

Article

The Current State of Capital Punishments in Taiwan

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ABSTRACT

This article analyzes Taiwan's past and present trends in death penalty practices, and attempts to predict future death penalty reforms. The first part of the article offers an overview of the past death penalty practices. The author describes how mandatory death sentences were present in Taiwan's pre-reform legal system, which was a legacy of the civil war and the subsequent emergency rule, combined with Confucian morality that dominated Taiwanese thinking. In second part of the paper, the author details some major reforms in capital punishment that occurred following the democratization of Taiwan. The elimination of mandatory death penalty and introduction of discretionary death penalty is noted, among other important reforms. Additionally, the procedural aspect of capital punishment is described in detail, supplied by statistics on age, gender and offenses committed by convicts. In the final part of the paper, the author examines public response to capital punishment. Although it appears that general public supports death penalty, author notes that this support is declining. The author argues that this continued shift in public opinion, combined with hesitance of authorities to execute convicts indicates that reforms to the current capital punishment practices are likely to be expected in the near future.

Keywords: Taiwan Death Penalty, Wang, Ching-feng, Robbery Punishment Act, Death Penalty Reform, Trial Procedure, Ministry of Justice

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I. INTRODUCTION

In March of 2010, former Minister of Justice Ms. Wang, Ching-feng caused a media sensation in Taiwan when she resigned from office due to her refusal to sign execution orders for any of 44 death row convicts. Ms. Wang is the first Minister of Justice to make such an explicit statement concerning capital punishment and consequently resign from office due to her views.

Minister Wang's resignation was precipitated on March 8, 2010 when her Deputy Minister Huang, Shih-ming was interviewed during a legislative hearing as part of his nomination to the post of Attorney General. When asked about his views on capital punishment, Mr. Huang stated that although he supports a policy to abolish the death penalty in Taiwan, he believes that 44 death row convicts should be executed in accordance with the current laws. Mr. Huang's statement was controversial because the Ministry of Justice (MOJ) had a practice (or policy) of not carrying out any executions since 2006.

Two days later, on March 10th Minister Wang spoke frankly to the members of the press stating that she "would rather go to hell" than sign any execution orders. She believes that "although the constitution authorizes the state to restrict the life of citizens, it does not authorize the state to abridge life".¹ Minister Wang firmly stated that, "[she] will not approve any execution during [her] term and would rather go to hell." She further noted that she would be willing to step down from her post in defense of her views. The same night, Minister Wang issued a public statement "*Reason and Forgiveness — Suspension of Practicing the Death Penalty*" urging the government to abolish capital punishment.²

Mr. Huang's statements ignited a heated debate in Taiwanese media, which reported the contradictory views of the Minister and the Deputy Minister. A popular TV show host, Ms. Pai, Ping-ping whose daughter was kidnapped and murdered thirteen years ago, stated that Minister Wang should step down if she did not wish to enforce the death penalty. Another well-known victim, Mr. Lu whose child was murdered after being kidnapped in 1987, said with tears that Minister Wang should resign from her post. The emotional responses of these prominent individuals were reported in the media and fueled public sympathy for victims and overshadowed Wang's calls for legal reforms.³

1. See Rich Chang & Iok-Sin Loa, *Justice Chief Defends Stay of Executions*, TAIPEI TIMES, Mar. 11, 2010, at 1.

2. Qing-Feng Wang, *Lixing Yu Kuanrong - Zhanting Zhixing Sixing* [Reason and Forgiveness - Suspension of Practicing the Death Penalty], available at <http://www.moj.gov.tw/public/Attachment/031016413364.pdf>.

3. See Flora Wang & Iok-Sin Loa, *Public Divided on Capital Punishment*, TAIPEI TIMES, Mar. 12, 2010, at 3.

Following the media frenzy, Ms. Wang unexpectedly resigned on the midnight of March 12th. Premier Wu and President Ma immediately accepted Ms. Wang's resignation. After Minister Wang's resignation, President Ma publicly expressed his support of capital punishment.⁴ The new Minister of Justice Mr. Zen who replaced Minister Wang stated that the convicts on death row "must be executed in accordance with the law, if all other legal remedies available to them are exhausted".⁵ On April 30th, the MOJ shocked the public by announcing that four death row convicts were executed. A subsequent inquiry into the issue revealed that Minister Zen approved the execution of the four convicts on April 28th, and the MOJ carried out executions before notifying the media. Human rights group voiced an emotional appeal to the government criticizing the Ministry for its imprudent executions.⁶ From that day on, Taiwan's four-year moratorium on executions was broken.

This paper aims to clarify the current state of death penalty laws by covering major aspects of death penalty laws and practices in Taiwan. Part II of this report will examine the relevant sections of Taiwan's Criminal Code, including the past laws, current laws and proposed future legal reforms. Part III examines procedural aspects of death penalty trials and remedies available to convicts. Part IV describes process of executions in Taiwan. Part V uses statistical data to analyze the nature of Taiwan's death penalty cases. Part VI will refer to the public opinion on the issue and will highlight the impact of international conventions on Taiwan's legal system.

II. SUBSTANTIVE LAWS

A. *The Past*

Until 2002, the legal system of Taiwan imposed an unreasonable mandatory death sentence for many offenses. For example, in 1990s, there were over 50 different offenses punishable by mandatory death sentence. According to *The Robbery Punishment Act*,⁷ those who "gather[ed] people in the mountain or near lake and resist the law enforcement" were punished

4. See Shu-ling Ko & Rich Chang, *Ma Breaks Silence on Execution*, TAIPEI TIMES, Mar. 16, 2010, at 3.

5. See *Death Penalty Within Rights: MOJ Chief*, THE CHINA POST (Taipei), Mar. 23, 2010, available at <http://www.chinapost.com.tw/taiwan/national/national-news/2010/03/23/249408/p2/Death-penalty.htm>.

6. See Iok-sin Loa, *Executions Were Illegal: Rights Groups*, TAIPEI TIMES, May 2, 2010, at 1.

7. Chengzhi Daofei Tiaoli [Robbery Punishment Act] was a law passed in 1944 by the ROC government. The Act was passed during the War against Japan and clashes with the Communist troop. Aimed to stop chaos, the Act was unreasonably harsh and carried a mandatory death sentence for many offenses. In 2002, the Act was abolished due to its unpopularity and pressures from human rights groups.

by a mandatory death sentence. According to the above-mentioned act, forcibly hijacking boat(s), vehicles(s), or airplane(s), was also punishable by death or life imprisonment. Stealing dead bodies from a tomb was punishable by an imprisonment of over ten years, life sentence or even a death penalty, depending on circumstances of a case. Another example is the offense of committing piracy and arson, mentioned under Article 334 of the *Criminal Code*. In the *Robbery Punishment Act*, there were ten offenses punishable by mandatory death penalty. Since many offenses required a mandatory death penalty, judges had no choice but to impose death penalty on the convicts.

B. *Transition*

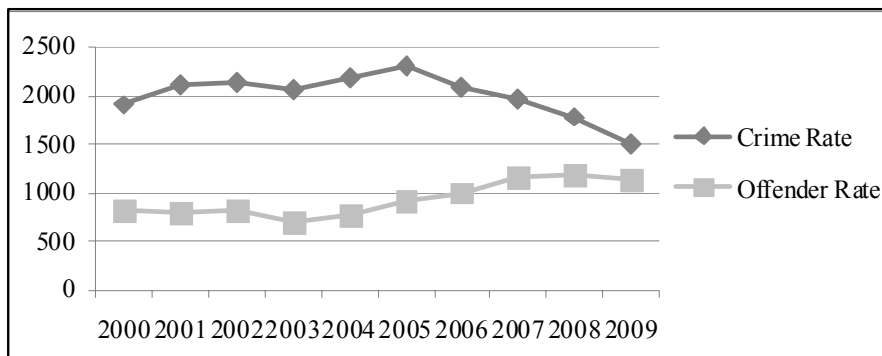
With greater demand for human rights and pressures from civil groups that campaigned for greater individual liberties, Taiwan's Legislative Yuan (the legislative assembly in Taiwan) abolished the *Robbery Punishment Act* in 2002. Furthermore, in 2006, all penal provisions with mandatory death penalty were transformed into discretionary death penalty. Currently, there are no offenses in Taiwan punishable by a mandatory death sentence and judges impose capital punishment at their discretion based on the severity of the case and other factors involved.

The opposition to abolishing the *Robbery Punishment Act* was based on the notion that harsh punishments deter future criminals. Statistics below prove there was no increase in crime rate following the abolition of the *Robbery Punishment Act* in Taiwan.

The statistics show that neither the general crime rate nor the violent crime rate increase after abolition of the *Robbery Punishment* (See Figures 1 & 2). Moreover, the unpublished statistics also demonstrate that crime rates of homicides, kidnappings, and robberies did not rise after the 2002 amendment.

