

# Roundtable

## Canada's Human Rights System and the International Covenants

WILLIAM W. BLACK \*

**Moderator:** PROFESSOR JAU-YUAN HWANG  
(College of Law, National Taiwan University, Taiwan)

**Speaker:** PROFESSOR WILLIAM W. BLACK  
(Faculty of Law, the University of British Columbia, Canada)

**Discussants (in order of appearance):**

PROFESSOR FORT FU-TE LIAO  
(Institutum Iurisprudentiae Preparatorio Office, Academia Sinica,  
Taiwan)

PROFESSOR DAVID S. LAW  
(School of Law and Department of Political Science, Washington  
University in St. Louis, United States)

PROFESSOR WEN-CHEN CHANG  
(College of Law, National Taiwan University, Taiwan)

LADY MAGDA SEYDEGART  
(South House Exchange, Canada)

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\* Professor Emeritus, Faculty of Law, the University of British Columbia; B.A., Stanford University, 1962; J.D., Harvard University, 1965. Email: black@law.ubc.ca. I would like to thank my colleagues, Prof. Robin Elliot and Prof. Karin Mickelson for their helpful comments concerning an earlier draft of this paper.

## Editor's Note:

Taiwan's ratification of the two United Nations human rights Covenants in 2009 has attracted a great deal of attention from the international community. All eyes are on how Taiwan will implement the two Covenants domestically and if the Taiwanese courts will protect those rights guaranteed in them. At this crucial moment, it is important for Taiwan to learn the experiences of other countries with regard to their domestic incorporation of international human rights instruments. Canada has ratified both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) for more than thirty years, and its Supreme Court is famous for its ceaseless efforts to incorporate universal human rights standards into the Canadian law. The College of Law, National Taiwan University, is honored to have Professor William W. Black from the University of British Columbia to share with us the Canadian experience of adopting these two important human rights Covenants. In this lecture, Professor Black describes three mechanisms that Canada has used to implement these Covenants domestically. His insightful discussion is a significant contribution to a more nuanced understanding of how international human rights can be effectively implemented in a domestic legal system.

## I. OPENING REMARKS

**PROFESSOR JAU-YUAN HWANG**

Good morning, everyone here. Welcome to today's lecture on human rights law. Before we start this program, allow me to make a brief introduction. This talk in fact was proposed by Canadian Trade Office in Taipei. Ms. Toby Schwartz of their office first approached me to discuss the ratification of two UN Human Rights Covenants by Taiwan in 2009. She wanted to help on the human rights matter, particularly on the implementation and enforcement of the human rights conventions in Taiwan. This was so good an idea that I couldn't reject. That's why we're having today's lecture.

We are very delighted to have Professor William Black from UBC, Canada to be today's speaker. Besides, we are honored to have another human rights expert, Ms. Magda Seydegart from Canada. On top of them, we also have Professor David Law, Professor Wen-Chen Chang, and Professor Fort Fu-te Liao as three discussants. Before I give the floor to today's speaker, allow me to introduce Professor William Black a little bit more, in case you don't know him as much as I do. Professor Black's research interests focus on human rights reform, equality rights, and mediation and other dispute resolution within human rights agencies. Now, he's a professor emeritus at the University of British Columbia in Canada. He joined the UBC faculty in 1970, probably earlier than when most of today's audience were born. He was promoted to associate professor in 1975 and professor in 1998. With my introduction, please welcome Professor Black.

## II. SPEECH

1. *Introduction*

Thirty five years ago, Canada ratified both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>1</sup> Unlike Taiwan, Canada has not completely incorporated the covenants into domestic law. However, in the intervening years, it has partially incorporated them. This paper reviews the mechanisms Canada has used to do so in the hope that the Canadian experience will be of some relevance to the implementation of the

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1. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3.

covenants in Taiwan. The lessons arising from this experience are both positive and negative. Overall, the experience has been positive, but an examination of some of the mistakes made by Canada may help Taiwan to avoid similar ones.

I start with an overview of the Canadian system for protecting human rights in order to give some context to the discussion of the covenants. I then discuss the different mechanisms Canada has used to incorporate the ICCPR into domestic Canadian law. The following section discusses the influence of the ICESCR in Canada. This section is brief for the simple reason that Canada has not done a great deal to implement this Covenant domestically. Finally, I will review possible ways in which this experience may assist Taiwan in implementing the covenants.

The Canadian nomenclature is somewhat confusing. In Canada, the term “human rights” is generally used in a narrow sense to refer only to anti-discrimination statutes rather than to all of the rights in the covenants or in the Constitution of Canada. In this paper, I will use the term in its broader international sense.

## 2. *Overview of Canadian Human Rights Protections*

For most of Canada’s history, there was almost no protection of human rights. Indeed, until after World War II, there were many laws that themselves violated human rights. For example, there were restrictions on the immigration of people coming from various Asian countries. Women and aboriginal people were not allowed to vote. Aboriginal children were taken out of their communities to attend residential schools that consciously attempted to assimilate them into white society and to erase their language and culture. During World War II, people of Japanese origin were forced into internment camps and their property was confiscated.<sup>2</sup>

The Canadian system for protecting human rights was gradually put in place after World War II. Human rights are now protected in a number of ways. An early step was the adoption of anti-discrimination legislation. Such legislation now exists in every Canadian jurisdiction. These statutes prohibit discrimination on grounds such as race, religion sex, disability and sexual orientation in both the governmental and private sectors.<sup>3</sup> Victims of

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2. This history is discussed in the first chapter of WALTER SURMA TARNOPOLSKY & WILLIAM PENTNEY, *DISCRIMINATION AND THE LAW* (1985); R. BRIAN HOWE & DAVID JOHNSON, *RESTRAINING EQUALITY: HUMAN RIGHTS COMMISSIONS IN CANADA* 3-6 (2000).

3. The statutes generally cover discrimination in employment, in housing and regarding public accommodations, services and facilities. The exact list of prohibited grounds of discrimination is different in different jurisdictions. As an example, the Canadian Human Rights Act, R.S.C.1985, c. H-6, sec. 3(1) (which applies to the federal government and those business sectors regulated by the federal government) prohibits discrimination on the basis of race, national or ethnic origin, colour,

discrimination can bring a legal action and obtain a civil remedy for that discrimination.

In 1960, the Canadian Parliament enacted the Canadian Bill of Rights. This law applied to the federal government, but not to the provinces. In form, this was a regular statute, but it was held by the courts to overturn laws that violated its terms and was given "quasi-constitutional" status. Despite that status, it had very little practical effect for reasons that will be described more fully below.<sup>4</sup>

In 1982, the Canadian Charter of Rights and Freedoms (the Charter) was incorporated into the Constitution of Canada.<sup>5</sup> The Charter is broader than the earlier anti-discrimination statutes in that it not only protects against discrimination, but also protects other rights such as, for example, freedom of expression and religion, the prohibition of unreasonable searches and seizures and various rights of persons arrested or charged with a criminal offence. However, the Charter is narrower than anti-discrimination statutes in that it only applies to governmental activity.<sup>6</sup> The Charter provides that laws inconsistent with charter rights are of no force and effect.<sup>7</sup> It also allows the courts to provide other remedies.<sup>8</sup>

Today, there are also other human rights protections such as statutes protecting privacy.<sup>9</sup> In addition, other more general statutes such as the Criminal Code contain sections protecting human rights.<sup>10</sup>

The two United Nations covenants played a significant role in these developments, particularly the ICCPR. The ICCPR contributed to the wording of the Charter and both covenants have been cited in cases interpreting the Charter. Along with the U.N. Universal Declaration of Human Rights, they also encouraged the development of the statutory protections such as the statutes prohibiting discrimination previously mentioned, though they did not directly influence the wording of those statutes.<sup>11</sup>

The covenants did not have an immediate influence on Canadian

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religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

4. Canadian Bill of Rights, S.C. 1960, c. 44. Two provinces and one territory have enacted laws somewhat comparable to the Canadian Bill of Rights, but they have not played a major practical role in protecting rights.

5. Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, ch. 11 (U.K.).

6. *Id.* sec. 32.

7. *Id.* sec. 52.

8. *Id.* sec. 24.

9. *See, e.g.*, Privacy Act, R.S.C. 1985, c. P-21.

10. *See, e.g.*, Criminal Code, R.S.C. 1985, c. C-46, s. 83.28(11) (affording a right to counsel during certain investigations).

11. The Ontario Human Rights Code, R.S.O. 1990, c. H.19, and Yukon Human Rights Act, R.S.Y. 2002, c. 116 refer in their preambles to the Universal Declaration of Human Rights.

domestic law at the time of ratification. In the Canadian legal system, international treaties such as the covenants do not automatically become part of domestic law when ratified. Instead, there must be a “transformation” of a treaty into domestic law.<sup>12</sup> The most common mechanism for this transformation is to incorporate the provisions of the treaty into statutes. The next section discusses the degree to which the ICCPR has been incorporated into Canadian law. As will be discussed later, the ICESCR has not been incorporated to the same degree.

### 3. *Domestic Effect of the International Covenant on Civil and Political Rights*

Canada has implemented the ICCPR in three ways. The first is that some of the wording of the Covenant (with some variation) was incorporated into the Charter and became part of the Constitution of Canada. The second method was to amend existing statutes to bring them into conformity with the Charter, and thus indirectly, with the Covenant. The third, which is obviously related to the first, consists of judicial decisions that interpret the wording of the Charter by reference to the wording of the Covenant and to the jurisprudence of the U.N. Human Rights Committee.

#### (a) Incorporation of the Covenant Wording into the Canadian Charter

Though Canada ratified the ICCPR in 1976, there was little progress in implementing the Covenant domestically until the 1980s. Part of the reason for the delay was that at the time of ratification, Canadian jurisdictions were involved in a long process of negotiations to amend the Constitution. While the negotiations involved other matters as well, a major focus was the adoption of a constitutional charter of rights and freedoms. The implementation of the Covenant quickly became entangled in these negotiations because the proposed charter was seen as an important means for accomplishing that goal. The negotiations were long and arduous, because Canada has a federal form of government and constitutional amendment required the agreement of the Federal Government and most of the provinces.<sup>13</sup> There was disagreement about the terms of the new Charter, but there were also other disputes involving matters such as the allocation of governmental powers between the provinces and the federal government and choosing a process for future amendments to the Constitution.<sup>14</sup> The

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12. PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* c. 11.4(a) (5th ed. 2007).

