

ARTICLE

RECONCEPTUALIZING PRESIDENTS' CLEMENCY POWER UNDER THE FRAMEWORK OF HUMAN RIGHTS: THE RIGHT TO SEEK CAPITAL CLEMENCY IN TAIWAN

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ABSTRACT

The incorporation of the International Covenant on Civil and Political Rights into Taiwan's domestic law provided death row inmates with the legal basis to submit requests for the President's mercy. However, Presidents have persistently ignored these requests without any response to the inmates, and the judiciary regularly dismissed the cases of the inmates by rendering decisions in support of the Presidents' inaction. The court justifications for these decisions were that the clemency power falls under the executive prerogative, and that it is a political question in nature and therefore not subject to judicial oversight. This Article argues against these justifications. Firstly, the presidential clemency power is constrained by the principle of legality and due process in government decision-making. As such, the President is obligated to respond to the requests according to relevant laws and due process requirements. Secondly, the presidential clemency power does not meet the criterion for the political question doctrine in Taiwan. In the United States—the country from which Taiwan borrows the political question doctrine—the pardoning power is subject to judicial review and not treated as purely a political question free of any oversight. Additionally, under the right to an effective remedy, preserved in Article 2 (3) of the Covenant, Taiwan's judiciary must adjudicate on cases brought by inmates on the merits, as their right to seek capital clemency would otherwise be violated. In viewing the presidential

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clemency power through the lenses this Article discusses, the power would no longer be a prerogative without limitations; instead, it would be a power exerted under the framework of human rights law with the checks and balances of the legislature and the judiciary.

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I. INTRODUCTION

Fourteen inmates on death row in Taiwan filed petitions to the President from 2015 to 2017 for a pardon or commutation of their sentences, but they didn't receive any responses from the President.¹ They subsequently brought their complaints through the administrative appeal process and then through review by the lower administrative court,² but received dismissals from both channels.³ Finally, their cases reached the Supreme Administrative Court, the court of the last resort for administrative lawsuits. Not surprisingly, their cases were returned with another dismissal in the last month of 2022.⁴ Nonetheless, those death row inmates are

1. See Zongtongfu Huazongsu Zidi 10600118263 Hao Suyuan Juedingshu (總統府華總訴字第10600118263號訴願決定書) [Huazongsu No. 10600118263 Administrative Appeal Decision of the Office of the President]; Zongtongfu Huazongsu Zidi 10700008993 Hao Suyuan Juedingshu (總統府華總訴字第10700008993號訴願決定書) [Huazongsu No. 10700008993 Administrative Appeal Decision of the Office of the President]; Taibei Gaodeng Xingzheng Fayuan 107 Niandu Su Zidi 274 Hao Caiding (臺北高等行政法院107年度訴字第274號裁定) [Year 107 Su No. 274 Ruling of the Taipei High Administrative Court]; Taibei Gaodeng Xingzheng Fayuan 107 Niandu Su Zidi 611 Hao Caiding (臺北高等行政法院107年度訴字第611號裁定) [Year 107 Su No. 611 Ruling of the Taipei High Administrative Court].

2. See sources cited *supra* note 1.

3. Ding Muqun (丁牧群), *Shisi Siqu Qiu Huoming Gao Caiyingwen Tao Teshe Fayuan Bohui Liyou Puguang* (14死囚求活命! 告蔡英文討特赦 法院駁回理由曝光) [*Fourteen Death Row Inmates Asked for Sparing Their Lives! Suing Tsai Ing-wen for Granting Pardons. The Reasons for the Denial of the Court Are Released*], YIPING XINWEN WANG (壹蘋新聞網) [NEXTAPPLE NEWS] (Sept. 1, 2022), <https://tw.nextapple.com/local/20220901/0182F800E8C4AAE140CAC235A3813C6B> [https://perma.cc/A924-NY29].