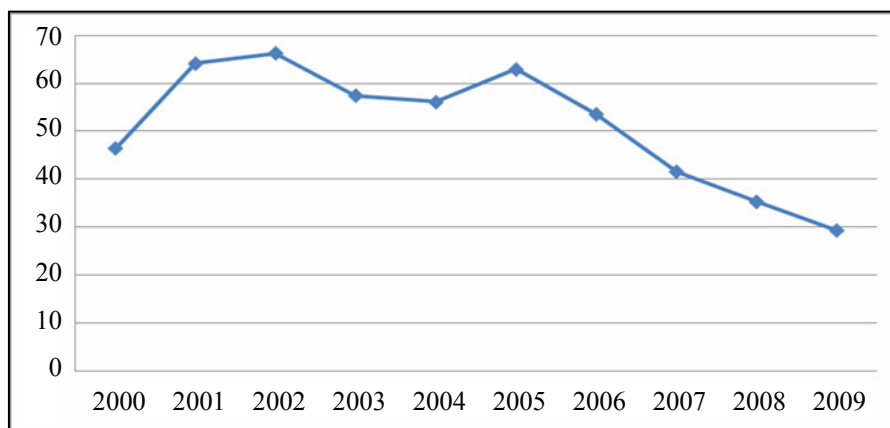
After the amendment of mandatory death penalty into discretionary death penalty in 2006, neither the general crime rate nor the violent crime rate increased. As mentioned above, the unpublished statistics also show that crime rates of homicides, kidnappings, and robberies did not increase after 2006.

Figure 1 General Crime Rate and Offender Rate per 100,000 people in the Last Decade



Source: National Police Agency. (Data obtained during confidential interviews, on file with author).

Figure 2 Violent Crime Rate per 100,000 people in the Last Decade



Source: National Police Agency. (Data obtained during confidential interviews, on file with author).

C. *Current Trends*

Death penalty offenses in Taiwan may be divided into three categories according to the severity of the crimes. The first group of the offenses mandates death penalty or life imprisonment for crimes such as the act of concurrently committing robbery and murder. The second group mandates death penalty or imprisonment for life or no less than 10 years for offenses such as murder. The third group mandates death penalty or imprisonment for life or no less than seven years for offenses such as kidnapping with the intention to extort ransom.

These death penalty offenses may be further divided into six different

groups: **1** - offenses against human life, such as murder;⁸ **2** - offenses against the state, such as organized criminal acts that attempt to destroy the organization of state, seize state territory, change the constitution or overthrow the government through illegal means;⁹ **3** - offenses under the *Criminal Code of the Armed Forces*, such as an assault or threat against the superior during the time of war; **4** - offenses related to drugs, such as manufacture of first degree narcotics; **5** - offenses that cause catastrophes, such as hijacking of airplanes; **6** - concurrence of two serious felonies, such as commitment of robbery and arson at the same time.

Currently, Taiwan has some 52 offenses in different Codes punishable by death. Most of the contemporary expert evaluations of these provisions share a consensus that some of the punishments are disproportionately harsh. For example, a person may be sentenced to death if he/she is found guilty of counterfeiting or altering the currency with intent to put it in circulation and cause serious financial instability. A person may also receive a death sentence if he/she manufactures, transports, or sells first-grade drugs such as cocaine, heroin, or opium.

Since Taiwan has no mandatory death penalty, The *Criminal Code* offers some general guidelines that help judges to determine appropriate punishment. Article 57 states: When guilty verdict is established, all circumstance of the case shall be considered, and special attention shall be given to the following items to determine the severity of the sentence:

Table 1 Considerations concerning the determination of appropriate sentence

| | |
|--|---|
| • Motivation for the offence | • Purpose of the offence |
| • Provocation at the time of the offence | • Means employed to commit the offence |
| • Living condition of the offender | • Conduct of the offender |
| • General knowledge of the offender | • Ordinary relations between the offender and the injured party |
| • Danger or damage caused by the offence | • Conduct of the offender after the commission of the offence |

Source: Article 57, *Criminal Code*.

In addition to the above-mentioned factors, a punishment may also be reduced “at discretion due to extenuating circumstances”.¹⁰ The above standard of sentencing applies to all offences, including the offenses

8. Chunghuaminkuo Hsingfa [Criminal Code of the Republic of China] [hereinafter *Criminal Code*] art. 271 (2010) (Taiwan).

9. *Id.* art. 101.

10. *Id.* art. 59.

punishable by death. It is important to note that Taiwan's legal system does not have aggravating circumstances or mitigating circumstances of the U.S. legal system to guide judges in deciding death penalty. Therefore, judges in Taiwan are endowed with a great degree of discretion in imposing death penalty.

Since 1985, constitutionality of death penalty was affirmed three times by the Constitutional Court. The first constitutional challenge criticizing the severity of the *Drug Control Act* during the *Period for Suppression of the Communist Rebellion* occurred in 1985. Article 5, Paragraph 1 of the Act states that "a person who sells drugs shall be sentenced to death". Although the Constitutional Court recognized that the punishment "is indeed harsh," it affirmed the constitutionality of the mandatory death sentence because its purpose was to eliminate the use of narcotics in order to maintain national security and social order during the unstable times of communist suppression.¹¹

Five years later in 1990, the constitutionality of mandatory death penalty was challenged again. Article 2, Paragraph 1, Subparagraph 9, of the *Robbery Punishment Act* imposed the mandatory death penalty for individuals who committed the act of kidnapping with the intention to extort ransom, regardless of the details and outcomes of their crimes. Once again, the Constitutional Court stated that although the penalty "is very harsh, it is still constitutional".¹² The Court explained that Article 8 of the *Robbery Punishment Act* authorizes a judge to reduce a sentence if a penalty is too severe when applied to a specific case. In addition, the above-mentioned Article also gives a judge an ability to reduce a sentence if a convict releases victims without taking ransom. The Court, therefore, stated that these two remedies may be used to avoid the mandatory death penalty in the *Robbery Punishment Act*.¹³

In 1999, new challenges to the constitutionality of the death penalty were brought to the attention of the Court. Article 5, Paragraph 1, of the *Narcotics Elimination Act* provides that anyone who engages in sale, transportation, and manufacture of narcotics, opium or marijuana shall be sentenced to death or life imprisonment. Article 4, Paragraph 1, of the *Drug Control Act* states that anyone who engages in the manufacture, transportation, and sale of first-grade narcotics, shall be sentenced to death or life imprisonment. The Constitutional Court affirmed that the right to life guaranteed by the constitution. However, the Court added that "to execute criminal sanctions, some special criminal laws are enacted for certain crimes and do not violate the principle of proportionality if they have the due

11. J. Y. Interpretation No. 194 (1985).

12. *Id.*

13. J. Y. Interpretation No. 263 (1990).

purposes, necessary means, and proper restrictions as outlined by Article 23 of the Constitution. Such laws will not be held unconstitutional merely because they infringe upon people's lives and their physical freedoms.” The Court reasoned that the purpose of the disputed Acts is to protect physical and mental health of the society, to maintain social order and safeguard the lives citizens by preventing substance addiction and eliminating the source narcotics. The aim of these laws is to cut off the supply of narcotics in order to eliminate the damage done by drugs. If the sources of narcotics cannot be found and eliminated, the damage caused by narcotics will spread and endanger affect the entire nation. Long-term imprisonment will not serve as an effective deterrent to drug traffickers. The Court concluded that the provisions that impose the death penalty or life imprisonment on individuals engaged in such activities are necessary to maintain national security, the social order and to promote the public welfare, and are thus are not unconstitutional.¹⁴

In conclusion, current verdicts of the Constitutional Court indicate that the death penalty is not a constitutional issue under the substantive aspect of law. Unless the Constitutional Court changes its jurisprudence on capital punishment, this issue will be debated mostly at the legislative level.

D. *Legal Limitations*

Under the *Criminal Code*, a death penalty may not be imposed on an offender under the age of eighteen.¹⁵ No matter how serious an offence may be, a minor may not be sentenced to death. This is based on traditional Confucius thoughts. However, until the 2005 legal reforms, an offender under the age of eighteen could be sentenced to death if he/she murdered a lineal blood ascendant.¹⁶ The reasoning behind this clause is based on a belief that such violent behavior against family harms traditional family values and must be punished. The provision was abolished in 2005 because of the consensus not to impose death penalty or life imprisonment on children under the age of eighteen, partly due to the influence of the *International Covenant on Civil and Political Rights* and *Convention on the Rights of the Child*.

14. J. Y. Interpretation No. 476 (1999).

15. *Criminal Code*, *supra* note 8, art. 63 (2010).

16. The Confucian philosophy has a deep impact on tradition Chinese culture. Confucius strongly promoted filial piety. Under this philosophy, children were subordinated to their parents, and parents were subordinated to the older generation. This harmony within the family would be reflected in the country as a whole. Due to this widely accepted notion within the Chinese culture, murdered a lineal blood relative carried severe punishment.

III. PROCEDURAL LAWS

A. *Trial Procedures*

Taiwan does not have grand jury system. The prosecutor has the right to indict offenses, including murder or other felonies. The indictment does not have to be consented or checked by a third party. At most, in capital punishment or serious felony cases, the indictment might be scrutinized more strictly by an internal supervisor.

