Rights Award Ceremony*. [Press Release] 10 December

<sup>8</sup> Bradsher, K. and Moore, J. 2009. An Interview with Ma Ying-jeou. *New York Times*. 22 February. [Online] [www.nytimes.com](http://www.nytimes.com) [Accessed 17 November 2009]

Ma further outlined: “We also want to identify all those areas that need improvements,” and placed this as an area of great importance to his government. A familiar human rights policy was being supported but this time the difference was the president had a comfortable legislative majority.

### 5.2.1. Ratification of the ICCPR and ICESCR

On 31 March 2009, the Legislative Yuan approved the ratification of the two main UN human rights treaties. Huang lamented that this did not generate much coverage in the Taiwan’s Chinese-language media but simultaneously, celebrated what he described as ‘hard-fought advances’.<sup>9</sup> Ma personally signed the instruments of ratification on 14 May in a ceremony at the Taipei Guest House. He stated: “Today’s signing of the covenants marks the coming of age for Taiwan in terms of human rights.”<sup>10</sup> In light of the domestic ratification, Taiwan attempted to complete the formal ratification process by depositing it with the United Nations Secretariat in New York. Relying on the help of four of its diplomatic allies, Palau, St Vincent and the Grenadines, Belize and the Gambia delivered the ratification documents to the UN Secretariat on 8 June.<sup>11</sup> This process served as nothing but a moot point; however, its symbolic value could not be dismissed. Since 1971, Taiwan has been excluded from the UN system and the formal ratification process was likely to be rejected. Ma’s government had acknowledged this and it was 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.”<sup>12</sup> Soon after ratification had been approved by the legislature, it then moved on to debating the methods of domestic implementation.

### 5.2.2. Domestic legislation

To clarify any doubt as to the effect of the ratification of these significant human rights instruments, the Legislative Yuan approved the a law governing their domestic implementation. Signed by Ma on 16 April 2009, the *Act to Implement the ICCPR*

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<sup>9</sup> Huang, P. 2009. A Breakthrough in Human Rights. *Taipei Times*, 8 April, p. 8

<sup>10</sup> Government Information Office, 2009b. President Ma Signs Instruments of Ratification of Two Covenants on Human Rights. *ROC Diplomatic Missions Portal*. 20 May. [Online] [www.taiwanembassy.org](http://www.taiwanembassy.org) [Accessed 15 June 2009]

<sup>11</sup> Rights Ratification Documents sent to UN. 2009. *China Post*, 15 June. [Online] [www.chinapost.com.tw](http://www.chinapost.com.tw) [Accessed 15 June 2009]

<sup>12</sup> Government Information Office, 2009a.

and ICESCR was promulgated on 22 April<sup>13</sup> and came into effect on 10 December 2009. The legislation unequivocally states that the two covenants have domestic legal status and makes them binding on all government agencies.<sup>14</sup> Although this law brings international human rights standards into Taiwan's legal system, it is very brief. It contains a mere nine articles and in its English translation is just over a page in length. The act places various obligations on all government institutions and their agencies. Ma states: "After the Implementation Act became effective, the government began to make a thorough examination of existing laws to see if there were any in contradiction to the spirit of the UN Covenants on human rights."<sup>15</sup> This refers to the duty of government institutions and agencies outlined in the law to identify and amend incompatible legislation within two years. Other government responsibilities mandated by the law are cooperation with foreign governments and NGOs to realize these human rights protections (Article 5), the setting up of a human rights reporting system (Article 6) and the preferential allocation of funds to implement human rights protections (Article 7).

Significant questions remain as to its enforceability, particularly whether there is any immediate recourse to judicial relief for breaches of the covenants. The act is silent on the issue; however, it does require (in Article 8) all levels of government to review laws and regulations to ensure compliance with the two human rights treaties. Article 8 states: "All laws, regulations, directions and administrative measures incompatible to the two Covenants should be amended within two years [...]." It appears that the intent of the law was to ensure all Taiwan laws conform with the Covenants; however, it does not contain any clear provision that future legislation must comply with the treaties nor does it state how incompatible legislation not amended within the two year limit will be considered. Should it be declared void or remain valid? The intentions behind this law seem progressive and commendable; however, the vague nature of several of its articles and the demanding tasks required of all government agencies without sanction for their non-compliance mean more is needed to ensure the effective implementation of international human rights standards. Thus, while the passage of this law is a momentous event for Taiwan's human rights development, its

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<sup>13</sup> President Ma Signs Instruments of Ratification on UN Human Rights Covenants. 2009. *KMT News Network*. 15 May. [Online] [www.kmt.org.tw](http://www.kmt.org.tw) [Accessed 9 April 2010]

<sup>14</sup> Act to Implement the ICCPR and ICESCR (2009) Articles 2 and 4

<sup>15</sup> KMT News, 2009.

effect will depend on how much consideration and dedication government agencies give to its enforcement.

The Ministry of Justice issued a policy brief just after the passage of Ma's significant human rights legislation and this should help clarify some of the issues outlined above. It stated: "The government is determined to raise the nation's human rights standards and human rights position in the world."<sup>16</sup> The document outlines Taiwan's position that human rights protection is necessary for Taiwan be a part of the international system and the 'mainstream' world view. Importantly, it provides details of the Justice Ministry's plan for enforcing the two covenants as instructed by Ma. It places the MOJ in a coordinating role for the administration and overseeing of the implementation act. It also provides for the Ministry of Education to include the contents of the covenants in school curriculums and requires public servants to be exposed to the covenants in their 'lifelong learning' program. Until the expiry of the two year limit, however, it remains to be seen how effective the law will be in ensuring Taiwanese legislation conforms to the ICCPR and ICESCR. Furthermore, whether the legislature will consider itself bound by the covenants and whether the judiciary will allow defendants to rely on them are important questions that will also impact on this law's worth.