4. Zuigao Xingzheng Fayuan 111 Niandu Kang Zidi 301 Hao Caiding (最高行政法院111年度抗字第301號裁定) [Year 111 Kang No. 301 Ruling of the Supreme Administrative Court]; Zuigao Xingzheng Fayuan 111 Niandu Kang Zidi 303 Hao Caiding (最高行政法院111年度抗字第303號裁定) [Year 111 Kang No. 303 Ruling of the Supreme Administrative Court]. See Lin Weixin (林偉信), *Shisan Siqu Qingqiu Zongtong Teshe Huo Jianxing Tigao Zhe Liyou Bohui Queding* (13死囚請求總統特赦或減刑提告 這理由駁回確定) [*Thirteen Death Row Inmates Who Petitioned for the President's Pardons or Commutation of Sentences Brought Their Cases to the Judiciary; The Dismissal of Their Cases Are Final and Binding Because of This Reason*], ZHONG SHI XINWEN WANG (中時新聞網) [CHINA TIMES NEWS NETWORK] (Dec. 8, 2022) (Taiwan),

not alone. On the contrary, members of the death row population have brought legal challenges against the President's clemency power vis-a-vis judicial review since 2010.⁵ The time spans across the periods of President Ma Ying-jeou (2008 through 2016) and President Tsai Ing-wen (2016 to present). President Ma strongly supported the capital sentence on the condition that the State used it with caution.⁶ Thirty-three death row inmates were executed during his tenure.⁷ By contrast, President Tsai used to state that "abolition of the death penalty is a universal goal."⁸ At the time of publication, there have been only two executions since she assumed office⁹—one in 2018 and the other in 2020.¹⁰ Although

<https://www.chinatimes.com/realtimenews/20221208004561-260402?chdtv>
[<https://perma.cc/Z4DQ-DA4C>].

5. Miao Poya (苗博雅), *You Quanli Mei Jiuji You Quanli Mei Huiying Renzhen Kandai Siqu Qingqiu Shemian huo Jianxing de Quanli* (有權利、沒救濟；有權利、沒回應—認真看待死囚請求赦免或減刑的「權利」) [*Having a Right without Any Remedies, Having a Right without Any Responses: Taking the Right to Pardon and Commutation of Capital Inmates Seriously*], 102 SIFA GAIGE ZAZHI (司法改革雜誌) [JUD. REFORM J.] 59, 59 (2014) (Taiwan).

6. *Ma Strongly Backs Death Penalty*, *TAIPEI TIMES* (Apr. 26, 2016), <https://www.taipetimes.com/News/taiwan/archives/2016/04/26/2003644857>
[<https://perma.cc/8F2L-86YP>].

7. Zhengzhi Zhongxin (政大中心), *Ying Ma Yingjiu Shiqi Banian Qingjue Sanshisan Ren Zuihou Fufa de Shi Zhengjie* (影／馬英九時期8年槍決33人 最後伏法的是鄭捷) [*Video/Thirty-Three Were Executed by Gunshot during the Eight-Year Term of the Ma Ying-jeou. The Last One to Be Executed Was Zheng Jie*], *ETTODAY XINWEN YUN* (ETTODAY新聞雲) [ETTODAY NEWS] (Aug. 31, 2018) (Taiwan), <https://www.ettoday.net/news/20180831/1248313.htm> [<https://perma.cc/3MKR-S974>].

8. Li-hua Chung, *Support for Death Penalty High: Poll*, *TAIPEI TIMES* (Sept. 13, 2022), <https://www.taipetimes.com/News/taiwan/archives/2022/09/13/2003785231>
[<https://perma.cc/93QP-ZDKD>]; Huang Jianhao (黃建豪), *Lanying Mindiao 86.9% Fandui Feisi, 79.9% Ren Cai Zhengfu Yi Shizhi Feisi* (藍營民調 86.9%反對廢死、79.9%認蔡政府已實質廢死) [*Blue camp poll: 86.9% oppose abolition of death penalty, 79.9% believe Tsai administration has in reality abolished the death penalty*], *NEWTALK XINWEN* (Newtalk新聞) [NEWTALK NEWS] (Sept. 12, 2022), <https://newtalk.tw/news/view/2022-09-12/815583>
[<https://perma.cc/3TCZ-BBPB>].

9. Carolyn Hoyle & Saul Lehrfreund, *Time to Scrap Capital Punishment*, *TAIPEI TIMES* (Feb. 10, 2023), <https://www.taipetimes.com/News/editorials/archives/2023/02/10/2003794074>
[<https://perma.cc/2RKR-X4S2>].