Prosecutors have the right to request court to impose the death penalty, either in their indictments or during a trial. On March 12th 2008, the MOJ issued an order to all prosecutors stating that “it would be better not to request the court to impose the death penalty”.¹⁷ The unclear wording of the document indicates that it was not intended to have binding effects on prosecutors but nonetheless highlights the informal practice of avoiding death penalty in Taiwan. For example, only recently on April 7, 2010, a prosecutor asked, in the indictment, for the court to impose three death penalties because the defendant killed her husband, mother, and mother-in-law, with the intent to claim insurance compensations.¹⁸ However, Taiwan did not execute any convicts between 2006 and April 2010. In a case, before April 2010, where a prosecutor requested for the death penalty, the judge mocked him stating “why do you ask for a death penalty when your MOJ does not execute it at all?”¹⁹

Any death penalty case in Taiwan is tried by a three-judge panel. Before 2003, cases at the district court level were tried by a single judge, with the exception of cases that attracted large public attention or involved serious felonies.²⁰ After the 2003 amendments to the *Code of Criminal Procedure* (CCP), all cases (except misdemeanor and none contested cases), are now tried by a three-judge panel.²¹ This also applies to the Court of Appeals. At the Supreme Court level, all cases are heard by a five-judge panel.²²

To sentence a defendant to death, a unanimous decision of all judges is

17. Letter of Minister of Justice (MOJ), Executive Yuan, Fa-Chan-Zi No. 0970800850 (2008) (Taiwan).

18. Rich Chang, *Prosecutors Want Triple Death Penalty for Murder Suspect*, TAIPEI TIMES, Apr. 8, 2010, at 2.

19. Chun-Hung Lin & Cheng-Chen Hsiang, *Tsui Chin Nien Wei Chiang Chueh Pan Ke Ssu Hsing Fan* [No Execution in the Past Four Years], THE LIBERTY TIMES, Feb. 1, 2010, available at <http://www.libertytimes.com.tw/2010/new/feb/1/today-so1-3.htm>.

20. Fa Yuen Tsu Chih Fa [Court Organization Act] art. 3 (2010) (Taiwan); Fa Yuen Pan Li Chung Ta Hsing An Su Shen Su Chieh Chu I Shih Hsiang [Judicial Ordinance on Dealing with Serious Cases] art. 12 (2008) (Taiwan).

21. Hsing Shih Su Sung Fa [Code of Criminal Procedure] [hereinafter *Code of Criminal Procedure*] art. 284-1 (2010) (Taiwan).

22. Court Organization Act, *supra* note 20, art. 3.

not required. Under the *Court Organization Act*, all judgments are decided according to the majority opinion of the judges.²³ Therefore, even if the minority of judges do not agree with the sentence, convict may still receive death penalty. Theoretically, the majority could even impose death penalty even if one or some of judges believe the defendant to be innocent. This practice, however, may change in the near future. In recent reform discussions, a proposal was brought forward requiring judges to arrive at unanimous decision in order to impose death penalty.²⁴

Taiwan does not separate sentencing procedures from trial procedures. When a case is indicted, a prosecutor sends all his files and evidence to the court along with the indictment.²⁵ The files and evidence include information unfavorable to defendant. Before a trial, a judge will read all the files and evidence in order to conduct the trial. In other words, before a trial starts, the trial judge is already familiar with the defendant's criminal records and other evidence that could be used against him. Defense attorneys object to this practice and believe the system to be unfair since it puts lawyers in an awkward position. They first have to argue that the defendant is not guilty, and second, request for a lenient sentence, in case the defendant is assumed to be guilty by a judge. Recent legal reform discussions propose two modifications to the existing trial procedures. The first modification would deny judges access to the prosecutor files before a trial. The second proposal recommends separating trial procedures from sentencing procedures.²⁶

B. Remedies after Conviction

After a district court renders its judgment, defendants and prosecutors have the right to appeal cases to the Court of Appeals on the ground of factual or legal errors. After the Court of Appeals renders its decision, both parties are able appeal the case to the Supreme Court only on the grounds of legal errors (if the cases are not misdemeanors). If a death penalty is imposed by a district court or the Court of Appeals, the case will be automatically appealed to a higher court.²⁷

Unlike in the United States, a prosecutor has the right to appeal an acquittal. For example, after the court acquits a defendant charged with

23. *Id.* art. 105.

24. See Press Release, Ministry of Justice, Fa Wu Pu Chen Tui Mei Ti Pao Tao "520 Chien Chien Yi Hsiu Fa Ti Kao Ssu Hsing Men Kan Ssu Fa Yuan Chu Chueh" Ti Chu Cheng Ching Shuo Ming [MOJ's Statement on the Report toward "Judicial Yuan Declined the Proposal from MOJ" (May 20, 2008)].

25. Code of Criminal Procedure, *supra* note 21, art. 264, para. 3.

26. See the website of Judicial Yuan, <http://www.judicial.gov.tw/>; Li-Hsiung Ku, *Hsing Shih Shen Pan Ju Heho Chao Hsiang Tang Shih Jen Chin Hang Yuen Tse Chien Chin?* [How Do the Criminal Trials Improve the Best Interest of Defendants?], 21 JUD. REFORM MAG. 6, 6 (June 15, 1999).

27. Code of Criminal Procedure, *supra* note 21, art. 344, paras. 5-6.

murder, the prosecutor has the right to appeal the verdict to a higher court. If the defendant is sentenced to life imprisonment, the prosecutor has the right to appeal the decision to a higher court and request the death penalty. It should be noted that the prosecutor could also appeal the case for defendant's benefit.²⁸ For example, if a defendant is indicted with manslaughter but the court finds him/her guilty of murder, the prosecutor could appeal the verdict for the benefit of the defendant.

The nature of appeals in Taiwan is trial de novo - a complete new trial of a case. Parties may raise new evidence and issues, or restate their arguments from the previous trial. Therefore, if a prosecutor succeeds in his appeal, the Court of Appeals may sentence defendant to death even if defendant was previously acquitted or was sentenced to life imprisonment. On the other hand, the Court of Appeals may acquit a defendant even if he/she was sentenced to death at the first instance.

The CCP provides that if an appeal is filed by a defendant or by other party for his benefit, the Court of Appeals shall not deliver a punishment more severe than that the punishment imposed in the original judgment. However, this does not apply to the cases where the law was incorrectly applied by the original court.²⁹ The purpose of this practice is to protect the defendant's right to appeal a judgment without a fear of retaliation from the Court of Appeals.

The Supreme Court makes its decisions based on the facts established in lower courts and only examines the legal issues surrounding the case.³⁰ When a legal error is found in lower court's decision, the Supreme Court may refer the case to lower court for a re-trial. The Supreme Court may also dispose of a case on its own judgment if lower court's findings of fact upon which a decision may be based are not affected.³¹ In theory, the Supreme Court may set aside lower court's decision and sentence a defendant to death based on its own judgment regardless of the verdict issued by lower courts. In practice, this has never happened and such instances are not found in Supreme Court records in the last decade.³²

Once the Supreme Court renders a verdict, its decision is considered to be final and becomes enforceable.³³ In this situation, convict may take advantage of the three remedies available. The convict may appeal for a "Retrial" for factual errors based on unusual grounds such as forged or altered evidence, witness perjury, or malfeasance.³⁴ Second, if there is a

28. *Id.* art. 344, para. 4.

29. *Id.* art. 370.

30. *Id.* art. 394, para. 1.

31. *Id.* art. 398.

32. *Id.* art. 398.

33. *Id.* art. 430.

34. *Id.* art. 420, para. 1.

significant legal error in the final judgment, defendant may petition to the Attorney General requesting an Extraordinary Appeal to the Supreme Court.³⁵ Third, a convicted defendant may petition to the Constitutional Court because the law or precedent applied in the final judgment is seen to be unconstitutional.³⁶

According to the statutes, the defendant's usage of the three remedies mentioned does not pause the execution process. However, according to the regulation found in *Review of the Execution of Death Penalty* issued by the MOJ, the execution must be postponed if the convicted defendant has filed a petition based on any of the above three remedies even if these remedies have not yet been examined by the relevant authorities.³⁷ Because the stay of execution is a matter of life or death, critics argue that these regulations should be entrenched in the statutes. The MOJ supports this assessment and has proposed to put these regulations in the CCP.³⁸

As was stated before, the MOJ did not carry out any executions from 2006 to April 2010. The MOJ stated that it did not execute the convicts because they applied for Retrial, Extraordinary Appeal, or Constitutional Review. Ironically, MOJ also stated that it executed the four convicts in April 2010 because none of them filed for any of the above-mentioned remedies available to them.³⁹

Up until April 2010, there were 44 convicts on the death row. Following the execution of the four convicts, there are now 40 individuals facing the death row. Table below provides data on these remaining convicts.

Table 2 Years of Final Judgments and Numbers of Un-executed Defendants

| Year | Number |
|------|--------|
| 2000 | 2 |
| 2003 | 1 |
| 2004 | 2 |
| 2005 | 8 |
| 2006 | 9 |
| 2007 | 4 |
| 2008 | 2 |

35. *Id.* arts. 441 & 447.