Although it has been only slightly more than a year since the ratification and its implementation law passed, a considerable amount of commentary (both positive and negative) has followed. At the time though, immediate reactions were somewhat muted. Cohen and Chen state: "These significant acts deserve greater appreciation that they have received."<sup>17</sup> The authors also highlight what they see as critical for the successful implementation of the covenants and these include government training, public education and awareness, a definite time frame and benchmarks for evaluating progress in addition to the mandated comprehensive examination of existing laws.<sup>18</sup> They further call on all parties, both governmental and NGOs, to cooperate to ensure the two years of revisions are successful. While the legislation has provided a

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<sup>16</sup> Ministry of Justice, 2009. ICESCR – Its value and stipulations on human rights. 10 April. [Online] [www.moj.gov.tw](http://www.moj.gov.tw) [Accessed 8 October 2009]

<sup>17</sup> Cohen, J.A. and Chen, Y.-J. 2009. Will Beijing Follow Taiwan's Lead on Human Rights? *South China Morning Post*, 28 May.

<sup>18</sup> *Ibid.*

framework, it is by no means a guarantee that full implementation will follow. Both the Executive and Legislative Yuans will have their work cut out for them. As of 22 March 2010, the first year had not produced tangible results in terms of legislative amendments. “There are many laws in Taiwan that are actually in violation of the ICCPR and ICESCR but the violations are somehow not noticed,” a participant at a recent human rights workshop noted.<sup>19</sup> Furthermore, Shih Yi-hsiang of Soochow University criticized the haste in which the covenants were enacted and stated this has caused both government and public confusion.<sup>20</sup> And in another criticism, Icyang Parod, an Aboriginal DPP official and former minister has brought up Ma’s negative handling of indigenous rights. He states: “Even though [Ma] signed the ICCPR and ICESCR last year, he said that it was not mandatory,” and he questions Ma’s sincerity in implementing it.<sup>21</sup>

The significance of Ma’s ratifying and implementation of these international human rights covenants cannot be underestimated. At the same time, it must be noted the KMT continually blocked such moves under the previous president. It is also imperative to note that implementation is not complete. The passage of this law is a start but the contents and spirit of this act must be followed by all levels of government for these international human rights standards to have effect. Though quite brief in its content, the implementation law has the possibility of having a positive effect on Taiwan’s legal system; however, further government action is required within the two years before a full conclusion can be made.

### 5.3. A National Human Rights Commission

While a NHRC was promised in Chen’s inaugural speech, after eight years he could not accomplish one’s establishment. With the election of Ma, the issue has received little attention. Ma has not vigorously campaigned for one and no legislation has been drafted in the little over two years since his election. Judging from Ma’s inaugural speech, he put great confidence in the existing constitutional framework to ensure democracy and human rights and as such, may seem to prefer the Control Yuan and its investigative role of government action as a sufficient mechanism for human rights

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<sup>19</sup> Loa, I.-S. 2010. Rights Covenants Still Little Understood. *Taipei Times*, 22 March. p. 3

<sup>20</sup> *Ibid.*

<sup>21</sup> Huang, S. 2010. Activists, Academics Accuse the President of Neglecting the Rights of Aborigines. *Taipei Times*, 12 May. p. 2

protection. Nevertheless, this chapter will examine discussion of a NHRC under Ma's presidency thus far.

### 5.3.1. NHRC discussions

On 13 May 2009, at a meeting of several NGOs from across Asia including the Taiwan Association Human Rights, Ma was again called upon to move for the prompt establishment of a NHRC. Ye indicates that at that meeting the president stated that the issue of a NHRC was being discussed by the Executive Yuan's Research, Development and Evaluation Commission.<sup>22</sup> It appears at best that the concept of a NHRC has been put to a committee by the Ma administration; however, it does not appear to be progressing beyond the discussion stage, nor at anytime has Ma expressed support for the pressing establishment of such a domestic human rights body. This is confirmed in a 2009 report by the Executive Yuan's Human Rights Protection and Promotion Committee where it states that the long-term goal of setting up an independent NHRC has yet to have been completed and that it is still in the consideration stage.<sup>23</sup> The report states that the establishment of a NHRC is a complicated matter under Taiwan's constitutional framework and states the independence of a NHRC established under the Presidential Office (as the previous administration had sought) cannot be guaranteed. Given the difficulty in constitutional revision it states that further reform is needed and, no set alternative has been released nor has any firm action or decision been taken.

### 5.3.2. Opposition and support

Within government circles, opposition to an independent NHRC has continued. The President of the Control Yuan, Wang Chien-shien maintains that the most suitable place for a NHRC is under the Control Yuan and that placing it in the Executive Yuan or Presidential Office is inappropriate.<sup>24</sup> Taking a rather pro-Control Yuan stance, the article cites unnamed sources that refer to the Control Yuan as the 'Human Rights Yuan' and this has been and continues to be a stumbling block for proponents of a NHRC.

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<sup>22</sup> Ye, 2009.

<sup>23</sup> Human Rights Protection and Promotion Committee, Executive Yuan. 2009. *2007-2008 National Human Rights Report*. In Chapter 4.