10. Lin Wilson (林偉信), *Cai Zhengfu Yu 3 Nian Wei Zhixing Sixing 38 Siqu Yao Buyao Qiangjue Zhengyi Wei Jie* (蔡政府逾3年未執行死刑 38死囚「要不要槍決」爭議未解) [*The Tsai administration has not executed executions for more than three years, and the controversy over whether 38 death row inmates should be shot remains unresolved*], *ZONG SHI XINWEN WANG* (中時新聞網) [CHINA TIMES NEWS NETWORK] (Aug. 14, 2023, 7:52 AM)

the two Presidents expressed opposition to the death penalty, the judiciary dismissed the death row inmates' lawsuits seeking the President's mercy without any exceptions.¹¹

Why did death row inmates in Taiwan begin looking for presidential pardons or commutations of their capital sentences in 2009? The answer lies in the fact that 2009 is the year Taiwan's legislature ratified and integrated the International Covenant on Civil and Political Rights (ICCPR) into Taiwan's domestic law. According to Article 6(4) of the Treaty, everyone sentenced to death shall enjoy "the right to seek pardon or commutation of the sentence."¹² Subsequently, inmates on death row brought their requests to the President. The President did not directly reject the requests from death row inmates, but instead, took a passive stance and did not respond to the requests. Interestingly, despite the fact that this right has been enshrined in the law without any ambiguity, the courts repeatedly denied the cases brought by the inmates with decisions in support of the President's inaction. The court decisions rely on the reasoning that clemency power is the President's constitutional prerogative and is not subject to judicial oversight.¹³ Thus, according to the courts' reasoning, the President has unfettered discretion in deciding whether to grant pardons and commutations.

The inaction of the President with the support from the courts has drawn criticism from inside and outside of Taiwan as well as from academia or the practice. Jerome A. Cohen, a professor emeritus at NYU School of Law, for example, has urged Taiwan's legislature to establish a specific procedure for reviewing the petitions for pardon or commutation of sentence from death row inmates to accomplish the legal requirement imposed by the ICCPR; this procedure is integral for every criminal legal system to

(Taiwan), <https://www.chinatimes.com/realtimenews/20230814000873-260402?chdtv> [<https://perma.cc/8VWK-RXJD>].

11. Michael Caster, Taiwan: *Can Tsai Ing-Wen Change the Politics of Death? The Incoming President Faces a Debate Over the Death Penalty*, THE DIPLOMAT (Feb. 10, 2016), <https://thediplomat.com/2016/02/taiwan-can-tsai-ing-wen-change-the-politics-of-death> [<https://perma.cc/S9Z4-2PEM>]. President Tsai was also expected to make some changes to the enduring problem of the death penalty. *Id.*

12. The International Covenant on Civil and Political Rights, art. 6, ¶ 4, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

13. See discussion *infra* Section II.B.

be a fair one.¹⁴ In the same year, Yiu-chen Su, a lawyer and the then chairman of Human Rights Committee of the Taiwan Bar Association, and Fort Fu-Te Liao, a human rights scholar, also made the same suggestion to the government.¹⁵ However, the absence of such a procedure remains. Hui-Huang Lin, former public prosecutor and the then-President of the Academy of the Judiciary, criticized the Taiwanese government for the lack of a review procedure for capital clemency requests in 2015.¹⁶ Ting-Chi Liu, a law professor in Taiwan, went a step further by blaming the Supreme Administrative Court for being too self-restrained to conduct any meaningful review of the dispute about the President's clemency power and the right to seek capital clemency.¹⁷

As such, this Article aims to take on the persistent conflict between the President's clemency power and the right to seek capital clemency of death row inmates. This executive sovereign power has its historical roots in the common law system¹⁸ as well as the civil law system.¹⁹ Finding a middle ground in this dispute is a seismic conundrum because it touches the death penalty—a

14. Jerome A. Cohen & Yu-jie Chen, *Slippery Slope*, SOUTH CHINA MORNING POST (May 11, 2010) (Hong Kong), <https://www.scmp.com/article/713979/slippery-slope> [https://perma.cc/MB2K-C8E5].

15. Su Yiu-chen (蘇友辰), *Sixing de Shemian Wenti* (死刑的赦免問題) [*The Question of Pardoning Death Row Inmates*], ZIYOU PINGLUN WANG (自由評論網) [LIBERTY TIMES NET] (Feb. 5, 2010), <https://talk.ltn.com.tw/article/paper/371807> [https://perma.cc/J8R6-38CT]; see also Fort Fu-Te Liao, *The Abolition of the Death Penalty in Taiwan: Why a de facto Moratorium was Established and Lost*, 11 ASIA-PAC. J. HUM. RTS & L. 1, 20 (2010).