36. Ssu Fa Yuen Ta Fa Kuan Shen Li An Chien Fa [Constitutional Interpretation Procedure Act] art. 5(1) (1993) (Taiwan).

37. Shen Heho Ssu Hsing An Chien Chih Hang Shih Shih Yao Tien [Review of the Execution of Death Penalty] art. 2 (2005) (Taiwan).

38. See Press Release of MOJ, *supra* note 24.

39. Rich Chang, *Four Executed Despite Controversy*, TAIPEI TIMES, May 1, 2010, at 1.

| Year | Number |
|-------|--------|
| 2009 | 12 |
| Total | 40 |

Source: Highest Prosecutorial Office. (Data obtained during confidential interviews, on file with author).

C. *Right to Counsel*

Defendants in all serious felony cases are required to have attorneys by themselves or designated by courts for defense of their cases. If a defendant is charged with serious felony and does not retain his own attorney, the court will appoint a lawyer regardless of his/her wishes. This is an important part of the legal process since failure to appoint a lawyer by the trial court will result in a reversible error.⁴⁰ This rule applies to trials at district level and in the Court of Appeals, but does not apply to the Supreme Court.⁴¹ Therefore, a death penalty defendant will certainly be represented by a lawyer, either retained or appointed at the first and second instances in Taiwan. Unfortunately, a death penalty defendant does not necessarily have legal representation at the Supreme Court level. For example, in the last decade, the Supreme Court affirmed 93 defendants' death sentences and 61 (65%) of them were not represented by an attorney.

The Supreme Court ruled that an appointed attorney shall provide "substantive and loyal" assistance to defendants.⁴² The "substantive and loyal" assistance includes the following:

1. A trial cannot be conducted without the presence of an attorney. An attorney has to be present in all court proceedings starting from the prosecutor's opening statements until the closing arguments. An attorney is deemed to be "absent" if he/she is late or leaves courtroom during the proceedings.⁴³
2. An attorney has a duty to make oral and written arguments for the defendant. If the record shows that an attorney did not make any oral arguments at trial or did not submit any written arguments, the conviction shall be reversed due to ineffective assistance from counsel.⁴⁴

40. Code of Criminal Procedure, *supra* note 21, art. 31, para. 1 & art. 379, para. 7.

41. *Id.* art. 388.

42. *Id.* art. 379.

43. Zuigao Fayuan [Sup. Ct.], Criminal Division, 93 Tai-Shang No. 2237 (2004) (Taiwan).

44. Zuigao Fayuan [Sup. Ct.], Criminal Division, 22 Shang No. 691 (1933) (Taiwan); Zuigao Fayuan [Sup. Ct.], Criminal Division, 68 Tai-Shang No. 1046 (1979) (Taiwan); Zuigao Fayuan [Sup. Ct.], Criminal Division, 77 Tai-Shang No. 935 (1988) (Taiwan).

3. An ineffective assistance is defined as a failure of an attorney to make any meaningful statements and “urge the judge to render a judgment in accordance with the law” or “refer all of the arguments to the written arguments.” The Court ruled that an attorney has to argue the factual or legal issues in favor of the defendant. Attorney’s failure to argue the case in a substantive manner favorable to defendant will constitute a reversible error.⁴⁵
4. The CCP provides that “one attorney may be appointed to defend several defendants unless their interests conflict”.⁴⁶ Contrary to the Code, the Court prefers one lawyer for each defendant, unless no conflict of interest is found. The Court emphasized that if one defense attorney is appointed for co-defendants, he must be prepared to provide sufficient service to each of the defendants.⁴⁷
5. The Court required that an appointed counsel must provide adequate defense and act loyally according to the work ethics. If a lawyer does not act in this manner, this constitutes a reversible error.⁴⁸

The above decisions were decided in cases involving appointed counsel. It was assumed that those decisions do not apply to cases where defendants retain their own lawyers. However, in 2008, the Supreme Court stated that, at least in serious felony cases, the same standards shall apply to the retained lawyers. This was demonstrated in a case where the defendant was indicted with the offense of selling first-grade drugs (an offense punishable by death). The defendant retained his own lawyer who unfortunately did not adequately represent his client. Court records demonstrated that the retained attorney said nothing except that “[his] arguments are specified in [his] previous written arguments.” The written arguments lawyer referred to contained nothing more than requests to the court asking to subpoena some witnesses. The Court concluded that this constituted a reversible error because the retained attorney did not argue the case in a substantive manner and defended his client.⁴⁹

In summary, defendants in death penalty cases have an unwaivable right to counsel, as well as the right to effective assistance of counsel, whether appointed or retained.

45. Zuigao Fayuan [Sup. Ct.], Criminal Division, 73 Tai-Shang No. 2750 (1984) (Taiwan); Zuigao Fayuan [Sup. Ct.], Criminal Division, 76 Tai-Shang No. 7072 (1987) (Taiwan).

46. Code of Criminal Procedure, *supra* note 21, art. 31(3).

47. Zuigao Fayuan [Sup. Ct.], Criminal Division, 91 Tai-Shang No. 1888 (2002) (Taiwan); Zuigao Fayuan [Sup. Ct.], Criminal Division, 95 Tai-Shang No. 4070 (2006) (Taiwan).

48. Zuigao Fayuan [Sup. Ct.], Criminal Division, 96 Tai-Shang No. 3922 (2007) (Taiwan); Zuigao Fayuan [Sup. Ct.], Criminal Division, 96 Tai-Shang No. 5673 (2007) (Taiwan).

49. Zuigao Fayuan [Sup. Ct.], Criminal Division, 97 Tai-Shang No. 561 (2008) (Taiwan).

D. *Victim Involvement in Trial Proceedings*

Until 1997, a victim did not have rights to make statements during a trial. The court did not necessarily subpoena the victim to appear at a trial. Even if a victim was subpoenaed, he/she had to testify based on the facts of the case, instead of stating his/her personal opinions or views.

The 1997 amendments to the CCP gave victims the right to make statements during a trial. The amended Article 271, Section 2 of the CCP provides that the court shall subpoena the victims or their family members and provide them with the opportunity to state their opinions, unless they do not want to make an appearance or the court considers their presence to be unnecessary to the case. The 2003 amendment to the CCP also allows the victim to employ a lawyer or an agent and make statements on his behalf without making a personal appearance in court.

IV. EXECUTION

The CCP provides that individuals diagnosed to be mentally insane and women who are pregnant cannot be executed until person's sanity returns and until a woman gives birth.⁵⁰ In addition, the *Prison Act* provides that a defendant sentenced to death cannot be executed on the following dates: national holidays; within 7 days after the death of the defendant's spouse, lineal relative; or within 3 days after the death of the defendant's relative within the third degree of kinship; or other dates considered to be imperative to the situation.⁵¹

Article 460 of the CCP provides that "if a judgment imposing a death penalty becomes final, the prosecutor shall *immediately* transmit the dossier to the highest judicial administrative office" (emphasis added). Article 461 states that "a sentence to death shall be subject to approval of the highest judicial administrative office by issuance of an order,⁵² and shall be executed *within three days* after receipt of the said order" (emphasis added).

Human rights lawyers argue that the MOJ has almost unlimited discretion in staying executions. Lawyers argue that Article 460 requires "immediate" transfer of the dossier to the MOJ and Article 461 requires death penalty to be carried out within "three days" after receipt of the order. Comparatively, the CCP has no mention as to when and how fast the MOJ must approve executions. Human rights lawyers argue that absence of these instructions implies that legislature gives the MOJ broad discretion in administering executions. As a result, if the Minister of Justice refuses to

50. Code of Criminal Procedure, *supra* note 26, art. 465.

51. Chien Yu Hsing Hsing Fa [Prison Act] art. 90, para. 2 & art. 31, para. 1 (2010) (Taiwan).

52. MOJ is the highest judicial administrative office referred in the Code of Criminal Procedure.

approve an execution, he/she does not violate the CCP.⁵³ Unfortunately, the majority of observers have the opposite view that the CCP's absence of when and how fast the MOJ must approve executions means nothing but the MOJ is supposed to be very careful in approving executions.

In practice, in order to execute a convict, authorities must go through the following steps: After the judgment of death penalty is finalized, the Supreme Court sends all dossiers to the Highest Prosecutorial Office. After the Office's prosecutor in charge of the case reviews the case and finds no errors, he/she submits the case to the MOJ. After the MOJ reviews the case and finds no errors, it submits the file to the Minister for approval. If the Minister approves the execution, he/she sends the case to the Prosecutorial Office affiliated with the Court of Appeals through the Highest Prosecutorial Office. After the prosecutor in charge of the case reviews the case and finds no errors, he/she requests his chief to approve the execution. With this approval, the prosecutor executes the convict.⁵⁴

This "review of errors" in the above procedure refers the following situations during all steps of the process. If one of the circumstances below is discovered, the execution must be stayed.⁵⁵

1. Whether the defendant or defense lawyer was legally served with the final judgment?
2. Whether the service of the final judgment has been more than ten days?
3. Whether there is a petition for Retrial, Extraordinary Appeal, or Constitutional Review? If yes, whether the petition is based on the same ground that have been petitioned for before?
4. Whether the defendant is insane or pregnant?
5. Whether the defendant is pardoned?