<sup>24</sup> Wang Chien-shien: A National Human Rights Commission is more suitable in the Control Yuan, 2009. *China Daily News*. (In Chinese) 21 July. [Online] [news.sina.com](http://news.sina.com) [Accessed 9 April 2010]

While nothing concrete has yet been publicly proposed by Ma's administration in terms of establishing a NHRC, since the ratification of the international human rights covenants, calls have continued for an independent human rights watchdog. Ye unconditionally states: "Our democracy has yet to be consolidated and entrenched and as such, a National Human Rights Commission in line with the Paris Principles is absolutely essential."<sup>25</sup> Cohen, Ma's former Harvard law professor and Chen state that 'an impartial monitoring body' is further required if meaning implementation of the covenants is to occur.<sup>26</sup> A NHRC would be a positive contribution to Taiwan's human rights development, especially in light of the recent implementation of international human rights standards; however, for the time being, Ma is showing no signs of making such a policy move.

#### 5.4. Ma and the death penalty

Upon Ma's inauguration as president, Taiwan had not carried out any executions since 2005 – a *de facto* moratorium was in place and going into its third consecutive year, it appeared the country was on the road to abolition. We will now examine Ma's policy and actions in regard to the death penalty under his term thus far. The analysis will begin by examining his appointment of Wang Ching-feng as Justice Minister in 2008. Her initial actions, statements and the controversy that erupted earlier this year will be explored. Presidential statements will be studied, before turning to the actions of the present Justice Minister.

##### 5.4.1. Appointment of Wang Ching-feng – *de facto* moratorium continues

It has been said that Ma's Executive Yuan appointees were composed of three categories of people: experienced political appointees, social activists and academics.<sup>27</sup> Although having some experience in the Control Yuan, Wang Ching-feng definitely came from the social activist group and her appointment to the Justice Ministry caused some surprise. "It was quite a shock for many to see the appointment of Wang Ching-feng," one news source confirmed.<sup>28</sup> Her previous role as chairperson

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<sup>25</sup> Ye, 2009.

<sup>26</sup> Cohen and Chen. 28 May 2009.

<sup>27</sup> Jennifer Wang and Wang Ching-feng: Government policy vs. social movements, 2010. (In Chinese) *United Daily*, 10 May. [Online] [www.udn.com](http://www.udn.com)

<sup>28</sup> New Cabinet Members Head into Office, 2008. *Taiwan Panorama*. 7 June. Mayer, D. (Tr.)



of the 3/19 Shooting Incident Special Investigation Commission in which she took on public prosecutors and police investigators had attracted controversy.<sup>29</sup> Furthermore, Wang was a well-known supporter of human rights and opposed the death penalty. It was reported: “Even Wang herself is probably wondering whether Ma is crazy to give her the nod?”<sup>30</sup> As somebody whose opposition to the death penalty was on the record, it appeared eventual abolition of capital punishment was still a real possibility.

Before her confirmation, Wang was on the record as saying: “I personally oppose the death penalty,” however, she did go on to clarify her remarks by stating that her individual opinion did not necessarily mean it would become Justice Ministry policy.<sup>31</sup> Also, in published remarks before her formal appointment as Justice Minister, Wang stated that she considered the policy of the Justice Minister at that time to be one of gradual abolition of the death penalty. She further stated that signing a death warrant would be a very difficult issue and one that would make her uncomfortable.<sup>32</sup> This stance was to turn out to have a serious impact on her position as minister.

Although the exact motivations of Ma’s appointment of Wang cannot be known, it can be assumed that Ma was intent on bringing in a human rights advocate to his administration and giving a positive spin to his human rights credentials. Early in Ma’s presidency and after Wang’s confirmation, the president gave his support to the new Justice Minister. On 18 June 2008, Ma received a delegation of international death penalty abolition advocates at the Presidential Office where he acknowledged Taiwan had not carried out executions for some years, although several inmates remained on death row. Significantly, he went on to praise Wang as a well-known human rights lawyer and a supporter of death penalty abolition at the same meeting.<sup>33</sup> While Ma was outlining his goal of gradual abolition and support for his anti-death penalty Justice Minister, at the same time he was conceding that the abolition of the death penalty still required public education and legislative amendment. This centrist

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<sup>29</sup> On Ma Ying-jeou’s Second Wave of Cabinet Appointments, 2008. *China Times*. 29 April. Chu, B. (Tr.)

<sup>30</sup> *Ibid.*

<sup>31</sup> Wang Ching-feng: An Individual Against the Death Penalty, 2008. (In Chinese) *Apple Daily*, 23 April.

<sup>32</sup> Wang Ching-feng: Don’t jump to conclusions about carrying out the death penalty, hopes for rectification, 2008. (In Chinese) *Central News Agency*, 11 May.

<sup>33</sup> Lin, Y.-F. 2008. President: Reducing the Death Penalty, the way forward. (In Chinese) *Central News Agency*, 18 June.

position appeared to be his policy on the death penalty. In addition, government publications continued to mention the *de facto* moratorium and indicate support for gradual opposition. “With regard to capital punishment, no death penalty has been carried out in Taiwan since 2006, an indication that Taiwan is moving toward abolition of the death sentence,” explained a government human rights publication.<sup>34</sup> From the beginning, the president did not oppose abolishing capital punishment nor though did he support immediate change.

By September 2009, Minister Wang had still not signed any death warrants and the first year and several months of Ma’s presidency had passed smoothly without any resumption in executions. Following the government’s poor handling of the Morakot Typhoon disaster, the Premier’s resignation was eventually accepted on 10 September and with this, as is required under Taiwan’s system of government, the cabinet too submitted its collective resignation. A new premier and revamped cabinet was to be selected. Despite a number of changes to significant posts, Wang retained her ministry.<sup>35</sup> Her opposition to the death penalty and refusal to approve executions was not considered a reason to remove her.