13. In the end, nine of the ten provinces agreed, though the amendments are also binding on the 10th province, Quebec.

14. HOGG, *supra* note 12 describes this process at ch. 4, sec. 1; *see also* EDWARD MCWHINNEY,

amendments did not come into effect until April, 1982, almost six years after Canada ratified the covenants.<sup>15</sup>

The Canadian Charter does not incorporate all of the rights set out in the ICCPR, but many sections of the Charter clearly derive from the Covenant. Despite some differences in wording, William Schabas and Stéphane Beaulac say that the fact that many Charter rights have their origin in the Covenant is “inescapable.”<sup>16</sup> They also say that the wording of the Charter was somewhat influenced by the criticism of the United Nations Human Rights Committee in its initial report on Canada.<sup>17</sup> Other commentators agree.<sup>18</sup> The documentary history of the deliberations leading up to the Charter also demonstrates the relationship between the Charter and the Covenant.<sup>19</sup>

One of the features of the Charter that was inspired by the Covenant was a section stating the criteria for permitting a limitation on a right. Section 1 of the Charter states:

“The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

The very idea of such a clause came from the covenants.<sup>20</sup> Neither the Canadian Bill of Rights nor the U.S. Constitution contains such a clause, and courts have had to read implicit limits into the various rights. The phrases “prescribed by law” (i.e. specifically authorized by a law) and “democratic society” also are said to derive from the Covenant.<sup>21</sup>

The wording of various rights in the Charter also demonstrates their origins in the Covenant. A number of the rights concerning persons charged with an offence are very similar to, if not identical with, comparable provisions in the Covenant. Thus, for example, section 11(d) of the Charter gives the right “to be presumed innocent until proven guilty in a fair and

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CANADA AND THE CONSTITUTION 1979-1982: PATRIATION AND THE CHARTER OF RIGHTS (1982).

15. The equality rights in the Charter did not come into effect until 1985. The delay was to allow legislatures to amend legislation that might violate the right to equality.

16. WILLIAM SCHABAS & STÉPHANE BEAULAC, *INTERNATIONAL HUMAN RIGHTS AND CANADIAN LAW: LEGAL COMMITMENT, IMPLEMENTATION AND THE CHARTER* 61 (3d ed. 2007).

17. *Id.*

18. See ANNE F. BAYEFESKY, *INTERNATIONAL HUMAN RIGHTS LAW: USE IN CANADIAN CHARTER OF RIGHTS AND FREEDOMS* 38 (1992).

19. See the paper written by the Minister of Justice at the time: Otto Lang’s “Constitutional Reform: Canadian Charter of Rights and Freedoms”, reproduced in ANNE BAYEFESKY, *CANADA’S CONSTITUTION ACT 1982 AND AMENDMENTS: A DOCUMENTARY HISTORY* 499-511 (1989).

20. See SCHABAS & BEAULAC, *supra* note 16, at 256; BAYEFESKY, *supra* note 18, at 40.

21. See, e.g., ICCPR, art. 22, para. 2; BAYEFESKY, *supra* note 18. The Charter is different from the Covenant in that s. 1 applies to all the rights contained in the Charter whereas different limitations are set out in different sections of the Covenant.

public hearing by an independent and impartial tribunal.” The presumption of innocence has long existed in Canadian law,<sup>22</sup> but the phrases “fair and public hearing” and “independent and impartial tribunal” seem to have come directly from Article 14, para. 1 of the Covenant. The wording of section 15 of the Charter, which provides for equality rights, was modified during the drafting process, in part to conform to Article 26 of the Covenant.<sup>23</sup> Earlier drafts of this section contained a closed list of grounds. The grounds were changed to an open-ended list to conform to Article 26. That change has proved to be important.<sup>24</sup> Many other sections could be cited as well.<sup>25</sup>

These provisions do not go as far in implementing the Covenant as does the Taiwan Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (which, for simplicity, I will refer to as the “Taiwan Implementation Act”). Taiwan has adopted the two Covenants word-for-word, whereas in Canada, it is necessary to determine whether similar, but somewhat different Charter wording implements a right set out in the ICCPR. Though the process of determining whether a covenant right has been fully incorporated into the Charter is not relevant to Taiwan, the at least partial incorporation of covenant rights has led Canadian courts to cite international authorities in interpreting the Charter, and I think those cases, discussed below, may be of relevance to Taiwan.

• *Strengths and Weaknesses of Incorporating Covenant Rights into the Canadian Charter*

A strength of incorporating Covenant rights into the Canadian Charter is that these rights have become part of the Canadian Constitution, which means that all legislation must conform to these rights.<sup>26</sup> Also, by design, the Constitution is difficult to amend. It would be hard to repeal a right

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22. But this language is fully consistent with art. 14, para. 2 of the Covenant.

23. See BAYEFESKY, *supra* note 18, at 45-46.

24. Judicial decisions have afforded protection on grounds such as sexual orientation, marital status and citizenship; see W. Black & L. Smith, *The Equality Rights, in CANADIAN CHARTER OF RIGHTS AND FREEDOMS* (Gérald Beaudoin & Errol Mendes eds., 4th ed. 2005). BAYEFESKY, *supra* note 18 at, 45-46 states that the change was made after representations made by John Humphrey, a Canadian who was one of the drafters of the *Universal Declaration of Human Rights*.

25. The mobility rights section of the Charter, s. 6, was inspired by art. 12, para. 1 of the ICCPR; the right to be tried within a reasonable time (s. 11(b) by art. 14, para. 3(d); protection against retroactive offences (s. 11(g)) by art. 15, para. 1; the right not to be tried twice for the same offence (s. 11(h)) by art. 14, para. 7; the benefit of the lesser punishment if the penalty for an offence is changed (s. 11(i)) by art. 15, para. 1; the right to an interpreter (s. 14) by art. 14, para. 3(f) (though this right also derives in part from the Canadian Bill of Rights). The addition of a remedies section of the Charter was inspired by art 2, para. 3 of the Covenant. The addition of a guarantee of equal rights to men and women was influenced by Art. 3 of the Covenant. See BAYEFESKY, *supra* note 18, at 38-49; SCHABAS & BEAULAC, *supra* note 16, c. 4.

26. Canadian Charter of Rights and Freedoms, *supra* note 5, sec. 52.



during some kind of perceived emergency or because a particular government did not believe in one or more of the rights.

As I understand it, the Taiwan Implementation Act is not part of the Constitution. However, one other aspect of the Canadian experience could possibly be relevant to the status of the Act. As I mentioned, although the earlier Canadian Bill of Rights was simply a statute of the Canadian Parliament, the courts assigned it greater importance than other statutes, calling it "quasi-constitutional." If a somewhat comparable status were assigned to the Taiwan Implementation Act, it might be possible to treat it as superior to other statutes, at least unless the legislature used the clearest of terms to indicate that another statute partially repealed a covenant right.<sup>27</sup>

A second advantage of the Canadian Charter is that it sets out rights in general terms rather than trying to anticipate every possible way in which a right might be violated. The Covenant, and thus the Taiwan Implementation Act, does the same, though some provisions are somewhat more detailed than the Canadian Charter. This general language makes it possible to afford protection when a right is implicated in unanticipated ways.

One disadvantage of this approach is that the Charter is not self-executing. The Charter gives courts the power to strike down laws that are inconsistent with the Charter, but it takes a court decision to do so, and governments often continue to apply the laws until they are overturned by the courts – sometimes many years later. If it were possible to draft laws so as not to violate a right in the first place, or to immediately amend laws that do violate rights, that outcome would be superior to litigation under the Charter after the violation has occurred. However, as I discuss in the next section of the paper, it is very difficult to achieve that goal.<sup>28</sup>

#### (b) Review and Amendment of Statutes to Detect and Cure Charter Violations

After the Canadian Charter came into effect, every Canadian jurisdiction conducted a review of its legislation to identify and amend provisions inconsistent with these new rights.<sup>29</sup> To the extent that the Charter

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27. For a discussion how that status was achieved in Canada, see HOGG, *supra* note 12, c. 35.

28. Section 3 of the Canadian Bill of Rights required the Minister of Justice to review all legislative bills and all proposed regulations to try to identify possible violations of rights before they occur. After the Charter came into effect, Parliament enacted a statute requiring a similar review to determine in advance whether proposed laws and regulations violated its provisions; HOGG, *supra* note 12, c. 35-12. Undoubtedly, these reviews sometimes identify violations and the statute or regulation can be modified before it comes into effect. However, the review is not public, and it is impossible to determine how effective it is.

29. See, e.g., the Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act, S. C. 1985, c. 26 (Can.); the Charter of Rights Amendment Act, S.B.C. 1985, c. 68 (Can.); the Mobility Rights Statute Law Amendment Act, S.O. 1985, c. 5 (Can.); the Equality Rights Statute Law

implements the International Covenant on Civil and Political Rights, as discussed above, these reviews also had the effect of rectifying Covenant violations, at least indirectly. These reviews were similar to those mandated by Article 8 of the Taiwan Implementation Act.<sup>30</sup>

These reviews did make some useful amendments. For example, the federal legislation amended numerous statutes to require a judicial warrant in order to search a house, and the Ontario rights legislation amended the Human Rights Code to expand the prohibited grounds of discrimination and to give added protection to certain psychiatric patients.<sup>31</sup> On balance, however, the process was not a success. In many cases, the changes were quite superficial. For example, numerous sections of the federal National Defence Act were amended to remove the phrase “officer or man” and substitute “officer or non-commissioned member.”<sup>32</sup> This change seems to have been made purely for cosmetic reasons; it does not appear to have given any additional rights to women in the Canadian military. In other cases, the changes had only fairly trivial effects such as the B.C. amendment to the Name Act to allow either spouse to change his or her name after marriage.<sup>33</sup> It appears that the process was hit and miss, identifying certain problems and overlooking others.

Perhaps the strongest evidence of the ineffectiveness of the process is the large number of judicial decisions striking down statutory provisions in the years after the enactment of these statutes. For example, the first major equality rights case decided by the Supreme Court of Canada overturned a section of a B.C. statute stating that only Canadian citizens could be members of the legal profession.<sup>34</sup> Many of these cases concerned Charter violations much more serious than those rectified by the omnibus statutes.

One explanation for the relative failure of this process may be that the different jurisdictions did not take the process seriously enough or did not provide sufficient resources to allow a thorough review of legislation. However, I believe that another explanation is the inherent difficulty of the process. A thorough review of legislation would require a careful reading of every statute and testing it against every right contained in the governing

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Amendment Act, S.O. 1986, c. 64 (Can.). It is noteworthy that these statutes were enacted several years after most of the Charter came into effect in 1982 (equality rights did not come into effect until 1985).