16. Lin Huihuang (林輝煌), *Siwang de Zhengyi Guoji Renquan Fa Xuangao Sixing zhi Zhengdang Chengxu Zhong* (死亡的正義—國際人權法宣告死刑之正當法律程序(中)) [*The Justice for Death: The Due Process for the Declaration of Capital Punishment under the International Human Rights Law (II)*], 66 FALING YUEKAN (法令月刊) [L. MONTHLY], no. 1, 2015, at 1, 29 (Taiwan).

17. Liu Ting-Chi (劉定基), *Guoji Renquan Gongyue Neiguofa Hua Dui Sifaa Shiwu de Yingxiang Yi Xingzheng Fayuan Caipan Wei Gauncha Zhongxing* (國際人權公約內國法化對司法實務的影響—以行政法院裁判為觀察中心) [*The Influence of the Domestication of International Human Rights Treaties on the Judicial Practice: Focus on the Decisions of the Administrative Courts*], 67 FALING YUEKAN (法令月刊) [L. MONTHLY], no. 10, 2016, at 78, 88-91 (Taiwan).

18. See generally ANDREW NOVAK, *COMPARATIVE EXECUTIVE CLEMENCY: THE CONSTITUTIONAL PARDON POWER AND THE PREROGATIVE OF MERCY IN GLOBAL PERSPECTIVE* (2016).

19. See generally Sonsoles Arias & Antonios Kouroutakis, *Separation of Powers and Executive Clemency in the Civil Law World: A Comparative Study*, in *EXECUTIVE CLEMENCY: COMPARATIVE AND EMPIRICAL PERSPECTIVES* 58 (Daniel Pascoe & Andrew Novak eds., 2021).

highly debated human rights issue—on one side and the President’s clemency power—an executive prerogative—on the other. Despite this, there has been little research on it.²⁰ For that reason, this Article endeavors to make a contribution to the scholarship on this topic.

This Article is organized as follows: Part I begins with the law and the sparse use of the President’s clemency power in Taiwan over the recent decades. It then turns to court decisions to assess how the courts handled conflicts between the clemency power and the right to seek pardon or commutation of death sentences after the ICCPR was integrated into Taiwan’s domestic law. Part I subsequently demonstrates how death row inmates drew on the ICCPR to reinforce their arguments; however, their efforts were made to no avail. The main finding of this Part is that the court decisions frequently favored the President in the choice between the President’s powers and those facing death.

The judicial response made it easier for the President when facing challenges against the prerogative power. The judiciary takes two approaches to undergird its reasoning and to address the conundrum before it: the “No Obligation Approach” and the “Political Question Approach.”²¹ The former allows the President not to take any meaningful steps on the requests for mercy in capital cases; the latter prevents the courts from reviewing the President’s non-decisions on their merits and allows them to dismiss the cases with procedural grounds. The two approaches, however, raise the concerns about whether the right to seek capital clemency and the right to an effective remedy, both enshrined in the ICCPR, have been violated.

In order to understand the development of the presidential clemency power in Taiwan, Part II explores the key elements of the right to seek capital clemency through examining the resolutions

20. Su and Xiong’s studies on China, Gumboh’s study on Malawi, and Pascoe and Novak’s study on China, Taiwan and Japan are notable exceptions. See Su Caixia, *The Present and Future: The Death Penalty in China’s Penal Code*, 36 OKLA. CITY U.L. REV. 427 (2011); Moulin Xiong, *Executive Clemency in Capital Cases: Inadequate Laws and Inactive Practice in Contemporary China*, in EXECUTIVE CLEMENCY COMPARATIVE AND EMPIRICAL PERSPECTIVES 164 (Daniel Pascoe & Andrew Novak eds., 2021); Esther Gumboh, *The Death Penalty in Malawi: An Assessment against Regional and International Human-rights Standards*, 33 S. AFR. PUB. L. 1 (2018); Daniel Pascoe & Andrew Novak, *Deadly Justice without Mercy in East Asia?*, 46 (2) INT’L J. COMP. & APPLIED CRIM. JUST. 141 (2022).