The Justice Ministry’s position on the death penalty remained the same. Wang continued to advocate gradual steps towards abolition and refused to issue death warrants. In a February 2010 press conference, she stated: “Taiwan will gradually push for the death penalty after a consensus is formed,” and clarified: “I’m not mentioning the abolition of the death penalty today and pushing it immediately.”<sup>36</sup> Continuing to push her support for opposition to the death penalty and addressing public concerns about raising crime rates should the abolition occur, Wang said that research shows this not to be the case. She also maintained that international trends continue to favour death penalty abolition; however, she did admit that her ministry had no fixed timetable for making legal changes. There had been claims made that abolition would be complete by November 2011 but they were refuted.<sup>37</sup> Wang made these remarks after the death penalty issue had again surfaced in the media following comments by Pai Ping-ping, a vocal supporter of capital punishment. Pai had

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<sup>34</sup> Government Information Office, 2009a.

<sup>35</sup> Taiwan Premier-Designate Wu Den-yih presents Cabinet lineup, 2009. *Taiwan News*, 9 September.

<sup>36</sup> The Debate over the Death Penalty in Taiwan, 2010. *Taiwan News*, 2 February.

<sup>37</sup> Huang, S. 2010. Capital punishment to be Abolished Gradually. *Taipei Times*, 2 February. p. 3.

expressed her desire to take the necessary public examinations to become a bailiff so she could carry out an execution herself.<sup>38</sup> For her, the discussion of ending capital punishment is intolerable.

#### 5.4.2. Controversy and resignation

In what was to bring about her downfall, Wang published an article ‘Reason and Tolerance – the Suspension of Carrying out the Death Penalty’ on 9 March 2009. In the same week, Deputy Justice Minister Huang Shih-ming had expressed his view that the executions of the 44 inmates sentenced to death should continue in the absence of legislation ruling it out.<sup>39</sup> Huang was being questioned by the legislature as he had been nominated for the position of state prosecutor-general and, with his response he clearly had contradicted Wang. In her article, she outlined her steadfast opposition to the death penalty stating that it is most dangerous and cruel and that the role of the government is to encourage respect for life and in doing so, educate the public about it. She stated that the death penalty does not have a deterrent effect and highlighted that in the four years in which no executions have occurred, there was a 32% decrease in dangerous crime. Wang also cited world trends and international standards to support her case, while also providing a domestic legal justification. She stated that under Taiwan’s constitution, the right to life is protected and that this is mandatory. Although the constitution states that on the grounds of maintaining social order, rights may be limited, Wang did not consider this to mean that the right to life can be deprived. Public opinion polls were also used to justify her stance. She cited the common figure that three quarters of Taiwanese oppose abolition but placed more value on the statistics that indicate a majority of Taiwanese (65.5%) support in fact support abolition if complementary measures (such as mandatory life sentencing without parole) are allowed for. She stated: “[R]ational people can accept the abolition of the death penalty,” and she concluded her article expressing her hope that one day when people ask if Taiwan still has the death penalty, “We can proudly say that there is no death penalty on this beautiful island.”<sup>40</sup>

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<sup>38</sup> *Ibid.*

<sup>39</sup> Taiwan Justice Minister Threatens to Resign Rather than Approve Executions. 2010. *Taiwan News*, 10 March.

<sup>40</sup> Wang, C.-F. 2010. Reason and Tolerance – the suspension of carrying out the death penalty. (In Chinese) Reprinted in *United Daily*, 11 March.

The following day, Wang put her job on the line as the ensuing controversy regarding her article flared and she stated: “I would rather quit than sign a decree to execute a convicted death row inmate.”<sup>41</sup> By trying to overturn the status quo and replace the government policy of gradual abolition with the actual carrying of it out, she faced a barrage of criticism from legislators and Control Yuan members. KMT legislator Wu Yu-sheng stated:

“If Wang does not offer to resign, I will submit a malpractice complaint to the Control Yuan. Since the death penalty is still part of our legal system, Wang Ching-feng’s stay of executions is in violation of the law and the Constitution.”<sup>42</sup>

Support for Wang’s stance was forthcoming from another KMT legislator, Hsieh Kuo-liang and NGO leader, Lin Hsin-yi (Taiwan Alliance to End the Death Penalty); however, critics outweighed the calls of support.

While Ma had in the past expressed his support for his justice minister, following the controversy, the president seemed to be willing to see Wang leave her position rather than get involved in the issue and back her up. On 11 March, a Presidential Office spokesperson Lo Chih-chiang expressed the president’s views on the matter and clearly came out on the side of Wang’s opponents. Lo stated:

“We’re a country governed by the rule of law and everything must be administered according to the law. For the death sentences to be commuted in cases that have already been decided would require a justification consistent with existing regulations. Otherwise the Justice Ministry should handle the cases according to the law.”<sup>43</sup>

At the same press conference, Lo reiterated the president’s position that until there is public consensus, abolition cannot occur and listed means of reducing death sentences as ‘future directions’ but avoided supporting abolition. Cohen states: “Ma’s initial

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<sup>41</sup> Justice Minister Defends Stance on Executions, 2010. *Central News Agency*, 10 March.