30. One difference is that the Canadian reviews only covered statutes and regulations and not directions or administrative measures.

31. *See, e.g.*, Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act, S. C. 1985, c. 26, secs. 4, 6(2), 7, 8, 9(2), 10(1) (Can.); Equality Rights Statute Law Amendment Act, S.O. 1986, c. 64, secs. 18, 33 (Can.).

32. Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act, Part III amending numerous sections.

33. Charter of Rights Amendment Act, S.B.C. 1985, c. 68, sec. 94 (Can.).

34. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

document (Charter or Covenant). Moreover, the people conducting that review would have to anticipate how the Charter or Covenant would be interpreted in the future; they would in a sense be working in the dark. Their task is daunting. Indeed, an examination of Canadian judicial decisions suggests that it is almost impossible to anticipate all the ways that a law might violate a human right. For example, in *Eldridge v. British Columbia (Attorney-General)*, the Supreme Court of Canada held that the Medical and Health Care Services Act must be administered in a manner that provides sign language interpreters to profoundly deaf patients undergoing medical treatment.<sup>35</sup> I very much doubt that this issue would have crossed the mind of someone reviewing that statute to identify inconsistencies with the Canadian Charter.

• *Other Statutory Amendments in Response to the Covenant*

The International Covenant on Civil and Political Rights has sometimes led to statutory amendments of Canadian law in a more direct way. Amendments have sometimes been made in response to decisions of the U.N. Human Rights Committee.<sup>36</sup> A notable example is the *Lovelace* case.<sup>37</sup> Canada has an Indian Act that gives certain benefits to people registered as status Indians, including the right to live on reserves set aside for their use. Section 12(1)(b) of the Act provided at the time that if a status Indian woman married a non-Indian man, she lost her status, whereas if a status Indian man married a non-Indian woman, not only did he keep his status, but his spouse acquired that status. Ms. Lovelace had married a non-Indian man and lost her status. Surprisingly, the Supreme Court of Canada had earlier rejected a challenge to this law on the basis of the equality rights in the Canadian Bill of Rights.<sup>38</sup> In the *Lovelace* decision, the U.N. Human Rights Committee found that these provisions violated Article 27 of the Covenant by preventing Ms. Lovelace from living in the community to which she was culturally attached. As a result, Canada amended the Indian Act so that women such as Ms. Lovelace regained their status and other women would not lose their status in the future.<sup>39</sup>

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35. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

36. Up until 2002, the U.N. Human Rights Committee had found Canada to have violated the ICCPR 8 times. Canada had implemented the findings of the Committee in five of the cases and had afforded individual redress in one additional case. It did nothing in the remaining two cases; CHRISTOF HEYNS & FRANS VILJOEN, *THE IMPACT OF THE UNITED NATIONS HUMAN RIGHTS TREATIES ON THE DOMESTIC LEVEL* (2002).

37. *Lovelace v. Canada*, Communication No. 24/1977, S.D. Vol. 1, p. 83; A/36/40 (1984), p. 200.

38. *Canada (Attorney General) v. Lavell*, [1974] S.C.R. 1349.

39. An Act to Amend the Indian Act, S.C. 1985, c. 27, s. 4. The amendment has been criticized because it gives the women themselves and the children of such women status, but not their grandchildren.

In 1989, the U.N. Human Rights Committee found that a statute enacted by the Province of Quebec to protect the French language violated Article 19 of the Covenant by limiting the use of English.<sup>40</sup> Quebec amended the legislation to bring the statute into conformity with the Covenant.<sup>41</sup> This response is especially significant because Quebec had refused to comply with an earlier decision of the Supreme Court of Canada finding that the same statute violated the Canadian Charter. Instead, it had exercised its power to exempt the law from challenge under the Charter for a period of time.<sup>42</sup>

(c) Canadian Court Cases Interpreting the Charter

Canadian judicial decisions interpreting the Charter of Rights and Freedoms may be of some relevance to Taiwan in two ways. The most obvious way is that some of these decisions cite the International Covenant on Civil and Political Rights (and very occasionally the International Covenant on Economic, Social and Cultural Rights) and use the Covenant to help interpret and apply a Charter right that is similar to a right set out in the ICCPR.

The second possible relevance is perhaps less obvious. Even Charter cases that do not rely on international law may be relevant in helping to demonstrate the techniques developed by the Canadian judiciary in order to interpret and apply the rights set out in the Canadian Charter. Like the international covenants, the rights in the Charter are set out in quite general terms.<sup>43</sup> As will be discussed more fully below, the broad language used in the Charter has required Canadian courts to adjust their interpretive techniques in order to sensibly apply this general language to a specific set of facts.

• *Canadian Judicial Use of International Sources*

The Canadian use of international sources is not as straightforward as would be their use in an action brought under Article 2 of the Taiwan

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40. Ballantye, Davidson and McIntyre v. Canada (Nos. 359/1989 and 385/1989), U.N. Doc. CCPR/C/47/D/385/1989, U.N. Doc. A/48/40, Vol. II, p. 91; see SCHABAS & BEAULAC, *supra* note 16, at 65.

41. An Act to Amend the Charter of the French Language, S.Q. 1993, c. 40.

42. See *Ford v. Quebec*, [1988] 2 S.C.R. 712. Section 33 of the Canadian Charter allows a legislature to declare that a statute or portion thereof shall operate notwithstanding certain sections of the Charter. The exemption lasts for a period of 5 years. For a period after the Charter came into effect, Quebec exempted all of its statutes to protest the fact that the 1982 constitutional amendments had been enacted without its consent. It did not renew these exemptions when the five years elapsed, and there have been very few exemptions since that period.

43. Indeed, the Charter often uses language even less detailed than the language of the ICCPR.

Implementation Act.<sup>44</sup> Taiwan has incorporated the two covenants verbatim, and in my opinion, there would be little doubt about the relevance of, for example, the decisions of the U.N. Human Rights Committee. As I have noted, it is clear that many of the rights set out in the Canadian Charter were inspired by rights in the ICCPR, but the language is not identical. Therefore, there can be disagreement about whether or not a particular Charter right fully implements a comparable covenant right.

Canadian courts have referred to the International Covenant on Civil and Political Rights in interpreting the Canadian Charter numerous times, but they have not always been consistent about the justification for doing so. One justification used is a common law presumption that Canadian law does not breach treaty obligations Canada has assumed. In other words, the courts should strive to give the Charter a meaning consistent with, for example, the ICCPR unless the wording of the Charter is so clearly inconsistent with the Covenant that such an interpretation is not possible.<sup>45</sup> In a similar fashion, former Chief Justice Dickson of the Supreme Court of Canada said:<sup>46</sup>

“The content of Canada’s international human rights obligations is, in my view, an important indicia of the meaning of “the full benefit of the *Charter*’s protection.” I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.”

Unfortunately, the Supreme Court of Canada has not always cited this presumption. Sometimes, it says instead that international sources are “relevant and persuasive.”<sup>47</sup> William Schabas and Stéphane Beaulac say that international sources are used simply to provide some of the background context that should be considered in interpreting the Charter.<sup>48</sup> Thus, the theoretical justification for using international sources as an aid to

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44. I note, however, the possibility that these sources could also be used as an aid to the interpretation of Chapter II of the Taiwan Constitution. If they were, the challenges and benefits would be very similar to those in Canada.

45. See GIBRAN VAN ERT, USING INTERNATIONAL LAW IN CANADIAN COURTS ch. 5 (2d ed. 2008); Jutta Brunée & Stephen Toope, *A Hesitant Embrace: The Application of International Law by the Canadian Courts*, 40 CAN. Y.B. INT’L L. 3, 6 (2002).

46. Ref. re Public Service Employees Relations Act (Alta.), [1987] 1 S.C.R. 313, para. 59 [*Alberta Reference*]. Chief Justice Dickson was in dissent in this case, but the quoted words appeared in a majority decision in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-57. See also former Chief Justice Antonio Lamer, *Enforcing International Human Rights Law: The Treaty System in the 21<sup>st</sup> Century*, in THE HUMAN RIGHTS TREATY SYSTEM IN THE 21<sup>ST</sup> CENTURY 305, 311 (Anne Bayefsky ed., 2000).

47. See *United States v. Burns and Rafay*, [2001] 1 S.C.R. 283, at para. 80.

48. SCHABAS & BEAULAC, *supra* note 16, at 94-95.

interpretation of the Charter is not entirely clear.<sup>49</sup>

Nevertheless, there is no doubt that those sources do play a role in Canadian cases interpreting the Charter. On many occasions, courts have cited the ICCPR as well as other international treaties in support of their reasoning in a case. Therefore, Canadian cases interpreting the Charter may sometimes be worth examining by judges and officials in Taiwan. That is particularly true when considering articles of the ICCPR that have clear parallels in the Canadian Charter. The body of cases is far too large to describe fully here, but I will cite some examples that I hope will be illustrative. I am not sufficiently knowledgeable to determine whether the particular facts of these cases are relevant to Taiwanese law. Instead, my purpose is to demonstrate the techniques used by Canadian courts in considering international sources.

In 2007, the Supreme Court of Canada held that the Charter right to freedom of association included the right of trade unions to engage in collective bargaining. As a result, it struck down a British Columbia statute that limited the right of unions representing health care workers to bargain collectively and that voided terms of collective agreements that were inconsistent with the statute. The statute had also imposed various working conditions on the workers without their consent for the purpose of reducing public health care expenses.<sup>50</sup> The case is especially interesting because it overturned earlier cases that had held that collective bargaining did not come within the right to freedom of association.<sup>51</sup> Part of the Court's justification for this step was that the section of the Charter guaranteeing freedom of association should be interpreted with reference to the ICCPR and ICESCR. The Court applied the presumption that the Charter provides rights at least as broad as the comparable rights in international human rights instruments Canada has ratified.<sup>52</sup> It cited Article 22 of the ICCPR, which explicitly gives the right to form a trade union and states that this right can only be restricted on certain grounds such as national security or public safety that did not apply to the facts of this case. The Court also cited Article 8 of the ICESCR, which contains similar terms, and Convention number 87 of the International Labour Organization. It said:<sup>53</sup>

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49. See VAN ERT, *supra* note 45, at 325-26, 332-51. The different justifications assign different levels of importance to the Covenant and thus can affect the outcome of the case.