21. See discussion *infra* Section II.B.

of the relevant UN political bodies, including the UN General Assembly, the Economic and Social Council (ECOSOC) of the UN and the UN Commission on Human Rights (later succeeded by the UN Human Rights Council). Part II also examines the General Comments and case law of the Human Rights Committee. Through tracing the evolution of the right to seek capital clemency, Part II presents and analyzes the development of this right in the first two decades after its emergence, as well as the stagnation that continued throughout the 2000s. In the 2010s, particularly the second half, considerable progress was made.

After the explication of the development of the right to seek capital clemency at the international level in Part II, Part III turns to the domestic level, discussing how the Constitution may curb the clemency power of the President and thus allow more space for the full realization of the right to seek capital clemency. This Part specifies two Constitutional principles regulating the President's exercise of the clemency power. The first is the principle of legality, which requires the President to wield the clemency power in accordance with law.²² The ICCPR and the General Comments, as well as case law, as part of Taiwan's domestic law, have the ability to constrain the presidential clemency power. The second principle this Part discusses is the relationship between ICCPR jurisprudence and Taiwan's legal system. Paragraph 47 of General Comment 36 affirms that state parties are afforded with the obligation to allow individuals sentenced to death to seek clemency.²³ Therefore, the No Obligation Approach, which the Supreme Administrative Court applies, helps the President shirk such obligation and therefore becomes untenable. The second is the requirement of due process. When the President is about to make decision on the clemency requests, she shall follow the procedural requirements designated by the Constitution and General Comment No. 36, including the right to be informed, the right to make representation, the right to be heard, the requirement that requests for capital clemency be meaningfully considered and conclusively decided upon, and the requirement that no particular category of persons sentenced to death be *a priori* excluded from clemency.

22. MINGUO XIANFA [CONSTITUTION] art. 40 (1947) (Taiwan). See discussion *infra* Section III.A.

23. See discussion *infra* Section III.B.

Moreover, after recognizing that the Clemency Act, as part of Taiwan's domestic law, does not provide meaningful procedural restraints on the President's clemency authority, Part IV presents and evaluates a second principle: due process in the government's decision-making. This principle has roots in the Constitution and matches some requirements of paragraph 47 of General Comment 36, such as the right to be informed; the right to make representation; the right to be heard; the right to meaningful consideration and conclusive decision-making for clemency requests; and the right not to be *a priori* excluded from clemency by virtue of belonging to a certain category of persons sentenced to death.²⁴ Therefore, the President's persistent neglect of capital clemency requests has violated certain due process requirements and General Comment 36's requirements. This Part also finds that there are four guiding principles, that is, effectiveness, transparency, fairness, and informativeness, helping to categorize the essential elements of the right to seek clemency in death penalty cases.²⁵

Part V precedes the Conclusion. It specifically focuses on the Political Question Approach and the hurdle it causes for courts to review capital clemency cases on their merits.²⁶ In the first half of Section A, this Article traces the development of the political question doctrine in Taiwan. It finds that although this doctrine has roots in US law, it nonetheless takes on its own particular form in Taiwan.²⁷ Pursuant to the criterion of Taiwan's version of this doctrine, this Article argues that issues of the clemency power are not political questions, and are therefore still eligible for court system's review of the merits. The second half of Section A turns to the political question doctrine in the US. It shows that the President's pardoning power is subject to judicial review and is not considered as a political question. Section B further calls for the strengthening of the courts' responsibility by resorting to Article 2(3) of the ICCPR. This Section argues that if courts fail to review capital clemency cases on their merits, they not only allow for the infringement of the right to capital clemency to remain, but they

24. See discussion *infra* Section III.B.

25. See discussion *infra* Section III.C.

26. See discussion *infra* Section IV.A.

27. See discussion *infra* Section IV.A.1.

also frustrate death row inmates' right to an effective remedy. Thus, the courts act in contravention of Article 2(3) of the ICCPR.