<sup>42</sup> Chang, R. and Loa, I.-S. 2010. Justice Chief Defends Stay of Executions. *Taipei Times*, 11 March. p. 1

<sup>43</sup> President Says Death Penalty Should be Administered According to the Law. 2010. *Formosa News*. 11 March. [Online] [www.englishnews.ftv.com.tw](http://www.englishnews.ftv.com.tw) [Accessed 26 May 2010]

reaction has not been encouraging to abolitionists.”<sup>44</sup> This seemed a marked move away from Ma’s away earlier commitment to gradual abolition.

As it was clear that both Ma and Premier Wu had withdrawn their support for Wang,<sup>45</sup> late on 11 March she offered her resignation, which was promptly accepted the following morning by Wu. Earlier on the morning of 11 March, Wang had expressed her view that Taiwan would become the ‘laughing stock of the world’ if she would be forced to step down as a result of her opposition to the death penalty;<sup>46</sup> however, with Ma failing to offer any support and indeed, by releasing the statement referred to above, Wang was left with few options. Premier Wu denied pushing Wang out of her job and stated that he only approved her resignation after consultation with Ma.<sup>47</sup> Many domestic media sources, government officials and victims groups supported Wang’s decision to step down; however, one report in the *China Times* declared that it was a major step backwards in Ma’s human rights achievements.<sup>48</sup> On 15 March, Ma directly spoke on the issue for the first time since the controversy was sparked and stated: “It takes time before answers are found to this conundrum.”<sup>49</sup> Ma called for more debate on the issue, consensus building and declared that the abolition of the death penalty and the stay of executions should be treated as two separate issues. The presidential opinion, it appeared, had shifted from one of gradual abolition to one of follow the law and execute those already convicted.

#### 5.4.3. New Justice Minister and resumption of executions

On 19 March, less than a week after Wang stood down in a storm of controversy, Tseng Yung-fu was named as the new justice minister and was sworn in on 22 March. Regarding Tseng’s appointment, Premier Wu believed Tseng would ‘act according to the law’ when asked if death row inmates would be executed.<sup>50</sup> With the new justice minister’s appointment, there were strong suspicions the *de facto* moratorium would be soon lifted and executions would resume. In an unfavourable sign, Premier Wu

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<sup>44</sup> Cohen, J.A. 2010. Tied to the Cause. *South China Morning Post*, 17 March.

<sup>45</sup> Death Penalty Dispute / Presidential Office and Executive Yuan ‘put out the flame’ – Wang Ching-feng steps down. 2010. (In Chinese) *Liberty Times*, 12 March.

<sup>46</sup> Justice Minister Wang Resigns, Firmly Opposed to Capital Punishment. 2010. *Taiwan News*, 13 March.

<sup>47</sup> *Ibid.*

<sup>48</sup> Chiang, H.-J. 2010. Finding a Death Penalty Minister is not Easy, Ma’s Government and Judiciary to become more Conservative. (In Chinese) *China Times*, 16 March.

<sup>49</sup> Ma Calls for a Rational Debate on Capital Punishment. 2010. (In Chinese) *China Times*, 16 March.

<sup>50</sup> Tseng Yung-fu Named New Justice Minister. 2010. *The China Post*, 20 March.

expressed his opinion that he did not expect Tseng to execute all death row inmates at the same time. “Executing all 44 death row inmates at the same time would create too much of an impact.” He added: “For the sake of the country’s reputation and the rule of law, Tseng Yung-fu will handle the matter properly.”<sup>51</sup> While criticising Wang’s actions in not signing any death warrants as against the law, Wu now considered signing all 44 death warrants at once also harmful to the rule of law in addition to the obvious criticism that would come from abroad. Clearly, the ‘legal’ position of executions was not fixed and depended on what Wu considered right. A further worrying sign appeared just a few days after Tseng’s appointment when he rejected the death penalty’s illegality in Taiwan. Tseng refuted Wang’s claim that executions were not permitted under the constitution and also stated that the signing of the two covenants by the Ma administration in 2009 does not affect his powers.<sup>52</sup> Tseng maintained that while the ICCPR aims to reduce executions, it does not prohibit them.

On 15 April, Tseng announced a range of amendments to the *Criminal Code* that would move Taiwan towards gradual abolition. He stated: “We are working on a raft of measures, including life imprisonment without parole and the establishment of special prisons to house such convicts, in preparation for the eventual elimination of capital punishment.”<sup>53</sup> Emphasising Ma’s ‘ultimate goal’ of gradual abolition, Tseng again stated there was no timetable for abolition given the lack of public consensus on the issue.

In this climate of public disagreement, Ma’s administration delivered a hard blow for opponents of the death penalty. On 30 April, Taiwan resumed executions officially ending the *de facto* moratorium that had been in place since the last execution in December 2005. Two days earlier, Tseng signed the death warrants for four convicted death row inmates and on Friday evening, they were put to death.<sup>54</sup> Premier Wu supported Tseng’s move and Presidential Office spokesperson Lo again stated that death penalty cases must be dealt with according to the law and just as he stated surrounding Wang’s demission, he mentioned that until consensus is reached, rational

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<sup>51</sup> New Justice Minister Will Not Execute All 44 Inmates at Once. 2010. *The China Post*, 21 March.

<sup>52</sup> Taiwan Justice Minister: execution of death penalty is not infraction of international covenants: Liberty Times. 2010. *Taiwan News*, 23 March.

<sup>53</sup> An, C.-H. and Wu, S. 2010. MOJ Looking to Replace Death Penalty with Non-Parole Life Sentence. *Taiwan News*, 15 April.