50. *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 [*Health Services*].

51. See *Alberta Reference*, [1987] 1 S.C.R. 313, *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

52. *Health Services*, [2007] 2 S.C.R. 391, at para. 70. Somewhat ironically, this presumption was first set out in the dissenting opinion of one of the cases being overturned.

53. *Id.* at para. 72.

“The ICESCR, the ICCPR and Convention No. 87 extend protection to the functioning of trade unions in a manner suggesting that a right to collective bargaining is part of freedom of association. The interpretation of these conventions, in Canada and internationally, not only supports the proposition that there is a right to collective bargaining in international law, but also suggests that such a right should be recognized in the Canadian context under s. 2(d) [of the Charter].”

In *United States v. Burns*, the Charter was used to limit ministerial discretion under a statute. The issue concerned the extradition of two Canadian residents to the United States to be tried for the murder of the family of one of them. They were 18 years old at the time of the alleged offence. One of the possible punishments was the death penalty, which Canada had abolished earlier (the other was life in prison). Canada's Extradition Act gives the minister discretion to seek assurances from another country that the death penalty will not be imposed before authorizing the extradition. The minister had decided not to seek such assurances in this case. The Charter issue was whether there was a violation of the Charter right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.<sup>54</sup>

There was no doubt about the fact that the liberty and security of the person of the two men were affected, and the issue was whether extradition in the circumstances violated the principles of fundamental justice. The Court held that except in exceptional circumstances, the failure of the minister to seek assurances that the death penalty would not be imposed would violate the principles of fundamental justice. In other words, the minister's discretion was severely limited.

Of course, the Court could not rely on the ICCPR itself, since Article 6 allows the death penalty to be imposed if certain conditions are met. However, the Court cited a variety of other international sources to support its decision, including reports of a U.N. special rapporteur, resolutions of the U.N. Commission on Human Rights, the European Convention on Extradition and Resolutions of the Parliamentary Assembly of the Council of Europe. It cited the Second Optional Protocol to the ICCPR prohibiting signatories from imposing the death penalty. It also cited Article 6 para. 5 of the ICCPR, which prohibits the death penalty for persons under the age of 18. Though the alleged perpetrators in this case were just 18, the Court said

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54. Two other sections of the Charter were also raised, but the Court found no violation of them and its discussion of them did not consider international sources.

that the Covenant suggested that their relative youth should be taken into account. In summing up the effects of all these documents, the Court said:<sup>55</sup>

“This evidence does not establish an international law norm against the death penalty, or against extradition to face the death penalty. It does show, however, significant movement towards acceptance internationally of a principle of fundamental justice that Canada has already adopted internally, namely the abolition of capital punishment.”

One of the interesting aspects of the case is that Canada was not a party to many of the international documents the Court cited. Instead, international sources were used as comparative background information to help delineate the context in which the Court should make its decision.

The Supreme Court of Canada used international instruments in a different way in *Canadian for Children, Youth and the Law v. Canada (Attorney-General)*.<sup>56</sup> The provision of the Criminal Code prohibiting assaults contains the following exception:<sup>57</sup>

“Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances”

The exception was challenged on a number of grounds under the Canadian Charter, but the ground of interest here was that it violated a child’s right to security of the person in a manner that was contrary to the principles of fundamental justice.<sup>58</sup> It was conceded that the exception implicated security of the person and the dispute was about whether it did so in a way that violates the principles of fundamental justice. It was argued that the phrase “what is reasonable under the circumstances” was so vague that it violated those principles in that it did not provide an intelligible standard to guide citizens and officials.

The Court conceded that, on its face, the phrase is very broad. However, it held that there were “implicit limitations” that added the necessary precision.<sup>59</sup> Some of these limitations were based on what the Court called “contemporary social consensus” and from the views of social science

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55. *United States v. Burns*, [2001] 1 S.C.R. 283, at para. 89.

56. *Foundation for Children, Youth and the Law v. Canada*, [2004] 1 S.C.R. 76 [*Foundation*].

57. Criminal Code, R.S.C. 1985, c. C-46, secs. 2 [am. 1994, c. 44, sec.2(2)], sec. 43.

58. Sec. 7 of the Charter.

59. *Foundation*, [2004] 1 S.C.R. 76, at para. 29.



experts. But the Court also said that statutes should be construed to comply with Canada's international obligations and cited provisions of the U.N. Convention on the Rights of the Child prohibiting certain conduct and Article 7 of the ICCPR prohibiting "cruel, inhuman or degrading treatment or punishment." It also cited the views of the U.N. Human Rights Committee that corporal punishment of children at school engages Article 7.<sup>60</sup> It said that together, these sources provided "a solid core of meaning" for the phrase "reasonable under the circumstances." Interpreted this way, the exception did not allow for corporal punishment at school except in very limited circumstances, was limited to "minor corrective force of a transitory and trifling nature" and does not apply to children under two or to teenagers.<sup>61</sup>

In *Health Services* and *United States v. Burns*, described above, international authority had been used to expand the meaning of a Charter right. In this case, the Court instead used international sources to narrow the scope of a statutory provision so that it did not conflict with a Charter right. The case has been criticized on its facts, but the general principle of narrowly interpreting statutes so as to avoid Charter violations is well-accepted in Canada.

In *R. v. Keegstra*, the ICCPR was used in still a different way. It was cited to justify a restriction on the right being claimed.<sup>62</sup> Keegstra was charged under a section of the Criminal Code which prohibits the wilful promotion of hatred, other than in private conversation, towards any section of the public distinguished by colour, race, religion or ethnic origin. He was a teacher who made vitriolic anti-Semitic statements in class and expected his students to repeat these statements on examinations. He alleged that this section of the Criminal Code violated his Charter right to freedom of expression.<sup>63</sup>

A majority of the Supreme Court of Canada concluded that the section did infringe on freedom of expression, saying that that right attached to any attempt to convey meaning, however odious, as long as it did not take the form of violence. However, the majority upheld the offence under section 1 of the Charter, which permits reasonable limits on a right if they are prescribed by law and demonstrably justified in a free and democratic society. Chief Justice Dickson said.<sup>64</sup>

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60. U.N. GAOR, 55<sup>th</sup> Sess., Human Rights Committee, *Report of the Human Rights Committee*, ¶ 426 & 434, U.N. Doc. A/50/40 Vol. I, Supp. No. 40 (1995); U.N. GAOR, 54<sup>th</sup> Sess., Human Rights Committee, *Report of the Human Rights Committee*, ¶ 358, U.N. Doc. A/54/40 Vol. I, Supp. No. 40 (1999); U.N. GAOR 55<sup>th</sup> Sess., Human Rights Committee, *Report of the Human Rights Committee*, ¶ 306 & 429, U.N. Doc. A/55/40 Vol. I, Supp. No. 40 (2000).

61. *Foundation*, [2004] 1 S.C.R. 76, para. 49.

62. *R. v. Keegstra*, [1990] 3 S.C.R. 697 (Can.).

63. He also raised other challenges not relevant to this discussion.

64. *R. v. Keegstra*, [1990] 3 S.C.R. at 750.

“Generally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the *Charter* itself [citation omitted]. Moreover, international human rights law and Canada’s commitments in that area are of particular significance in assessing the importance of Parliament’s objective under s. 1.”

He then cited a section of the International Convention on the Elimination of all forms of Racial Discrimination (CERD) and Articles 19 and 20 of the ICCPR to show the importance of the objectives of the section of the Criminal Code being challenged. He then said:<sup>65</sup>

“*CERD* and *ICCPR* demonstrate that the prohibition of hate-promoting expression is considered to be not only compatible with a signatory nation’s guarantee of human rights, but is as well an obligatory aspect of this guarantee .... This is not to deny that finding the correct balance between prohibiting hate propaganda and ensuring freedom of expression has been a source of debate internationally [citation omitted]. But despite debate Canada, along with other members of the international community, has indicated a commitment to prohibiting hate propaganda, and in my opinion this Court must have regard to that commitment in investigating the nature of the government objective behind s. 319(2) of the *Criminal Code*.”

In short, international sources played an important role in the Court’s decision to uphold the section and in the process place a limit on freedom of expression.

• *Canadian Charter Cases not Citing International Sources*

I noted earlier that even Canadian cases that do not rely on the covenants or other international sources may be of some relevance to the interpretation and application of the Taiwan Implementation Act. Rights such as those in the Canadian Charter and the Covenants change somewhat the role of judges. As former Chief Justice Brian Dickson has said:<sup>66</sup>

“[T]he interpretive principles to which a court will have recourse

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65. *Id.* at 754.

66. Brian Dickson, *The Canadian Charter of Rights and Freedoms*, in *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*, *supra* note 24, at 20.

in expounding the meaning of a constitutional provision are, of necessity, wider than the rules of statutory interpretation applicable to the explication of ordinary statutes. The Constitution calls for liberal and purposive interpretation unconfined by the strictures of narrow literalism ...”

Rights such as these are generally stated in broad language that requires courts to develop new principles of interpretation that strike a balance between unduly narrow interpretation and decision-making unconstrained by legal rules.

The experience in Canada suggests that it requires conscious planning to achieve this change. Twenty two years before the Charter came into effect, the Canadian Parliament enacted the Canadian Bill of Rights. As mentioned earlier, the Bill of Rights was not part of the constitution but was held to have “quasi constitutional” status. Despite that status, it was close to a complete failure. The Bill of Rights was interpreted in a very narrow fashion that provided almost no protection. In those 22 years, only one statute was ever overturned and there were only a handful of cases providing any other remedy.

There were a number of reasons for this failure, but I think an important one was that the judiciary was not yet ready to take on this new role. By and large, judges did interpret the Bill of Rights using the same techniques used to interpret ordinary statutes. They were cautious to a fault. As far as I know, little, if anything was done to prepare the judges for their new role.

The failure of the Canadian Bill of Rights was unfortunate, but this negative experience may have helped judges to realize that a similar approach to the Canadian Charter would be disastrous. In any event, the early Charter cases adopted a completely different approach. In *Hunter v. Southam*, the Supreme Court of Canada had to interpret the word “unreasonable” in the section of the Charter prohibiting “unreasonable search or seizure” (section 8). Speaking for the Court, Chief Justice Dickson said:<sup>67</sup>

“It is clear that the meaning of “unreasonable” cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction. The task of expounding a constitution is crucially different from that of construing a statute.”