Between 2000 and 2010, Taiwan executed 53 convicts. In 2000, executions reached the highest number of 17 people. From 2006 to April 2010, Taiwan did not carry out any executions. On April 30, 2010, Taiwan executed four convicts in one single day after its four-year record of not carrying out executions.

Most of the executed defendants in the last decade were 30 to 40 years old. None of them was more than 60 years old. The following Table 3 shows the years of executions, numbers of executed, and their ages.

53. Yung-Cheng Kao, *Fa Wu Pu Chang Yu Hsiang Pi Tu Chang* [Minister of Justice and Her Discretion], 67 SSU FA KAI KO TSA CHIH [JUD. REFORM MAG.] 27 (Nov. 2008).

54. Zan-Chin Lin, *Wo Kuo Chih Hang Ssu Hsing Chih Ssu Fa Shih Wu Yu Chi Ti Tai Fang An Chih Cheng I* [The Practice of Execution and the Disputes of Alternatives to Death Penalty], 51(3), HSING SHIH FA TSA CHIH [CRIM. L. MAG.] 62 (2007).

55. Review of the Execution of Death Penalty, *supra* note 37, (2005) (Taiwan); Lin, *supra* note 54, at 63-64.

Table 3 Years, Ages, and Numbers of Executions (persons per year)

| Year/Age | 20-24 | 24-30 | 30-40 | 40-50 | 50-60 | Above 60 | Total |
|----------|-------|-------|-------|-------|-------|----------|-------|
| 2000 | 0 | 3 | 10 | 4 | 0 | 0 | 17 |
| 2001 | 0 | 0 | 4 | 4 | 2 | 0 | 10 |
| 2002 | 1 | 3 | 2 | 3 | 0 | 0 | 9 |
| 2003 | 1 | 1 | 2 | 2 | 1 | 0 | 7 |
| 2004 | 0 | 1 | 2 | 0 | 0 | 0 | 3 |
| 2005 | 0 | 2 | 1 | 0 | 0 | 0 | 3 |
| 2010 | 0 | 0 | 0 | 2 | 2 | 0 | 4 |
| Total | 2 | 10 | 21 | 15 | 5 | 0 | 53 |

Source: Data obtained during confidential interviews with officials of Ministry of Justice and Judicial Yuan, on file with author.

Those who were executed in the last decade were mostly punished for murders and violations of the *Robbery Punishment Act*. Table below provides information on these offenses and the years.

Table 4 Years and Offenses of Executions (persons per year)

| | Murders | RPA | Kidnaps | Murders & Rapes | Drugs Offense | Robbery |
|-------|---------|-----|---------|-----------------|---------------|---------|
| 2000 | 5 | 6 | 5 | 1 | 0 | 0 |
| 2001 | 8 | 0 | 0 | 1 | 1 | 0 |
| 2002 | 2 | 4 | 0 | 1 | 1 | 1 |
| 2003 | 3 | 1 | 1 | 1 | 0 | 1 |
| 2004 | 2 | 0 | 1 | 0 | 0 | 0 |
| 2005 | 3 | 0 | 0 | 0 | 0 | 0 |
| 2010 | 2 | 0 | 2 | 0 | 0 | 0 |
| Total | 25 | 11 | 9 | 4 | 2 | 2 |

Source: Data obtained during confidential interviews with officials of Ministry of Justice and Judicial Yuan, on file with author.

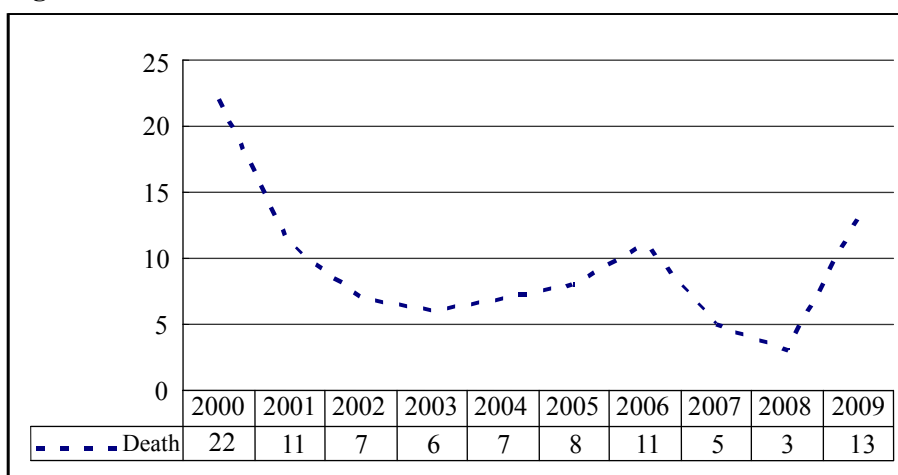
V. EMPIRICAL ANALYSIS

A. *Analysis of the Death Penalty Cases*

In the last decade (2000-2009), the Supreme Court affirmed 93 death penalty cases. The peak was reached in 2000 when 22 death penalties were affirmed; and the lowest number was three death penalty affirmations in 2008 (Figure 3). Among the 22 defendants in the year 2000, only one of them did not

commit murder or a crime that resulted in a death (rather, he committed a series of robberies and rapes). All other 21 defendants committed murders or murders combined with other felonies, such as robberies, extortions, and kidnappings.

Figure 3 Death Penalties Affirmed in 2000-2009



Source: Data obtained during confidential interviews with Supreme Court Judges, on file with author.

Although there are approximately 52 provisions in different statutes carrying death penalty sentence, the statistics show that only offenders who committed murders, murders combined with other felonies, drug offenses, or rapes combined with robberies were actually sentenced to death. The following Table shows the offenses committed by 93 defendants.

Table 5 Offenses Committed in the Last Decade

| Offenses | Defendants |
|---|------------|
| Murder | 36 |
| Robbery and Murder under Criminal Code | 19 |
| Kidnap for Ransom and Murder | 15 |
| Rape and Murder | 10 |
| Robbery and Murder under RPA | 9 |
| Manufacture and Sale of First-Grade Drugs | 2 |
| Murder of Lineal Blood Ascendant | 1 |
| Robbery and Rape | 1 |
| Total | 93 |

Source: Data obtained during confidential interviews with Supreme Court Judges, on file with author.

Among these 93 defendants, only three did not kill any victims. All other 90 defendants committed murders or murder combined with other felonies, such as robberies or rapes. These three defendants committed (in the respective order) a series of robberies combined with rapes, sale of first-degree drugs, and transportation of drugs and smuggling of controlled substances. It should be noted that all three cases were decided before 2002 and since then the Supreme Court did not affirm any death penalty cases where defendant did not kill or cause any person to death.

Among the 90 cases where victims were killed, 21 (23.3%) of defendants were convicted of only one offense - murder, and the other 69 (76.6%) defendants were convicted of murders and other offenses, including felonies such as rapes and robberies.⁵⁶

In the last decade, many defendants committed offenses punishable by death, but the majority did not receive death penalty. In the last decade, there were 1099 defenders whose life imprisonment was affirmed by the Supreme Court. Among them, 1008 (91.7%) committed offenses punishable by death. Adding these 1008 to the 93 death penalty convicts, means that there were at least 1101 defendants who committed offenses punishable by death. However, only 93 of them (8.4%) were sentenced to death, and other 1008 (91.5%) individuals were sentenced to life imprisonment.

In the last decade, the average between the time when indictment was issued and the death penalty conviction became final is over 50 months. The longest one took record 19 years and seven months before it became final and the shortest conviction was finalized in six months. Among the 93 cases, six of them became final within one year, and seven of them more than 10 years; 74% of them became final within five years, and 8% of them more than 10 years. The average time for the 93 cases to become final and their numbers and ratios are as follows:

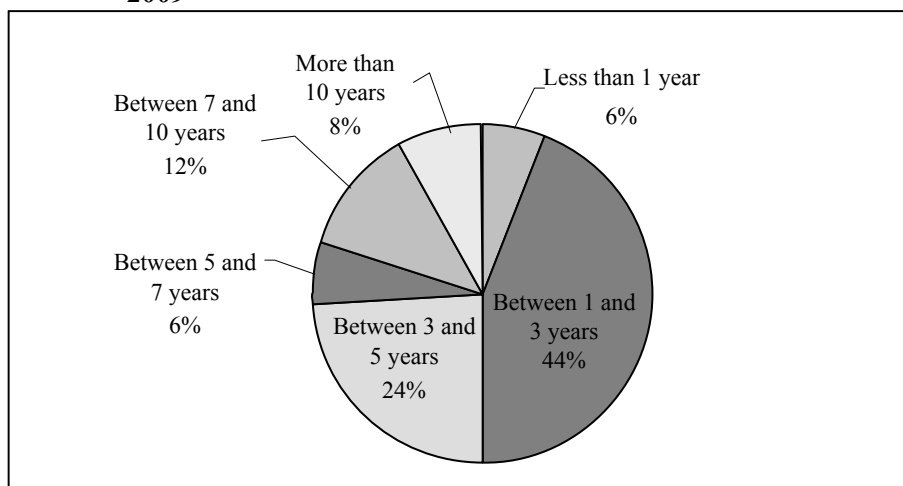
Table 6 Time Spent to Finalize Death Penalty Verdicts from 2000 to 2009

| Time | Less than 1 year | Between 1 and 3 years | Between 3 and 5 years | Between 5 and 7 years | Between 7 and 10 years | More than 10 years |
|-------|------------------|-----------------------|-----------------------|-----------------------|------------------------|--------------------|
| Cases | 6 | 41 | 22 | 6 | 11 | 7 |

Source: Data obtained during confidential interviews with Supreme Court Judges, on file with author.