<sup>54</sup> Lee, S.-H. and Wu, S. 2010. Four Death Row Inmates Executed: MOJ. 2010. *Taiwan News*, 30 April.

discussion is needed before a final decision can be reached. DPP leader, Tsai Ying-wen adopted a ‘middle of the road’ approach not too dissimilar to that of Ma and stated that the government must consider both international trends and public opinion in carrying out executions.<sup>55</sup> Domestic opposition was, however, heard. Prior to the executions, the Taiwan Alliance to End the Death Penalty had submitted a request for a declaration of constitutionality on executions to the Judicial Yuan; however, the four inmates were executed before they could sign their petitions and this raised concerns of the legality the executions according to the TAEDP.<sup>56</sup>

Following the resumption of executions, there was much international criticism. An Australian Senator, Bob Brown who was in Taiwan at the time of the executions stated:

“It is revolting that four people have been put to death by a civilized, wealthy country. It is barbaric. It dehumanises the governments that not only allow it to happen, but do not legislate against it.”<sup>57</sup>

Further criticism came from such organizations as Amnesty International and the European Commission, who warned Taiwan’s future visa-free status in the Schengen Area could be in jeopardy.<sup>58</sup> Cohen and Chen state that the sudden and secret nature of these executions raises serious procedural issues and in a recent article, they outline various procedural reforms that should be implemented immediately to remove any suspicions from the process.<sup>59</sup> These include an immediate investigation by the Justice Ministry (or Control Yuan) to establish the precise facts leading up to the executions and in future, making sure that the a written declaration be made stating there is no impending review and access to lawyers should not be denied ‘for any reason’, as is alleged to have occurred in the lead up to these executions.

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<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> Taiwan Executes Four. 2010. *The China Post*, 2 May.

<sup>58</sup> Lee M.-C., Tsao Y.-F. and Wu, S. 2010. EU Urged to Delink Death Penalty from Visa Waiver. *Taiwan News*, 2 May.

<sup>59</sup> Cohen, J.A. and Chen, Y.-J. 2010. Slippery Slope. *South China Morning Post*, 13 May.

On 5 May, Tseng announced that there were no further executions scheduled for the time being.<sup>60</sup> Forty inmates, however, remain on death row and their future is uncertain. Indeed, given the events of this year and the apparent change in Ma's policy, further executions are foreseeable. Ma emphasizes a two-headed approach to his death penalty policy. On one hand, he expresses his goal of eventual and gradual abolition while at the same time, he states the law must be followed. Furthermore, he states the importance of public opinion and 'consensus' before changes can be made. This is a policy of convenience and uncertainty, combining both populism and idealism. It is remarkable too that public opinion is given such weight on this issue. The constant references to consensus before action are indicative of an administration that relies heavily on opinion polls before taking any action; however, in other policy areas, this is clearly not the case. In Ma's speech on his two years in office, he noted he would push through with widely unpopular second-round health insurance reforms and stated that losing votes and going against the opinion polls were acceptable and these reforms must be pursued.<sup>61</sup> For some policy, consensus is irrelevant while for the death penalty, abolition is contingent on public agreement.

### 5.5. Future directions and conclusions

With still just under two years remaining of Ma's current term in office, there is still time for future developments in human rights policy. In his first two years, Ma has both been applauded and drawn criticisms. In terms of overall policy, less emphasis has been placed on human rights than Chen. Human rights state-building and reconciliation of past injustices have not featured as predominant a theme as they did particularly in Chen's first term. In its place, Ma has placed great importance on respecting the constitution and maintaining the rule of law.

Ma's greatest achievement thus far has been the ratification and passage of the implementation law of the ICCPR and ICESCR. This significant act shows a commitment to international human rights standards and serves as an attempt to implement them into Taiwan's domestic law. It is not yet clear whether this law will be effective and it is hoped that revision of laws by the government institutions and

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<sup>60</sup> No Timetable for Further Executions: Justice Minister. 2010. *The China Post*, 5 May.

<sup>61</sup> Wang, C.-M. 2010. Regardless of Losing Votes and Impacting the Polls: President Ma – Reforms will be Promoted. (In Chinese) *Now News*, 19 May.



agencies will be thoroughly carried out and result in legislative amendments. The adoption of these standards though was not able to positively influence the death penalty debate. Although showing a commitment to the international covenants by pursuing their adoption, this did not prevent international trends and UN resolutions being ignored with regards to the death penalty. The resumption of the death penalty marks a low point for human rights under Ma's presidency. The President's commitment to abolition under his previously stated position on gradual abolition must be questioned. In the name of the rule of law, executions have been resumed and it remains to be seen how the arbitrary separation of current executions and future abolition will bring capital punishment to an end any sooner.

With regards to the second indicator, there are no signs of a NHRC being proposed as policy in the near future. NGOs and human rights advocates continue to support such a body's establishment but it does not appear to be a priority for Ma. With nearly still two years remaining, Ma's success in terms of human rights will be measured on how effectively the international covenants implementation legislation is followed and, how many and in what circumstances future executions are carried out. Up until now, while achievement in the first indicator is commendable, Ma's record offers mixed results.

## 6. Conclusion

In terms of policy and awareness, the situation of human rights in Taiwan is much improved considering its past. Political liberalization and democratization have created an environment in which citizens demand their human rights and freedoms and where governments attempt to deliver in this regard. The conclusions that have been reached in this chapter are drawn from a consideration of the three indicators of human rights progress, which have been analyzed in a foreign setting and both historically and contemporarily in the case of Taiwan.