He added that the Charter “must, therefore, be capable of growth and

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67. *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 155 (Can.).

development over time to meet new social, political and historical realities often unimagined by its framers.”<sup>68</sup>

If Taiwanese judges are presented with future cases brought under the Taiwan Implementation Act, they would, in my opinion, be faced with challenges very similar to those I have described.<sup>69</sup> It may be useful to consult Canadian cases to learn from our failures as well as our successes.

#### 4. *Domestic Effect of the International Covenant on Economic, Social and Cultural Rights*

Canada has done little to implement this Covenant. That is not to say that most Canadians do not enjoy most of the rights set out in this Covenant. For example, Canada is proud of its public health care system (Article 12), and our educational system conforms to most of the objectives set out in Article 13.<sup>70</sup> It is also true that Canada has implemented some of the rights that are set out in the ICCPR as well as the ICESCR.<sup>71</sup> But the ratification of the ICESCR has provided little additional domestic legal protection.<sup>72</sup> It has only been cited in a few judicial decisions.<sup>73</sup>

One of the reasons for Canada’s failure to implement the ICESCR may be the view that this Covenant sets out goals or objectives rather than concrete legal rights.<sup>74</sup> A second reason may be that some of the rights in the Covenant are set out in quite broad terms that may sometimes be difficult to turn into specific legal rights. A third reason may be that many of the rights require positive governmental action (rather than prohibiting the government from doing certain things as is true of many of the ICCPR rights). Canadian courts have been reluctant to order governments to engage in new initiatives,

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68. *Id.*

69. In my opinion, those officials reviewing laws, regulations, directions and administrative measures under Article 8 face similar challenges.

70. However, it cannot be said that Canada is progressively introducing free education at the university level; if anything, fees in most of the country are increasing; *see* art. 13, para. 2(c).

71. *See, e.g.*, the discussion of *Health Services*, [2007] 2 S.C.R. 391 and the accompanying test.

72. One possible example of implementation of an ICESCR right is the right of men and women to equal pay for work of equal value. That right is contained in Canadian Human Rights Act, R.S.C. 1985, c. H-6, sec. 11 (Can.), which was enacted the year following ratification of the covenants and which arguably implements art. 7, para. (a)(i) of the ICESCR. However, this statute only applies to areas of the economy within the jurisdiction of the federal government; provincial human rights laws generally provide a right to equal pay that is narrower than that contained in the Covenant.

73. *See Health Services*, [2007] 2 S.C.R. 391, paras. 71-73; *Gosselin v. Quebec (Attorney-General)*, [2002] 4 S.C.R. 429, paras. 147-48 (dissenting). The relevance of the Covenant was rejected by the majority at paras. 93-94.

74. *See* art. 2; *see* Pierre Elliott Trudeau, “A Canadian Charter of Human Right.” presentation to Federal-Provincial First Ministers’ Conference, Ottawa, Ontario, Feb. 5-7, 1968, reproduced in BAYEFESKY, *supra* note 19, at 60. The author was Minister of Justice at the time of this presentation and was Prime Minister of Canada at the time the Charter was adopted.

particularly if they have monetary implications.<sup>75</sup>

There is some force to these arguments. However, I think more could have been done to incorporate the ICESCR into Canadian law, at least partially. For example, courts could have cited it more frequently in interpreting Charter rights, just as they have done with respect to the ICCPR. With regard to this Covenant, Canada may have much to learn from Taiwan in the future.

### 5. *Relevance of the Canadian Experience to Taiwan*

In my discussion of Canada's implementation (or non-implementation) of the covenants, I have occasionally mentioned a way in which the Canadian experience may be relevant to the Taiwan legal system. My aim in this section is to expand somewhat on that discussion.

#### (a) Judicial Decisions about Rights Versus Attempts to Identify in Advance Conflicts between Domestic Laws and the Covenants

I described earlier the relative failure of Canadian attempts to identify in advance statutes that violated the Charter and to amend them to bring them into conformity with the Charter. Taiwan is engaged in a similar attempt under Article 8 of the Taiwan Implementation Act. It is certainly possible that Taiwan will be more successful than Canada in conducting this review. However, I think the complexity of the task makes it inherently difficult to achieve complete success. I note that Article 2 of the Act gives domestic legal status to the human rights protection provisions in the two covenants. If this section makes it possible to file cases based directly on a covenant right, I think that would be a useful supplement to the reviews under Article 8. The large body of cases that came into being after Canada's statutory review suggests that many possible conflicts with the covenants are unlikely to be identified only during the reviews.

#### (b) New Challenges to Judicial Interpretive Techniques

I have described the failure of the Canadian courts to develop effective techniques for interpreting the broad language of the Canadian Bill of Rights and the fact that it took a second chance for Canadian courts to develop

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75. See, e.g., *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, paras. 81-84. The case concerned the right to life, liberty and security of the person under section 7 of the Charter. Other sections of the Charter clearly impose positive obligations, notably secs. 16-20 regarding the official languages of Canada and sec. 23, concerning the establishment of primary and secondary educational programs in both official languages.

approaches that eventually made the Charter effective. Obviously, that is not the most efficient way to make progress.

As I mentioned, little was done to educate Canadian judges about their new challenges when the Canadian Bill of Rights was adopted in 1960. Today, the situation is quite different. Since 1988, the National Judicial Institute has led in the development of extensive judicial education programs in Canada.<sup>76</sup> The Institute conducts education programs for all levels of court. Its curriculum covers substantive law, judicial skills development and social context awareness. Its website states, “A lifelong project of learning is essential to judicial excellence and strong judicial institutions anywhere in the world.”<sup>77</sup> I believe that judicial education is a major reason why Canadian courts have overcome their earlier limitations and have developed the new techniques needed to effectively apply the Charter. In this regard, both Canada’s initial failure and its later success may merit consideration in Taiwan. That is particularly true if Article 2 of the Taiwan Implementation Act will give rise to cases claiming rights under the covenants.

(c) Training of other Government Officials, Including the Police

Canadian experience suggests that it is also useful to train police officers and other public officials so that they understand the provisions of the covenants (or in Canada, the Charter), or at least the provisions relevant to their particular work. An obvious benefit is that such training can help prevent violations of covenant rights before they occur. Such prevention better protects citizens but also assists governments by reducing challenges based on Charter or Covenant rights. Unfortunately, Canada has not always provided sufficient training and the result has been avoidable violations of rights.<sup>78</sup> This is another area in which Taiwan can learn from Canada’s mistakes.

(d) Access to Justice Issues

If cases are brought under the authority of Article 2, one issue that will arise is whether it will be possible to obtain legal representation. Legal aid is generally available in Canada for serious criminal cases, but it is not available in most civil cases. Litigation about Charter or Covenant rights is complex, especially at the beginning when there is little or no domestic

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76. See NATIONAL JUDICIAL INSTITUTE, <http://www.nji-inm.ca> (last visited Mar. 9, 2011).

77. National Judicial Institute, *Why Judicial Education Matters*, NATIONAL JUDICIAL INSTITUTE, <http://www.nji-inm.ca/nji/inm/a-propos-about/index.cfm?lang=en&>. (last visited Mar. 9, 2011).

78. See, e.g., CBC News, *Police Need Rights Training: Judge* (Nov. 26, 2010, 6:26 PM), <http://www.cbc.ca/news/canada/prince-edward-island/story/2010/11/26/pei-charter-rights-police-training.html>.

precedent. Most citizens would be unable to effectively present their case without legal assistance. For a time, the Canadian federal government funded a "Court Challenges Program" to fund legal cases. But that program only applied to cases brought against the federal government and only applied to challenges based on equality rights or language rights, and even that assistance no longer exists. While that program was in effect, cases were litigated that would have been impossible without that assistance. Since the demise of the program, litigators have frequently failed to find the resources to file potentially meritorious cases. Thus, the Canadian experience suggests that the rights in the covenants will not be fully protected unless a system of legal assistance for such cases is put in place.

(e) A Comparative Law Approach

I have described some cases in which Canadian courts have examined decisions of the U.N. Human Rights Committee.<sup>79</sup> Canadian courts have also examined decisions under international instruments that Canada is not a party to such as the European Convention on Human Rights.<sup>80</sup> They have also examined decisions of the courts of other countries that have rights comparable to those under consideration, including the United States, South Africa and other countries.<sup>81</sup> Decisions of the Human Rights Committee will be of obvious relevance in Taiwan since they interpret provisions identical with those that have been adopted domestically. But Canadian experience suggests that a wider examination of other decisions can also be very useful.

(f) Monitoring Implementation of the Covenants

Canada's implementation of the ICCPR and ICESCR is monitored at periodic intervals by the U.N. Human Rights Committee and the U.N. Committee on Economic, Social and Cultural rights respectively.<sup>82</sup> This monitoring provides an assessment of both the positive and negative aspects of Canada's performance. It gives Canadian citizens an opportunity to point out flaws in Canada's performance but also gives Canadian governments (federal and provincial) the ability to cite the positive assessments by the two committees. The reports have a high degree of credibility because of the

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79. See, e.g., *Foundation*, [2004] 1 S.C.R. 76 para. 33.

80. See, e.g., *Canada v. Schmidt*, [1987] 1 S.C.R. 500, 522.

81. See, e.g., *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, paras. 124-25.

82. See Human Rights Committee, Concluding observations of the Human Rights Committee : Canada, U.N. Doc. CCPR/C/CAN/CO/5 (Apr. 20, 2006); Human Rights Committee, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Canada, U.N. Doc. E/C.12/CAN/CO/4, E/C.12/CAN/CO/5 (May 2, 2006).

stature of the members of the committees and their complete independence from the Government of Canada. That independence is enhanced by the international status of the committees; assessment by some domestic Canadian body would not have the same credibility.

Taiwan cannot take advantage of this process because it is no longer a member of the United Nations. In my opinion, however, it would be useful to both the government and to Taiwanese citizens and civil society groups if some comparable process could be put in place.

### 6. *Conclusion*

Taiwan is to be congratulated on the domestic adoption of the two international covenants. There was great excitement in Canadian legal circles when the Canadian Charter came into effect, and I think it likely that Taiwan will experience similar excitement. I look forward to following future developments.