⁵⁶ These 69 cases might actually represent the same aggravating circumstance as those found in United States law requiring death penalty sentence.

Figure 4 Time Spent to Finalize Death Penalty Verdicts from 2000 to 2009



Source: Data obtained during confidential interviews with Supreme Court Judges, on file with author.

B. Court Practices

1. Court of Appeals

Taiwan has a famous saying “severe sentence at the first instance, lenient sentence at the second instance.” The statistics support this statement. In the last decade, 217 defendants received a death sentence in various district courts. After their cases were appealed to the Court of Appeals, 56 (26%) of death sentences were reduced to life imprisonments or imprisonments for more than ten years (See Table 7). If the sentences at the first instances were life imprisonment or imprisonment for more than ten years, many of these sentences were reduced as well.⁵⁷

57. In the last decade, among 2279 defendants sentenced to life imprisonment at the first instance, 882 of them were re-tried and given sentences that are more lenient. Among 8295 defendants sentenced to imprisonment for more than 10 years at the first instance, 1105 of them were re-tried and given sentences that are more lenient.

Table 7 The Second Instance's Judgments on the Lower Court's Death Penalty

| Judgments/Year | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | Total |
|----------------------------------|------|------|------|------|------|------|------|------|------|------|-------|
| Death at the First Instance | 35 | 34 | 28 | 41 | 27 | 26 | 5 | 6 | 8 | 7 | 217 |
| Judgments at the Second Instance | | | | | | | | | | | |
| Death | 16 | 21 | 16 | 34 | 21 | 16 | 5 | 6 | 6 | 6 | 147 |
| Life Imprisonment | 16 | 7 | 8 | 5 | 5 | 9 | | | 1 | 1 | 52 |
| Imprisonment less than 10 yrs | | 1 | | | | | | | | | 1 |
| Imprisonment more than 10 yrs | 1 | 1 | | | 1 | | | | | | 3 |
| Not guilty | | | | | | | | | | | 0 |
| Others | 2 | 4 | 4 | 2 | 0 | 1 | 0 | 0 | 1 | 0 | 14 |
| Rate of Affirmation | 46% | 62% | 57% | 83% | 78% | 62% | 100% | 100% | 75% | 86% | 68% |
| Rate of Lenience | 49% | 26% | 29% | 12% | 22% | 35% | 0% | 0% | 13% | 14% | 26% |

Source: Data obtained during confidential interviews with Supreme Court Judges, on file with author.

It is very rare for the Court of Appeals to impose more severe sentences than the ones imposed by district courts. Cases of a non-death-penalty sentences upgraded by the Court of Appeals to a death penalty are even less frequent. In the last decade, among 2279 defendants sentenced to life imprisonment at the first instance, only 29 cases (1.2%) were upgraded to death penalty sentence at the second instance. Among 8295 defendants who were sentenced to imprisonment for more than 10 years at district courts, only one (0.01%) sentence was upgraded to death penalty at the second instance (See Table 8).

Table 8 The Second Instance's Judgments on the Lower Court's Imprisonments

| Judgments/Year | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | Total |
|---|------|------|------|------|------|------|------|------|------|------|-------|
| Life Imprisonment At the First Instance | 208 | 194 | 169 | 229 | 253 | 302 | 315 | 263 | 213 | 133 | 2279 |
| Judgments at the Second Instance | | | | | | | | | | | |
| Death | 12 | 4 | 3 | 3 | 2 | 2 | 2 | 1 | | | 29 |
| Life Imprisonment | 128 | 108 | 106 | 161 | 146 | 186 | 164 | 110 | 83 | 37 | 1229 |
| Less than 10 yrs | 14 | 10 | 5 | 10 | 13 | 13 | 29 | 15 | 4 | 7 | 120 |

| Judgments/Year | | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | Total |
|---------------------------------------|--|------|------|------|------|------|------|------|------|------|------|-------|
| | More than 10 yrs | 35 | 57 | 43 | 53 | 83 | 91 | 112 | 122 | 114 | 52 | 762 |
| | Not guilty | 3 | 3 | 4 | 1 | 5 | 2 | 3 | 8 | 3 | | 32 |
| | Others | 16 | 12 | 8 | 1 | 4 | 8 | 5 | 7 | 9 | 37 | 107 |
| Rate of more Severe | | 6% | 2% | 2% | 1% | 1% | 1% | 1% | 0% | 0% | 0% | 1% |
| Rate of Affirmation | | 62% | 56% | 63% | 70% | 58% | 62% | 52% | 42% | 39% | 28% | 54% |
| Rate of Lenience | | 24% | 35% | 28% | 28% | 38% | 34% | 45% | 52% | 55% | 44% | 39% |
| Rate of Not Guilty | | 1% | 2% | 2% | 0% | 2% | 1% | 1% | 3% | 1% | 0% | 1% |
| More than 10yrs at the First Instance | Defendants Sentenced to more than 10 years | 580 | 598 | 640 | 806 | 682 | 715 | 876 | 1104 | 1082 | 1212 | 8295 |
| | Judgments at the Second Instance | | | | | | | | | | | |
| | Death | | 1 | | | | | | | | | 1 |
| | Life Imprisonment | 8 | 10 | 8 | 8 | 6 | 17 | 7 | 11 | 6 | 2 | 83 |
| | Less than 10 yrs | 84 | 100 | 112 | 130 | 109 | 106 | 125 | 135 | 121 | 83 | 1105 |
| | More than 10 yrs | 368 | 356 | 359 | 506 | 402 | 433 | 556 | 672 | 715 | 640 | 5007 |
| | Not Guilty | 14 | 16 | 36 | 14 | 12 | 9 | 17 | 35 | 28 | 19 | 200 |
| | Others | 106 | 115 | 125 | 148 | 153 | 150 | 171 | 251 | 212 | 468 | 1899 |
| | Rate of More severe | | 1% | 2% | 1% | 1% | 1% | 2% | 1% | 1% | 1% | 0% |
| Rate of Affirmation | | 63% | 60% | 56% | 63% | 59% | 61% | 63% | 61% | 66% | 53% | 60% |
| Rate of Lenience | | 14% | 17% | 18% | 16% | 16% | 15% | 14% | 12% | 11% | 7% | 13% |
| Rate of not Guilty | | 2% | 3% | 6% | 2% | 2% | 1% | 2% | 3% | 3% | 2% | 2% |

Source: Judicial Yuan. (Data obtained during confidential interviews with Judicial Yuan officials, on file with author).

It should be noted that those who were sentenced to death by the district court have not received an acquittal by the Court of Appeals in over a decade. At most, convicts received a more lenient sentence at the second instance, such as life imprisonment or imprisonment for more than 10 years. The Court of Appeals acquitted 32 defendants (1%) from those who sentenced to life imprisonment, and 200 defendants (2%) from those sentenced to imprisonment for more than 10 years by the lower courts. The data provided indicates that district courts appear to be extremely careful and consistent in handing out death sentences.