### 6.1. First indicator assessment

In terms of progress across the first indicator, the implementation of human rights domestically, as we have seen in the case of Australia, is no easy process. For Australia, the task of fully implementing the ICCPR by passing a bill of rights is still on going. While its ratification of the international covenants and initial attempts to implement international human rights standards were carried out decades before Taiwan, Australia has shown that a gradual and incremental approach to introducing its human rights protections has been the case. Political opposition has been encountered and attempts to preserve Australia's much valued Westminster system of government have been hurdles that successive governments have had to overcome. Indeed, Chen Shui-bian's efforts were limited by a similar factor.

Chen's attempts to ratify and implement international human rights standards into domestic law were numerous. While his election was seen as highly promising for the promotion and safeguarding of human rights in Taiwan, he encountered insurmountable difficulties along the way. Simply put, the several draft laws his administration attempted to push through the legislature were commendable on paper; they were well researched and purported to incorporate international human rights provisions into Taiwan's domestic law; however, a hostile legislature was neither cooperative nor amendable to Chen's plans. The KMT opposition rebuffed Chen's attempts at each occasion citing fears of self-determination among other reservations to his policies and, it could be said that the KMT were intent on not allowing Chen to be seen as pulling off a momentous victory, which the passage of such human rights legislation would have been. There are also those that suggest, especially in the latter

years of his presidency, Chen was otherwise occupied and his intentions to pursue human rights reform waned and he was criticized for failing to pursue negotiations to ensure the passage of his human rights agenda. Whether or not this is valid, after numerous rebuffs and the obstructionist nature of the KMT-dominated Legislative Yuan, it became clear Chen's goal of building a human rights state was not going to be completed under his presidency.

Ironically, the presidency of Ma Ying-jeou in his still unfinished first term has achieved what Chen set out to but could not achieve. To much fanfare and international praise, Ma's administration successfully pursued both ratification and the passage of an implementation law through the Legislative Yuan in 2009. The KMT's staunch opposition to implementing a human rights law that had existed under Chen had fast disappeared. Ma's government had adopted a key policy of the previous administration and swiftly, achieved its passage into law. While undoubtedly, this is a commendable achievement, the full effects of this remain to be seen. In the absence of participation in the international human rights regime, Taiwan cannot rely on the United Nations system, as ineffective as it may be, to monitor and critique Taiwan's implementation. Although the ICCPR and ICESCR may now be part of the Taiwan's domestic law, a considerable amount of research, investigation and legislative and policy amendments are needed to fully carry out the implementation law's effect. The legislation gives government agencies a two-year limit to fulfill such tasks, so a clearer picture will be known in 2011.

## 6.2. Second indicator assessment

As regards to a NHRC, Taiwan has not yet seen any results. While Taiwanese civil society has agitated for one and the presidential candidates of the 2000 election had all agreed upon the idea, the establishment of a NHRC has so far eluded Taiwan. This is contrast to Australia, which has been a leader in the development of its NHRC. In Australia, a human rights commission in various forms dates back to the 1980s and the current NHRC is seen as an example for others to follow. The Australian Human Rights Commission has been established as an independent statutory commission, like the respective state and territory bodies that also exist in Australia and as such, it has not been marred down in debates concerning where it should be located under

Australia's framework of government. For Taiwan, this has been a constant hurdle in the efforts to establish a human rights body.

Chen was a strong supporter of a NHRC for Taiwan, having promised one in his inaugural speech. This support, however, could not correspond to one's establishment. Similar to the situation of implementing international human rights standards and passing a human rights law, Chen established committees of inquiry to assist in the design of and implementing his NHRC policy. Legislation was drafted but was again not able to overcome opposition both in and outside of the Legislative Yuan. Given Taiwan's constitutional framework, Chen's preferred option of placing the NHRC under the Presidential Office was not supported. Indeed, this was and remains a significant stumbling block for the establishment of any potential human rights body in Taiwan. The Control Yuan seems to oppose any attempts to establish a NHRC outside of its control and labels such attempts as unconstitutional and an encroachment on its powers. The Control Yuan does not currently though exercise the functions of a human rights body and Taiwan remains lacking of such an institution in spite of Chen's attempts.

Unfortunately, the issue of establishing a NHRC has not featured significantly at all in the area of Ma's human rights policy to date. The only discussions that can be found on the topic at a presidential level since Ma's time in office are brief mentions in committee meetings that resolved to further investigate the matter. Ma has appeared to reaffirm his support for upholding the rule of law and human rights within the present constitutional framework and in the absence of any surprise policy announcements, it is feared that a NHRC for Taiwan will not come into being in his current term. This is in face of continued civil society support for one's establishment.

### 6.3. Third indicator assessment

The death penalty and the status of its abolition show very different positions between Australia and Taiwan. While Australia has been abolitionist for some decades now, Taiwan is still debating this issue and it remains contentious, topical and relevant, especially this year. For Chen, it initially appeared that the status of the death penalty was not a priority for his administration despite his opposition to it. This area was

eventually to be the one in which his government had the most success in the field of human rights as seen across the three indicators. As his policy officially remained one of gradual abolition once consensus of public opinion had been reached, early in Chen's presidency it was not looking optimistic for supporters of abolition, notwithstanding the fact the number of executions was actually declining. In terms of legal change, Chen's administration ensured the removal of remaining mandatory death sentencing and made improvements in criminal procedure but it was in a practical non-legal sense that Chen's government was to have the most impact. The commencement of a *de facto* moratorium under his presidency, which saw the Justice Minister refuse to authorize death warrants, was a subtle victory for human rights in Taiwan.