## III. COMMENTARY

### A. PROFESSOR FORT FU-TE LIAO

Thank you, Professor Hwang. My dear colleagues, ladies and gentlemen, it is my pleasure to be the discussant of this roundtable. I will focus my comment mainly on five points.<sup>83</sup> The first point or question is which approach we adopt to bring international treaties back to our country. The first approach is the Canadian way, which does not give international treaties any legal status in their country. The second approach is the British way. As far as I know, in 1998, the United Kingdom adopted the Human Rights Act, which gave domestic legal effect to European Covenant on Human Right. The third way is the Taiwanese way. The reason to emphasize the Taiwanese way is that we have a very unique international status, and we can only ratify these two Covenants unilaterally by ourselves. Therefore, bringing treaties back by ourselves and adopting the two Covenants in domestic laws constituted our distinctive approach.

My second point will focus on the legal status of international human rights treaties, especially on ICCPR and ICESCR, because different approaches will lead to different results of legal status. On the one hand, ICCPR and ICESCR do not have legal status in Canada. And notwithstanding the fact that the ECHR has domestic legal status in UK, it

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83. See also Fort Fu-Te Liao, *Pichun Lienhokuo Liangke Jenchuankungyueh chi Chihting Shihhsingfa chi Pinglun [A Comment on the Ratification of the Two UN Human Rights Covenants and the Enactment of Their Implementation Act]*, 174 TAIWAN L. REV. 223 (2009).



has neither incorporated nor adopted the two Covenants till now. On the other hand, in Taiwan, we promulgated the Implementation Act to give the rights protected by the two Covenants domestic legal effect. However, one question still remains – what is the legal status of the provisions of ICCPR and ICESCR? Specifically, are they superior to domestic laws? These are the questions that have never been answered in the Implementation Act. There are three explanatory theories regarding the domestic legal status issue of international human rights treaties. One is to regard international treaties as special laws that are superior to domestic laws. The second theory adopted by the United States is *lex posterior derogat priori* – that new laws are superior to old laws, which could result that domestic new laws are superior to all the human right treaties. The third theory is that should there be any conflicts between domestic laws and international human rights treaties, such as ICCPR and ICESCR, one must try to figure out which – treaty or domestic law – has more comprehensive protection than the other and the one with more comprehensive protection must prevail. In this way, domestic courts should apply the one with more comprehensive protection of human rights, whether it is from domestic laws or international human rights treaties such as ICCPR and ICESCR. This is important because even Canada adopted her Charter in 1982, some rights prescribed in ICCPR still do not have legal status in her domestic legal system, let alone that ICESCR. In any event, we need to observe whether human rights treaties are superior to domestic laws and in what specific contexts.

My third point is that whether domestic courts have obligations to apply the two Covenants? Canadian Courts do not apply ICCPR directly, but apply decisions made by the two Committees of ICCPR and ICESCR. However, in Taiwan, we have the Implementation Act that requires all governmental institutions to apply the two Covenants, and the judiciary is no exception. Consequently, courts in Taiwan have obligations to apply the two Covenants. Nevertheless, as far as I know, only a few courts have applied the two Covenants in their adjudication. This may constitute the reason to appeal to the Supreme Court for not applying the law –the two Covenants– that should have been applied.

My fourth point is that, why should the courts have to apply these two Covenants? For many countries that have ratified ICCPR and ICESCR, they have to send reports to the Human Rights Committee and ICESCR Committee for supervision on their compliance. And if they have also ratified the first optional protocol of ICCPR, their citizens are allowed to file communications against their own states to the Human Rights Committee. However, it is a pity that Taiwan cannot successfully ratify the optional protocol of ICCPR, which means that citizens of Taiwan cannot bring cases to the Human Rights Committee. That is the reason that I suggest that the

domestic courts have obligations to refer to the decisions made by the Human Rights Committee. Second, I would explain how to realize this possibility. According to Article 3 of the Implementation Act, applications of the two Covenants should make a reference to their legislative purposes and interpretations made by the Human Rights Committee. I believe that domestic courts are obligated to make a reference to interpretations made by the Human Rights Committee. Nevertheless, there is one thing missing: the Implementation Act does not mention the committee of ICESCR. I therefore suggest that we should make an amendment to include the opinions of ICESCR committee.

The final point that I would like to discuss is the review of domestic laws. In Taiwan, Article 8 of Implementation Act requires all levels of governmental institutions review and revise domestic laws that are inconsistent with ICCPR and ICESCR. The provision stipulates that such review and revision process should be completed within two years, which means by December 10, 2011. Please be reminded that we will have a legislative election in 2011, and it has been a tradition that legislators would have a recess before the election. This would mean that we only have very short time from now to complete the task. What will happen if the legislators fail to complete the review and revision required by the law? It is as uncertain as the legal status of Article 8 of Implementation Act. Hopefully, the legislature will speed up this process, though I do not think it is very likely. Maybe I am wrong, and I hope I am wrong. These are the five points for my comments. Thank you.

#### **B. PROFESSOR DAVID LAW**

Professor Black is surely right to suggest that the ICESCR will receive less judicial enforcement than the ICCPR. There are at least two reasons for this. First, there is judicial reluctance to enforce rights that impose a cost on the public fisc and to interfere in such a blatant way with the allocation of scarce and fungible resources by the elected branches. Second, the ICESCR reads like a list of directives as opposed to judicially enforceable obligations.

Budgetary choices are difficult, and courts generally realize that they are not competent to make these kinds of choices. One example from the United States Supreme Court is *Schwarzenegger v. Plata*.<sup>84</sup> California has a chronic problem of prison overcrowding, to the point of violating the most basic constitutional rights of its prisoners in egregious ways. The prison system there was designed to accommodate roughly 80 thousand prisoners but now holds over 160,000 prisoners. The conditions are so dismal that people are

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84. *Schwarzenegger v. Plata*, 131 S.Ct. 631 (2010)..

actually dying from inadequate medical care, at the rate of roughly one person per week. The issue that the Supreme Court now faces is whether the courts can actually force the state of California to spend more money on its prisons.<sup>85</sup> Legally speaking, there is no real question that the federal courts can force state governments to do things that cost money, but the Supreme Court remains very reluctant. Even this was about clear-cut human rights of the prisoners, like that of life, but still the Court is being super-cautious. The reason for the Court's caution is that vindicating these kinds of rights costs a lot of money. The U.S. is known for having active judicial enforcement of constitutional rights, but still, when it comes to the allocation of resources, the Court becomes very cautious. As a result, I cannot imagine that the courts here in Taiwan would be more anxious to enforce, say, the right of education. That seems unlikely to me. So, although I'm going to refer to the "Covenants" in plural, I think that, as a practical matter, efforts at implementation and enforcement are going to center on the negative rights found in the ICCPR.

There are two problems I would like to discuss here. One is the fish or fowl problem: What is the legal nature of the Taiwan Implementation Act (TIA)? What exactly is the domestic legal status of these two Covenants? Is the TIA a statute that the Taiwanese Constitutional Court can enforce? Or is it a treaty which has been given a statutory form? Is it itself of quasi-constitutional status? This Act simply prescribes that the Covenants have domestic legal status. There is no express indication of quasi-constitutional status. Moreover, I would like to point out that the TIA also does not contain any interpretive rules directing the courts to read other statutes as consistent with the Covenants. That is the kind of interpretive rule you will find, for example, in the New Zealand Bill of Rights Act, and in the United Kingdom's Human Rights Act. Thus, the character of the TIA remains an important unresolved legal issue. Is it a statute, a treaty, or a "constitution's little helper" guide to interpreting the constitution? There are a number of possibilities.

The other problem is what might be called the direct versus indirect enforcement problem. In direct enforcement, we simply treat and enforce the TIA like a statute. There may be further questions about whether to give it greater force than regular statutes. For example, the Canadian Supreme Court declared that the 1960 Canadian Bill of Rights was quasi-constitutional. The other possibility is that the two Covenants can be enforced indirectly. That means that we can enforce the Covenants by allowing these Covenants to shape our interpretation of the rights that are

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85. For more issues of this case, *see*, for example, Sara Myers & John Sun, Legal Info. Inst., A Preview of *Schwarzenegger v. Plata* 131 S.Ct. 631, available at <http://topics.law.cornell.edu/supct/cert/09-1233> (last visited Feb. 21, 2011).

already found in the Constitution of the Republic of China (Taiwan). We already know that the interpretation of statutes can be influenced by the constitution. It is standard practice to read statutes in the light of the constitution. However, the interpretation of the constitution can also be considerably influenced by statutes. The British courts offer an example of this. Some sophisticated observers have contended that the British courts do not like to be seen as relying upon the European Convention on Human Rights to strike down domestic statutes, but rather prefer to leave the impression that the obligations found in the ECHR already exist in British law in the first place; that is to say, the British courts prefer to leave the impression that they can reach the same conclusion by interpreting domestic law as by enforcing the ECHR. I do not think it is always easy to force the domestic standard to become the same as the foreign standard. But there is a sense of pride: You don't want your national law to be not as good as the foreign or international law that you imported. We may reasonably think that the reason courts do not like to apply different domestic and international standards to the same case is that it complicates things, but I think there is also an element of national pride involved.

Here is an example of the kinds of questions and opportunities that the uncertainty surrounding the legal character of the TIA creates. Procedurally, there are statutory rules for the Taiwanese Constitutional Court that require a two-thirds majority to make a constitutional interpretation but just a simple majority for a uniform interpretation of the laws. So the question is, which of these two rules governs the TIA? Is the Court allowed to pick? It seems to me that perhaps it can. As I said, you can choose to treat the TIA like a statute or like a super-statute. So there is the potential for the Court to take the simple-majority approach and use the TIA to decide what are really constitutional questions as a way of getting around the two-thirds majority rule. I have talked to the justices of the Constitutional Court, and I know from talking to them that this two-thirds rule is sometimes a real barrier for them to reach constitutional interpretations.

The Taiwanese court can take advantage of the TIA's statutory status to minimize the counter-majoritarian difficulty. The court can say: "We are simply enforcing a law that the political majority adopted. If you don't like it, you only need to change the statute." Or, the Court can turn these statutory norms into entrenched constitutional norms by allowing these norms to shape its interpretations of the constitution. Undoubtedly, there are textual differences between the two Covenants and the R.O.C. Constitution. But due to the general implementation clause of the ICCPR, I do not think there would be much trouble.