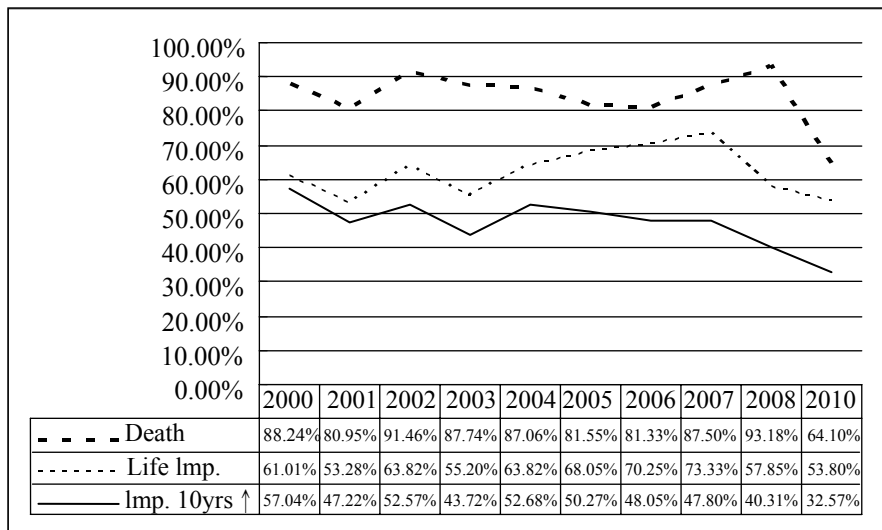
2. The Supreme Court

A panel chief at the Supreme Court stated that the Court strictly scrutinizes all death penalty cases. He underlined three major and principles that guide the Supreme Court in dealing with death penalty cases. First, the Supreme Court affirms the lower court's death penalty decision only when there is certainty that the defendant cannot be rehabilitated or reformed. Therefore, defendants who commit gruesome murders will not necessarily receive a death sentence if they do not have any previous criminal records. Second, when the prosecutor seeks a life imprisonment sentence, the Court

will not affirm the lower court’s death penalty sentence unless the lower court adequately explains the reasons for not accepting the prosecutor’s requests. Third, if a case is reversed because of inappropriate sentence, the reason for the reversal is generally because the sentence is too severe, rather than because the sentence is too lenient.⁵⁸

The above statement is consistent with the Supreme Court’s reversal rate of lower court decisions. In the last decade, the Supreme Court’s average reversal rate of lower court’s death penalty verdicts was as high as 84.45%. However, during the same period, the average reversal rates of cases involving life imprisonment and imprisonment for more than 10 years are 63.68% and 45.12% respectively. The reversal rate of death penalty sentences is significantly higher than any other sentences. This data indicates that the Supreme Court is strict in its evaluation of death penalty cases.

Figure 5 Supreme Court Reversal Rate of Different Sentences



Source: Data obtained during confidential interviews with Supreme Court Judges, on file with author.

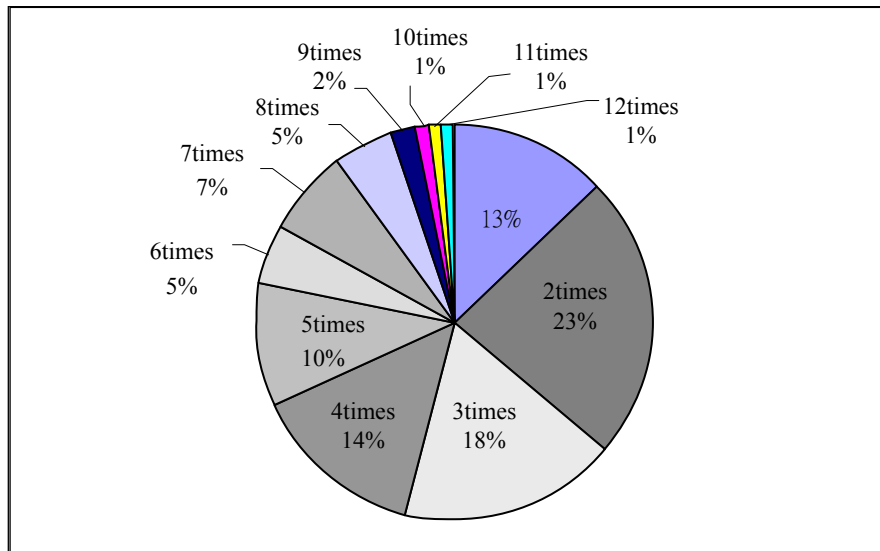
Furthermore, among the 93 defendants’ death penalties affirmed by the Supreme Court in the last decade, only 12 of them (13%) do not have the history of being reversed by the Supreme Court. All other 81 cases (87%) were reversed at least once by the Court before they were affirmed, and 30 (32%) of them were even reversed four times (the highest record stands at 11 reversals).

58. Mu-Chin Shih, *The Principle of Sentencing in Taiwan’s Murder Cases* (2009) (unpublished manuscript) (on file with author), symposium on International Human Rights in 2009, held by MOJ’s Judicial Officer Training Institute.

Table 9 Times of Reversal Before Final

| Times | 0 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 |
|------------|------|------|------|------|------|------|------|------|------|------|------|------|
| Defendant | 12 | 21 | 17 | 13 | 9 | 5 | 6 | 5 | 2 | 1 | 1 | 1 |
| Percentage | 0.12 | 0.22 | 0.18 | 0.13 | 0.09 | 0.05 | 0.06 | 0.05 | 0.02 | 0.01 | 0.01 | 0.01 |

Source: Data obtained during confidential interviews with Supreme Court Judges, on file with author.

Figure 6 Times of Reversal Before Final

Source: Data obtained during confidential interviews with Supreme Court Judges, on file with author.

From the 81 cases reversed by the Court, four were originally sentenced to life imprisonment by lower courts before their case were appealed to the Supreme Court for the first time. Eventually, these four cases received upgraded death sentences by lower courts and affirmed by the Supreme Court. These four cases indicate that the Supreme Court may not play a favorable role in cases where defendants are not sentenced to death by lower courts. In other words, if these four cases were not appealed or reversed by the Supreme Court, the defendants would have avoided the death penalty. One of the four cases should be noted in greater details since it highlights the proposed argument. Before the case became final, it was reversed as much as four times by the Supreme Court. In total, The Court of Appeals sentenced the defendant five times (in chronological order) to life imprisonment, death, life imprisonment, life imprisonment, death. In other words, lower courts sentenced the defendant to life imprisonments on three occasions and to death penalty on two occasions. Eventually, the Supreme Court accepted

death penalty verdict, instead of life imprisonment.

Out of the 81 cases mentioned above, 77 were sentenced to death by lower courts before the cases were appealed to the Supreme Court. For these 77 cases, the Supreme Court's repeated reversals ultimately did not alter the original judgment. Out of the 77 cases, four were re-sentenced once or twice to life imprisonments at remands by the lower courts; the other 73 cases were never re-sentenced to life. For these 77 defendants, the reversals and retrials did nothing except reinforce the original death penalty judgments.

VI. POLL AND POLICY

Opinion polls from 1990, 1994, and 2001 show that 75%, 69%, and 78% of the respondents did not support the abolishment of death penalty⁵⁹. However, if there is an effective alternative to death penalty (such as life imprisonment without parole), the approval rate v. objection rate of abolishing the death penalty becomes 49% v. 41% in 2000, 44% v. 46% in 2001, 47% v. 42% in 2002, 53% v. 44% in 2006, and 56% v. 43% in 2007.⁶⁰ The approval rate was higher than the objection rate in every poll year except the 2001 survey. It should be noted that when the survey question is phrased as: "if defendants have not been reformed, they shall be executed; if they have been reformed, their death penalty could be reduced to life imprisonment," the approval rate becomes much higher than the objection rate. In this instance, the approval rate v. objection rate was 63% v. 29% in 1993, 62% v. 34% in 2006, and 65% v. 31% in 2007.⁶¹

The first campaign attempting to abolishing capital punishment in Taiwan emerged in 2000 when President-elected Chen, Shue-Bien stated that "it is the world trend to abolish the death penalty, but it shall come with some alternatives" following a meeting with Catholic Cardinal Paul Shan. The government's first "official" policy in abolishing the death penalty was formulated in 2001 when the Minister of Justice, Chen, Din-Nan stated that, "the government wishes to abolish the death penalty step by step." Under his plan, the government had to abolish unreasonably strict *Robbery Punishment Act*. Second, the government had to increase maximum terms of imprisonment and qualifications for parole,⁶² and then, finally, abolish capital punishment.⁶³

59. Ministry of Justice, Fei Chu Ssu Hsing Chi Ti Tai Fang An Chih Yen Chiu [Research on the Abolishment of Death Penalty and Its Alternatives] 47 (2007).

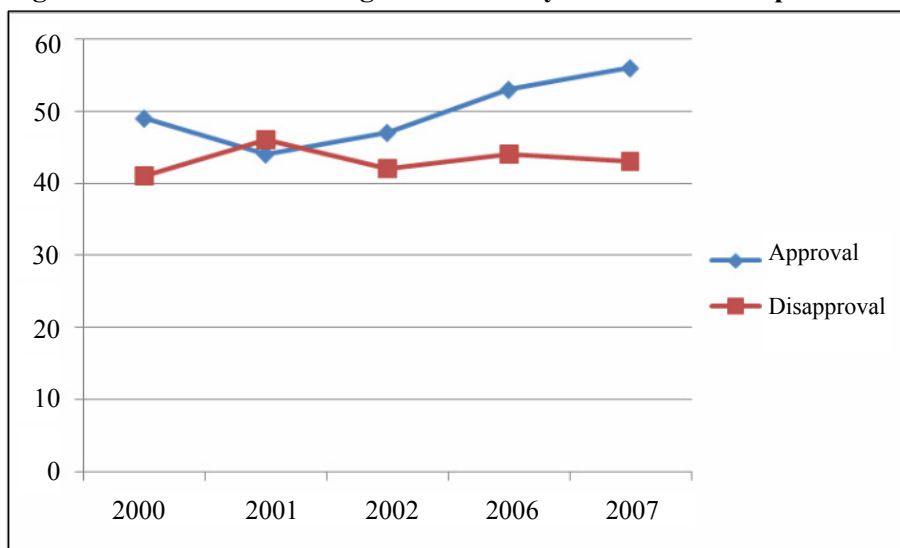
60. MINISTRY OF JUSTICE, KUO NEI SSU HSING HSIANG KUAN YI TI CHIH FA CHAN [THE DEVELOPMENTS OF ISSUES RELATED TO DEATH PENALTY IN TAIWAN], (Mar. 9, 2010) <http://www.moj.gov.tw/public/attachment/031011554995.pdf>.