Ma's actions in this regard since his election have proved to be more disappointing. While also appearing to hold the same policy as Chen in relation to the death penalty, that of eventual opposition upon public consensus, events were to take a remarkable turn in early 2010. Executions were restarted despite the passage of almost five years free of executions. Ma supported such moves on the grounds of following the law and applying it to the letter. When his appointed Justice Minister, whom he had appointed in full knowledge and support of her opposition to the death penalty, issued a public declaration indicating refusal to carry out executions, Ma abandoned his support for her and accepted her resignation. The public outcry largely against the Justice Minister's vocal position was too large and Ma did not attempt to lose any political capital trying to save her. Public opinion and Ma's tacit approval resulted in the appointment of a new Justice Minister and the prompt resumption of executions.

It is significant to note the importance attached to public opinion in the justification for the retention of the death penalty in Taiwan. While statistics usually relied upon to support the government's policy favour the death penalty, more accurate statistics indicate a willingness to support alternative options such as life imprisonment but these are not taken into account. Indeed, captivity to populism does not extend to all policy areas of the government but when it concerns the death penalty, Ma has been incapable of pursuing principle over polls. In the case of Australia and many other nations, the death penalty has been removed notwithstanding support for its retention and human rights factors are given preference. The policy of gradual abolition

attempts to appease both supporters and opponents of the death penalty; while in reality, it has resulted in its continuation with no clear timeframe or prospect of actual abolition. The ending of the *de facto* moratorium has been a regrettable course of action for Ma's administration and will cast a stain on his human rights record, however it turns out to be.

#### 6.4. Towards a human rights state?

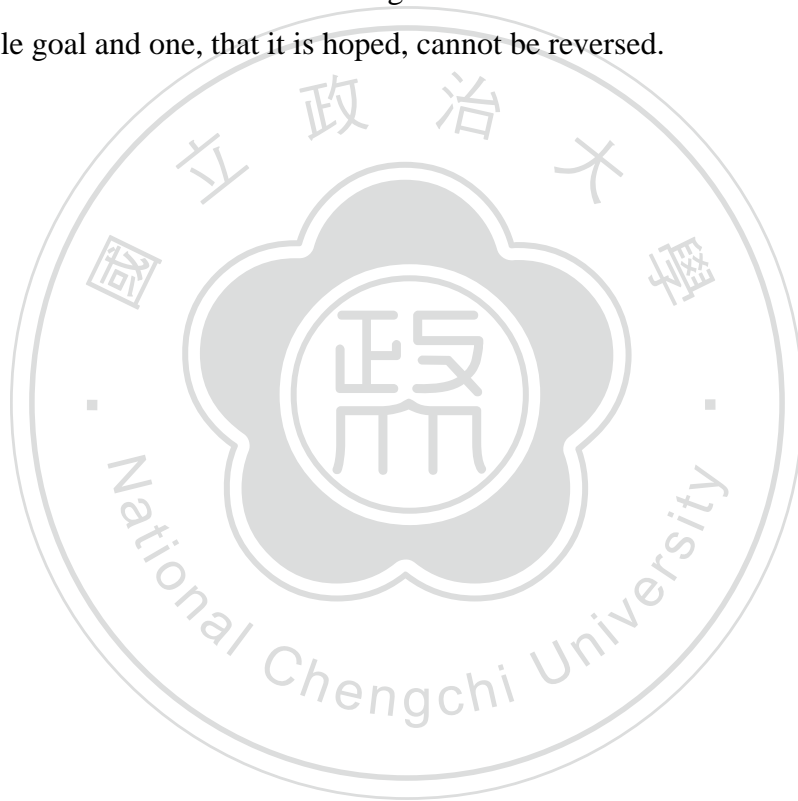
Overall, there is both support and repudiation for the proposition that Taiwan is moving towards becoming a human rights state. Especially when Taiwan's not so distant authoritarian past is taken into account, there have been marked improvements in Taiwan's human rights situation. In terms of the three indicators, there have been many attempts to make improvements but unfortunately many such attempts have been met with skepticism and opposition and as such, were unsuccessful.

Chen's policy objectives had they been implemented would have been a great contributor to Taiwan's human rights state development; however, the emphasis must be on the 'would' as political circumstances did not allow Chen to have his way. Credit must be given, however, for the imposition of the fragile but valuable halt in executions that occurred in Chen's final three years in office. This was a positive step in terms of the third indicator, which gave hope (albeit false hope) to an eventual legal moratorium. As for Ma, his record thus far is also mixed. His achievement in the first indicator with the ratification and passage of legislation implementing the international human rights covenants domestically is a significant achievement and positive sign of human rights development for Taiwan. The apparent failure to consolidate this move and to establish an effective means of ensuring the spirit of this significant law is upheld by creating a NHRC is regrettable, as is the backward steps taken in the area of capital punishment.

When the positive actions of both presidents are given consideration, there are been encouraging progress in terms of the first and third indicators, while the second has remained lacking. Ma's recent implementation of international human rights standards into Taiwanese law has the potential to be very beneficial towards the protections of human rights in Taiwan. Chen's subtle measures to decrease the

number of executions in his two terms and the *de facto* moratorium that was initiated have proved significant in bringing attention to the status of the death penalty and rallying efforts to see its formal abolition, regardless of the present situation.

Regrettably, attempts to establish a NHRC did not succeed and have fallen off the radar; however, it is hoped that in the future this issue will be readdressed. In light of the above findings, I conclude that Taiwan is moving towards becoming a human rights state albeit in a sometimes ‘two-step forward, one-step back’ fashion. Progress and setbacks have been encountered across all three indicators; attempts to implement change although not successful have inspired optimism and importantly, improvements have been seen. Moving in this direction towards a human rights state is a noble goal and one, that it is hoped, cannot be reversed.



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