Let me go back to the Canadian analogy. The idea with the TIA is that the legislature can override what the court says about the Covenants, because

the Covenants are adopted by statute. Will this fact make the court more willing to strike down laws? Some have argued that in Canada, the Supreme Court did become more active because legislators have a way to respond. Section 33 of the Canadian Charter of Rights and Freedoms, the “notwithstanding” clause, enables the legislature to re-enact a statute after the Court has already ruled it unconstitutional. Some have suggested that, precisely because the legislators have the power to override the Court’s decisions, the Court is more willing to strike down laws in the first place. Striking down laws in the presence of a legislative override feels less counter-majoritarian and can be characterized as a form of “dialogue” between the courts and the legislature, although, to be sure, the characterization of what the Canadian Supreme Court generates as “dialogue” as opposed to “monologue” has been fiercely disputed. The TIA raises similar questions. We can say that the TIA does generate dialogue, because the legislators have an opportunity to respond. So the question is: will the Taiwanese Constitutional Court be more willing to enforce the covenants because the TIA is just a statute and so applying it seems less counter-majoritarian? The opposite might happen as well. The Taiwanese Constitutional Court could read the ICCPR directly into the Constitution by interpreting the Constitution in light of the covenants. It might do so for domestic pride or reasons of analytical simplicity.

Whether the Taiwanese Constitutional Court will feel that enforcement of TIA is less counter-majoritarian feeds into a larger question that I think is the one we really care about. That is: what practical difference will the TIA make? Will we be even able to tell whether it has made a difference, if the Court simply uses the Covenants to shape its interpretation of the constitution? That kind of use of the TIA can be done silently. There is little to stop the Court from engaging in this kind of “stealth domestication” of the Covenants. Ultimately, will the TIA lead to greater rights enforcement in Taiwan? I’m a little skeptical. For starters, there has never been much to prevent the Court from reading the Covenants into the Constitution. The R.O.C. Constitution is like most constitutions: the language is fairly terse and the provisions are open-ended, particularly regarding rights. Rights provisions are written in language that is already very open to interpretation. So I would suggest that this TIA is just another tool, another arrow in the quiver, for the Court to use to strike down laws it doesn't like. But frankly the Court already has all the tools it needs to enforce the rights found in the Covenants. The rights found in the ICCPR are already available both directly and indirectly to the Taiwanese Constitutional Court—directly via citation of the ICCPR itself, and indirectly via the ICCPR’s influence on the jurisprudence of all the countries that the Court routinely takes into account anyway. The question is, why would this particular tool make a big

difference? Was the Court really held back by the fact that it could not call the Covenants domestic law? I do not think this additional tool is either a necessary or sufficient condition for enforcement of the rights found in the Covenants.

Last but not least, though perhaps this point may be a little controversial. What is the importance of these two Covenants being of U.N. origin? On the one hand, these two Covenants may send a message to the Taiwanese legislators and executive officials that their rules are actually invalid under the laws of an international organization that denies Taiwan's existence and cannot even be bothered to answer its mail. I wonder whether this might not create the risk of some sense of resentment, if not political attacks, against judicial decisions based on the Covenants. But on the other hand, maybe Taiwan's exclusion from the United Nations has made it more anxious to curry favour from the international community. This is what the sociologist John Meyer has called "the world society" phenomenon: countries feel obliged to behave in particular ways in order to win approval from "world society."<sup>86</sup> If someone has difficulties getting into a nightclub, he will become extra anxious to get into the nightclub. Taiwan is out there standing in the rain; South Africa just got into the building, Israel got hassled but eventually got in, but still the big red bouncer (China) keeps Taiwan out. I do not think it is naïve idealism to think that the response to the U.N. provenance of these covenants will be a desire to please the international community rather than to reject the covenants. I think my time is up. Thank you all.

### C. PROFESSOR WEN-CHEN CHANG

I would like to express my most sincere gratitude to Professor Black and the representatives from Canada for their generosity in offering insights and experiences about the Canadian systems on implementing the two Covenants and also other human rights. I have learned so much from Professor Black's lecture. I also learned very much from my colleagues, Professor Liao, Fu-Te and Professor David Law in their respective remarks. I think that Professor Law has already proved to us that it was possible to learn the Taiwanese law in a very short period of time. Professor Law knows so much about the Taiwanese legal system even though he has only been here for a little more than three months.

I would like to reflect upon Professor Black's lecture from three aspects. I think one crucial difference between Taiwan and Canada in terms of

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86. WORLD SOCIETY: THE WRITINGS OF JOHN W. MEYER (Georg Krücken & Gili S. Drori eds., 2009).

implementing the Covenants is that Canada was able to implement the two Covenants by constitutionalization. Here in Taiwan, however, we have a very old constitution which was promulgated in 1946, long before the two Covenants went into effect. Now we finally are able to ratify and implement the two Covenants, forty years later than our Constitution went into effect.

Before the ratification of the two Covenants and the enactment of the Implementation Act, our Constitutional Court has occasionally referred to the ICCPR, ICESCR and other international human rights treaties in their constitutional interpretations.<sup>87</sup> Empirically, there were 7 interpretations out of 684 where in the majority opinions our Constitutional Court referred to ICCPR or other international human rights treaties: a little more than 1%. This is not a very high ratio but still shows that the Court on occasion did refer to these international human rights treaties. In addition, we have about 18 separate –concurring and dissenting– opinions in which justices also referred to international human rights treaties. In other words, about 3% of separate opinions of our Constitutional Court referred to international human rights treaties and conventions, even prior to the promulgation of the Implementation Act and the ratification of the two Covenants. Here again we see some evidence of our Court's effort in trying to incorporate even non-binding international human rights norms into our domestic constitution.

What our Constitutional Court has done is very similar to the Canadian Court, notwithstanding that the cases are very few. As indicated earlier, we have a very old Constitution. Therefore, prior to the Implementation Act, when our Court cited those international human rights treaties, it was primarily to add some new rights into our very old list of constitutional rights. For example, right of privacy, right of information, and some other personal rights all were added into our Constitution by way of judicial reference to these international human rights instruments. And our Court also, occasionally, used international human rights to limit the existing rights. For instance, our Court referred to the Convention on Rights of the Child to argue that children have the right to be free from sexual exploitation and thus the limitation to free speech of sexually exploitative materials was justified

I would also like to share my view on the prospect of this Implementation Act. Will our Constitutional Court become more friendly, active or even aggressive to the incorporation of the rights in the two Covenants into our Constitution and the domestic legal regime? Had we constitutionalized the Covenants by the method of constitutional amendments, I would probably be more confident in answering that

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87. Wen-Chen Chang, *An Isolated Nation with Global-minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan*, 4(3) NTU L. REV. 203 (2009).

question. However, what we did in 2009 was just enacting the Implementation Act at the statutory level. This might actually create some technical difficulties for the Constitutional Court to incorporate international human rights in the course of their constitutional adjudication. As we all know, the Constitutional Court reviews laws and regulations based upon its understandings and interpretations of the Constitution. Prior to the Implementation Act, it was entirely in the discretion of the Constitutional Court if it preferred to rely only on the Constitution and the rights protected or if it preferred to invoke some international human rights or even universal norms for such interpretation. After the enactment of the Implementation Act, however, it is not at all clear on what basis the Court should refer to international human rights norms. Is it because of the requirement of the Implementation Act at the statutory level? Or is it because of some constitutional mandates or interpretations that implicitly require such references? Professor David Law suggested a while ago that the Constitutional Court might be able to ease the “counter-majoritarian” difficulty by invoking international human rights based upon the Implementation Act, a statutory mandate. But, modelled on the European style of judicial review, our Constitutional Court has never really had any “counter-majoritarian” difficulty on a conceptual or practical level, in striking down laws and regulations, or even constitutional amendments,<sup>88</sup> based upon the Constitution. Nevertheless, the Court might have problems if rendering constitutional interpretations based upon a mere statutory mandate. That is precisely what has been happening after the promulgation of the Implementation Act. The Constitutional Court actually became hesitant in invoking international human rights based upon –or not– the Implementation Act. The empirical evidence I can give so far is that after this Implementation Act went into effect, the Court has struck down several laws that infringed individual rights. But on no occasion did they make any explicit reference to the rights or spirits of the two Covenants.<sup>89</sup>

The other interesting development is related to the two-year period of statutory review and revision. In April 2010, about forty death row inmates

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88 . See J.Y. Interpretation No. 499 (2000), available at [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?exno=499](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?exno=499).

89. In its dismissal of constitutional petitions by forty death row inmates, the Constitutional Court had to deal with the Implementation Act as it was the legal base on which those inmates made their constitutional request. The inmates challenged constitutionality of death penalty and some of their sentencing processes as the violation of the ICCPR. While the Constitutional Court did not seem to reject the Implementation Act as part of its legal base or mandate in interpreting constitutional rights, it nevertheless did not take the opportunity to clarify the status of the Implementation Act and what relationship the rights of the ICCPR and ICESCR might have with the Constitution as a result of the Implementation Act. The dismissal was made in the 1358<sup>th</sup> Council meeting on May 28, 2010. The content of the dismissal in Chinese is available at <http://www.judicial.gov.tw/constitutionalcourt/p04.asp>.



made a constitutional petition to the Constitutional Court, challenging the constitutionality of their death penalty and some of their sentencing processes as the violation of the ICCPR based upon the ratification of the ICCPR and the Implementation Act. But the Court dismissed their request.<sup>90</sup> One of the grounds for the dismissal was the two-year period of review. The Court reasoned that the government still had two years to review, and therefore, it was premature to adjudicate on the matter.<sup>91</sup> While in this dismissal, the Court did not seem to reject the Implementation Act as part of its legal base or mandate, it did not clarify the status of the Implementation Act and the relationship between the Implementation Act, the rights guaranteed in both ICCPR and ICESCR and the Constitution. It is not clear what attitude the Court will hold towards the Implementation Act and the rights protected in the ICCPR and ICESCR once this two-year period passes.

In contrast with the rather limited role of the government and courts in domestic incorporation of international human rights, however, our nongovernmental organizations (NGOs) have done a great deal after the promulgation of the Implementation Act. There were several workshops held by NGOs trying to examine how much –and to what degree and in what ways– our existing laws and regulations would have been found inconsistent with the two Covenants. Elsewhere I have argued that the NGOs in Taiwan played a significant role in advocating the ratification of international human rights treaties and facilitating their domestic incorporation and compliance.<sup>92</sup> In many constitutional cases where international human rights treaties were referred to, such references were often initiated by the NGOs or individuals. In Taiwan, there clearly exists a huge gap between the NGOs on one side and the government on the other regarding their very different attitudes and actions toward the two Covenants and many other international human rights treaties.