61. *Id.*

62. In 2005, the maximum term of the imprisonment was amended from 20 years to 30 years.

63. See MOJ's website discussing future death penalty issues, <http://www.moj.gov.tw/>.

Figure 7 Polls on Abolishing Death Penalty if Alternative Implemented



Source: Ministry of Justice (2010). *Timeline of domestic debates on death penalty*. Retrieved from <http://www.moj.gov.tw/public/Attachment/031011554995.pdf>

In September 2005, the succeeding Minister Shih announced steps to abolish the death penalty. According to his plan, the government had to demonstrate its sincere wish to abolish the death penalty by submitting the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights* to the Legislature for ratification. Second, the government had to amend all mandatory death penalty laws to discretionary death penalty law, as well as increase the maximum term of imprisonment and the qualifications for parole. Third, the government had to enhance and implement the new Victim’s Compensation Laws.⁶⁴ It should be noted that Minister Shih is the first minister who refused, albeit indirectly, to approve executions on the ground that death row convicts had filed petitions for Retrial, Extraordinary Appeal, or Constitutional Review.

The next Minister Wang, who took the office in 2008, also followed her predecessor’s policy of not approving any executions. During her term, she established a team responsible for “Research and Movement on Step-by-Step Abolishment of Death Penalty.” The team consists of 27 members that included representatives of victims, defense lawyers, human right groups, and scholars.⁶⁵ Wang is also the first Minister who openly spoke to the

64. *Id.*

65. See Chieh-Pai Tung, *Ssu Hsing Cheng Yi: Fa Pu Hsia Wu Yao 25 Wei Yuan Tao Lun* [Death Penalty Controversies: MOJ Invited 25 Panels to Discuss], LIEN HO WAN PAO [UNITED EVENING NEWS], Mar. 23, 2010, at A2.

public stating that she will “never approve any executions.” Unlike her predecessor who indirectly blocked executions, Minister Wang was open in her resolve and for this reason attracted negative media publicity that ultimately forced her to resign.

After Minister Wang stepped down, the President Ma quickly and explicitly expressed his support of capital punishment. Using examples of capital punishment practices in Japan and the United States, Ma stated that it would be more practical to reduce the use of death penalty, rather than abolish it completely.⁶⁶ After succeeding Minister Wang, the new Minister Zen expressed his support of the death penalty only when all other legal remedies are exhausted by the convicts. Shortly after, on April 30th four convicts were executed.

On March 31st, 2009 Taiwan’s Legislature Yuan passed the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*. The Legislature Yuan also passed the *Law to Implement the International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights* (hereinafter the *Implementation Law on Two Covenants*). Its Article 2 states that the provisions regarding human right protection in the two Covenants have the same effects as domestic law. The *Implementation Law on Two Covenants* became effective on December 10, 2009.

After the passage of the two Covenants, a consensus emerged predicting that the government will abolish the death penalty in November 2011. To counter this “rumor”, the MOJ issued a newsletter stating that there is no timetable or deadline on abolishing the death penalty. The newsletter stated that the MOJ will follow requirements of Article 8 of the *Implementation Law on Two Covenants* that requires consistency of all domestic laws with the *Two Covenants* within two years after the ratification of the document. The MOJ stated that it will complete the review and examination of all relevant domestic laws by December 10th, 2011 but will not to abolish the death penalty before this process is completed.⁶⁷ Therefore, it seems that Taiwan’s death penalty policy and executions are not currently directly relevant to the two Covenants.

VII. CONCLUSIONS

Previously, Taiwan had numerous offenses that had disproportionately

66. See Ko & Chang, *supra* note 4.

67. See Press Release of Ministry of Justice, Chen Tui Yu Lun Wu Chieh “Fa Wu Pu Chiang Wu 100 Nien 11 Yueh Ti Chien Wan Cheng Chien Tao Fei Chu Ssu Hsing” [Regarding the Misleading Public Opinion that “The Ministry of Justice Will Come to a Conclusion on the Abolishment of Death Penalty”], Feb. 1, 2010, available at www.taedp.org.tw/download.php?id=171.

harsh mandatory death sentences. Since 2002, Taiwan underwent a steady reform of its capital punishment laws. Taiwanese government abolished the unreasonable *Robbery Punishment Act* in 2002. In 2006, the government changed all mandatory death penalty laws to discretionary death penalty. Although there are 52 provisions in 11 different Codes mandating death penalty, almost all death penalties in the last decade were imposed on those who committed murders or murders combined with other serious felonies. In the last decade, out of the 93 death row convicts, only three did not kill or committed crimes that caused death. These three defendants committed offenses such as robberies, rapes, sale of first-grade drugs and smuggled controlled substances.

Examining the procedural side of death penalty, the current CCP is criticized for the following policies: 1 – An unanimous opinion of judges is not required in rendering a verdict. Therefore, death penalty sentence may be imposed even if some judges opposed the sentence. 2 – Taiwan has no separation of trial procedures from sentencing procedures. In addition, judges review all the prosecutor's dossiers before the trial and this has unfavorable effects on the defendants. 3 – Defendants do not have a right to counsel at the Supreme Court level. All of the above flaws have been noted and are continuously debated with serious reform consensus emerging at all levels of society.

Additionally, Taiwan has also made progress in protecting the defendant's procedural rights. For example, under the CCP, a defendant has an unwaivable right to counsel if he is indicted with offenses punishable by death. The Supreme Court has also stated that both the appointed and retained counsel must provide effective and substantive assistance to the client. Failure to do so would result in a reversible error.

Empirical analysis proves that Taiwan's courts are very strict in imposing the death penalty. In the last decade, there were 1101 defendants who committed offenses punishable by death, but only 93 (8.4%) of them were sentenced to death. All other 1008 (91.5%) defendants were sentenced to life imprisonment. In addition, the Supreme Court also strictly scrutinized death sentence verdicts of lower courts. The average reversal rate of the death penalty verdicts in the last decade is as high as 84.45%. During the same period, the average reversal rate for life imprisonment is 63.68% and 45.12% for imprisonment of more than ten years. In the last decade, 87% of the cases were reversed at least once before their death penalties were affirmed by the Supreme Court. Out of these cases, 32% were reversed at least four times by the Supreme Court.

Although opinion polls indicate that the great majority of Taiwanese citizens support the death penalty, it is clear that the government is supporting the abolition of the practice. From 2006 to March 2010,

Taiwanese authorities refused to execute death row convicts. In March of 2010, Minister Wang explicitly stated that she will never execute anyone during her office term. This statement infuriated many victims and aroused an emotional debate within Taiwanese society. Under the pressure of victims, President Ma did not support Minister Wang. After Minister Wang's resignation, her successor, Minister Zen, quickly and secretly executed four convicts in a single day.

Minister Wang stated that her motivation for publicly bringing up the issue of death penalty was to face the issue in an open manner, rather than hiding it. Without a doubt, public statements of Minister Wang and the subsequent resignation achieved her goal. The events of March ignited a major debate within Taiwanese society.

It has been 10 months since the last execution, and there are still 40 more death penalties to be carried out. Yet, as of February 2010, no executions were carried out, indicating the hesitance of the government to enforce the death penalty. The case of Jiang-Kuo-Qing created further support for abolishing the death penalty, following a forensic investigation that revealed serious flaws in the case.⁶⁸ With the declining support for capital punishment and reforms within the MOJ, I am confident that there will be major changes in death penalty laws within Taiwan in the near future.

68. Shu-ling Ko, Rich Chang & Hsiu-chuan Shih, *Ma Apologizes for Wrongful Execution*, *TAIPEI TIMES*, Feb. 1, 2011, at 1.

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臺灣死刑現況

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摘 要

本文分析臺灣過去死刑司法實務趨勢，並且嘗試預測未來死刑制度改革的方向。於第一部份中，本文回顧過往死刑實務運作，闡述唯一死刑規定在臺灣的前改革法律體系中所扮演的角色。第二部分，本文描述隨著民主化過程而發生的若干死刑制度重大改革，尤其著重於唯一死刑的廢除，以及死刑裁量的引入。除此之外，本文亦深入分析死刑的程序面向，並佐以相關統計數據，包括死刑維持率、判決確定所須時間等等。在最後部分，則檢視大眾對於死刑的反應。一般大眾雖然普遍而言支持死刑，但作者指出死刑獲得的支持正在減少。作者主張，公眾輿論的持續轉向，結合當局對於執行死刑所採取的保留態度，顯示針對現行的死刑實務運作之改革，可能在不久的未來將實現。

關鍵詞： 死刑制度、上訴制度、實證研究、唯一死刑、審判程序、辯護制度