I would like to conclude here by answering one further question asked by Professor Black: in what ways Taiwan can –or cannot– implement the ICESCR better than Canada. Notwithstanding the dimming prospect I offered with regard to the government's implementation on the two Covenants, I nevertheless would like to offer some positive steps that have been already undertaken in environmental litigation and some public interest litigation by children's rights groups in Taiwan.<sup>93</sup> These groups have had

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90. The dismissal was made in the 1358<sup>th</sup> Council meeting on May 28, 2010. The content of the dismissal in Chinese is available at <http://www.judicial.gov.tw/constitutionalcourt/p04.asp>

91. See *id.* For further discussions on this dismissal, see Wen-Chen Chang, *Comment on the Dismissal of Constitutional Petitions by Death-Row Inmates*, in GRAND JUSTICES, PLEASE GIVE REASONS 347-66 (Judicial Reform Foundation ed., 2010) (in Chinese).

92. Chang, *supra* note 87.

93. See Wen-Chen Chang, *Public-Interest Litigation in Taiwan: Strategy for Law and Policy Reforms in Course of Democratization*, in PUBLIC INTEREST LITIGATION IN ASIA 136-60 (Po Jen Yap

quite successful public interest litigation in their respective rights advocacy, and they were quite excited by the fact that Taiwan also ratified the ICESCR and the Implementation Act also included it. They might put forward some test cases regarding for example right to water or right of education related to the ICESCR. We do not know if their litigation would be successful and to what extent those rights arguments would be accepted by the Court, but this is certainly the progress that we are all very much looking forward to.

#### **D. MAGDA SEYDEGART**

I would like to discuss the responses of civil society to the implementation of the two Covenants, and refer to some experiences we have had in Canada. There are three areas that can be part of your engagement in the human rights projects: policy development, operations and implementation, and education. Today I will focus mainly on the policy level.

First of all, we should be aware that the government will not only use the court as their way of implementing the two Covenants, but they will also start to design policies. It is a tremendous advantage if individuals and NGOs are engaged in the project of these policy analyses, and you are prepared to discuss all the relevant policies and ideas in conferences, workshops and many other activities. That is how it happened in Canada. When the Canadian Charter of Rights and Freedoms first came into effect, we had an absolute burst of civil society responses, such as activism, conferences, and publications. Now you can even have online discussions, which were not available in 1982, that can be extremely dynamic and generate many different policy options for analysis. When the Canadian Charter was passed in 1982, we immediately published high-level compilations of essays, and the government paid a great deal of attention to those essays. These civil society discussions can broaden the range of topics, moving away from very strict analyses of the law –how it might be interpreted in one court or another– to a whole array of other issues that may emerge out of the implementation of the Charter in our case, and of the two Covenants in Taiwan’s case. These discussions in civil society are pivotal. Otherwise, it will always be the government that sets the agenda for what gets discussed, and what does not, what process gets applied, and what does not. Moreover, I do not think these discussions are exclusively in the domain of NGOs. I believe it is also the domain for law faculties, political science faculties, the literary community, the arts community, and the minority and majority communities.

Another strategy on policy is to take a look at how other members of the UN, or the world community, have absorbed the law, the two Covenants, and what they have learned from other jurisdictions. The direction I would like to point out is the important question of designing cases. It is the community of legal scholars that can attract or find very strong cases to bring forward to the courts to test certain principles of law or to apply some dimensions of the Covenants. Proactive development or selection of a strong test case is greatly recommended, rather than risking a weak case that will be lost in court on minor legal points. In Canada NGOs have worked hard to select strong test cases for the purpose of court challenges. For example, regarding the rights of women in Canada, we have an organization that started around the time when the Canadian Charter was passed, and I urged you to take a look online because this organization has done some fascinating work in finding testing cases by looking at the more complex issues and allowing some simple and strong cases to go forward in the courts. This group is known as Women's Legal Education and Action Fund (LEAF).<sup>94</sup>

The other strategic example that can be learned from Canada's legal community is a virtual Women's Court. It is made possible by individuals with a deep commitment and strong legal analysis. These people select certain decisions made by the Supreme Court: decisions that have ruled not in favour of women, decisions that have in some ways restricted the rights of women or interpreted those rights very narrowly, or even decisions that have not been considered as women's rights issues. Once decisions are selected, those who work with the virtual Woman's Court of Canada then rewrite the decisions through a feminist lens. In other words, they analyse the same issue in those selected cases as if they were appealed to the virtual Women's Court. It is fascinating, experimental, and dynamic. The Women's Court analysts rewrite the decisions in a disciplined manner, which means they rewrite it in the language of the court and with juridical analyses. These re-viewed cases are used increasingly now by law faculties to review Supreme Court cases particularly concerning women's rights.

Both LEAF and the Women's Court of Canada are creative models, which may deserve further consideration here in Taiwan.

We have tried many other strategies in Canada, but I do not want to take up too much time because I am more interested in your comments. Nevertheless I would like to say two more things. First, the government of Canada occasionally establishes special commissions of inquiry into particular topics. This type of national inquiry commission allows a wide ranging discussion around fundamental or emerging issues. Probably Taiwan

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94. WOMEN'S LEGAL EDUCATION AND ACTION FUND, <http://www.leaf.ca> (last visited Mar. 1, 2011).

also has institutions parallel to this. Such a commission may bring out some very important issues, develop strategies at statutory or policy levels for implementation of change, and undertake educational efforts.

The last thing I would like to emphasize is that education about human rights is essential. Human rights education for judges, for government officials, for border-control personnel and for children and youth will have profound influences upon individuals who are going to see their rights being protected, or infringed. In addition, creating a new generation of young people who are aware of human rights has to be placed high on the agenda, and it will be crucial to train a new bank of scholars and activists for teaching and researching.

Thank you for this opportunity to share our experience.

#### IV. GENERAL DISCUSSIONS AND RESPONSE

*Chien-Chih Lin (College of Law, National Taiwan University):*

Thank you, Professor Black, for the very enlightening lecture, and thank you, Prof. Hwang, for organizing this roundtable discussion. Professor Chang mentioned that only about one percent of the interpretations by the Constitutional Court cited international human rights treaties in their decisions. Empirically, how often does the Supreme Court of Canada refer to or cite international human rights treaties, including but not limited to the ICCPR and ICESCR in its decisions?

*Professor William Black:*

I think they cite frequently. Probably more international human rights treaties are cited after the Charter came into effect. Sometimes the Court adopts a presumption that I discussed earlier in my talk. Other times it recognizes that international human treaties are binding. I think the percentage of decisions where international human rights treaties are referred to is probably about 10 percent.

*Yung-Djong Shaw (College of Law, National Taiwan University):*

My question is that you, Professor Black, mentioned the Canadian Supreme Court failed to incorporate international human rights into the Canadian Constitution at the beginning, and it took 22 years to learn that mistake. After the Charter came into effect, the Court started to incorporate international human rights into it. Was there any external element, including the pressure from NGOs or from the Canadian civil society, that made this

happen?

*Professor William Black:*

In that period, there was widespread criticism against the Court. The reputation of the Court was down. The other thing I would like to mention is that there was no attempt to educate the Court about what they would be, how other courts or jurisdictions have already done. Since that time, however, they did accept the mistake and established a national judicial institute. They created new educational programs not only for new judges but also for very senior judges. It was part of the program as to how to deal with the integration of international human rights domestically. I believe these efforts made a big change. The judges became confident that they understood those international human rights and their roles in incorporating those rights. They eventually became less conservative.

*Yi-Li Lee (College of Law, National Taiwan University):*

As you, Professor Black, indicated in the lecture, human rights commission is another important institution that protects human rights. Would you please briefly introduce how the national human rights commission apply the two Covenants in Canada?

*Professor William Black:*

The national human rights commission helps interpret the statutes and the Constitution. They also interpret the Charter, and probably quite often refer to international human rights treaties and relevant decisions in their works.

*Hsin-Yang Lee (College of Medicine, National Taiwan University):*

I think Professor Law made a very good point that all the Covenants are just adding another tool for interpreting the Constitution. I am wondering if the perspective of courts is really changed by those Covenants. I think it does not really need 22 years for such change to take place, and perhaps it is the society rather than the two Covenants that change the law.

*Professor David Law:*

I think this law or society question is a chicken or egg question. The empirical research suggests that there is barely any tie between human rights

guarantees and actualization of those rights. In fact, sometimes the relationship is negative: countries that protect rights from being torture have more torture in reality. I like the fact that law professors assume their writings really have an impact, but I think what we all agree is that the law has to be done on the ground to make rights more than an empty cynical mockery.

*Professor William Black:*

The law does not change things without society, and the society without the law would not make any meaningful changes. In other words, one step on the one side, and one step on the other.

*Professor Wen-Chen Chang:*

I would like to point out that I think the Taiwanese society is quite ready for the incorporation of the two Covenants. As I mentioned earlier, the NGOs in Taiwan have made all possible efforts to bring into the attention of government with regard to ratifying the two Covenants and other conventions, such as the Convention on Eliminations of Discriminations against Women (CEDAW) and the Convention on the Rights of the Child (CRC). There have been a great number of workshops held by NGOs and academic institutions. For example, we will organize a workshop with NGOs in December with regard to the compliance of the two Covenants, particularly on the writing of NGOs' shadowy reports. But admittedly, there are still lacking the pressure to the government and also some more educational programs to the society. The implementation of the two Covenants has been greatly emphasized by the NGOs but not so much by the government, let alone the civil society at large.

*Yi-Sheng Liu (College of Law, Tsinghua University):*

Good morning, Professor Black. We all know that Canada is a country with lots of legal and illegal immigrants. After the adoption of the two Covenants, have the illegal immigrants had effective remedies from the Canadian courts? And if something illegal takes place outside Canada, will the Canadian courts still have the jurisdiction over such cases?

*Professor William Black:*

In terms of the remedy for matters outside Canada, our courts have been somewhat ambiguous about that. In general, our courts have stated that they

cannot enforce rights where the violation occurred outside Canada.

*Professor Jau-Yuan Hwang:*

Due to the time constraint, we have to conclude this roundtable now. Once again, I would like to thank Professor Black and Ms. Magda Seydegart for sharing with us their experiences in Canada. Also, I would like to thank the three other discussants: Professors Fort Fu-te Liao, David Law and Wen-Chen Chang. My special thanks also go to the Canadian Trade Office in Taipei for proposing this event and making it possible. Last but not the least, I would like to thank all of you for participation. I hope we will have more roundtables or workshops on human rights laws in the future. Thank you all.

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