II. CLEMENCY POWER, HUMAN RIGHTS, AND THEIR CLASHES IN TAIWAN

This Part commences by discussing the law and limited utilization of the President's clemency authority in Taiwan over the past decades.²⁸ It then examines court rulings to evaluate how conflicts between the clemency power and the right to seek pardon or commutation of death sentences were handled after the integration of the ICCPR into Taiwan's domestic legislation.²⁹ Furthermore, it illustrates how death row inmates invoked the ICCPR to support their arguments, but unfortunately, their endeavors did not yield successful outcomes.³⁰ The key conclusion of this Part is that court decisions often favor the President and rely on two approaches: the "No Obligation Approach" and the "Political Question Approach."³¹

A. *The State of Law and Practice of the President's Clemency Power*

The clemency power of the President is traditionally viewed as a prerogative, especially in English-speaking countries.³² Clemency indicates the demonstration of mercy or leniency.³³ The US Supreme Court describes such executive authority as unfettered and plenary.³⁴ In Taiwan, pursuant to Article 40 of its Constitution, the President is authorized to exert the clemency power through four channels: amnesty, pardon, commutation of sentence, and restitution of civil rights.³⁵

28. See discussion *infra* Section II.A.

29. See discussion *infra* Section II.B.

30. See discussion *infra* Section II.C.

31. See discussion *infra* Section II.B.

32. NOVAK, *supra* note 18, at 4-6.

33. James N. Jorgensen, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 347 (1993).

34. Schick v. Reed, 419 U.S. 256, 262 & 266 (1974).

35. MINGUO XIANFA art. 40 (1947) (Taiwan) ("The President shall, in accordance with law, exercise the power of granting amnesties, pardons, remission of sentences and restitution of civil rights.").

In accordance with the Clemency Act, an amnesty may void one's guilt and sentence after conviction or declare one's offense free of prosecution before conviction.³⁶ There has been only one amnesty case in Taiwan since World War II.³⁷ As for a pardon, the President may enact it in one of two forms: partial or full. The former remits punishment, and the latter voids conviction and sentence.³⁸ Whether in part or in full, a pardon takes effect prospectively and does not have any backward influence.³⁹ Presidents have granted eight pardons over the country's history;⁴⁰ five of the pardons occurred after the Martial Law period, which ended in 1987.⁴¹ Commutation of sentence reduces the original punishment.⁴² Restitution of civil rights allows the President to restore one's civil rights.⁴³ In the context of Taiwan's criminal law, such civil rights include the right to be a public official and the right to seek candidacy for public office.⁴⁴

36. Shemian Fa (赦免法)[The Clemency Act], art. 2, FAWUBU FAGUI ZILIAOKU, Sept. 24, 1991 (Taiwan).

37. Liu Hengwen (劉恆文), 1970 Niandai Zhiqian Zhonghua Minguo Shemian Shijian de Chuantong Secai (1970 年代之前中華民國赦免實踐的傳統色彩：以「復仇」、「官蔭」與「留養」為主的討論) [*Traditionalism in Pre-1970 Pardons in the R.O.C.: The Principles of "Avenging the Death of a Father," "Inheritance of Officialdom's Privileges," and "Sparing Remaining Descendant for Parents"*], 39 FAZHISHI YANJIU (法制史研究) [J. LEGAL HIST. STUD.] 197, 198 (2022) (Taiwan).

38. The Clemency Act, arts. 3 & 4 (Taiwan).

39. See Sifa Yuan Dafaguan Jieshi No. 283 (司法院大法官解釋第 283 號) [Judicial Yuan Interpretation No. 283] (1991) (Taiwan). The Judicial Yuan is the highest office of the judiciary in Taiwan. See MINGUO XIANFA art. 77 (Taiwan); see also Zuigao Fayuan 106 Niandy Taikang Zidi 842 Hao Xingshi Caiding (最高法院106年度台抗字第842號刑事裁定) [Year 106 Taikang No. 842 Criminal Ruling of the Supreme Court].

40. Lin Guanyin (林冠吟), Siwei Zongtong Baci Teshe Zhexie Ren Abian Guansi Lianbao Qian Teshe Baimi Zhadanke Deng Ershiyi Ren (4位總統8次特赦這些人！阿扁官司連爆前特赦白米炸彈客等22人) [*These People Were Pardoned During the Eight Times of Pardons by the Four Presidents. Before His Lawsuits Break Out, President Chen Pardoned Twenty-Two Persons, Including the Rice Bomber*], ETTODAY XINWEN YUN (ETODAY新聞雲) [ETODAY NEWS] (Apr. 22, 2022) (Taiwan), <https://www.ettoday.net/news/20220422/2235348.htm> [https://perma.cc/74RB-WCUB]. See Table 1 for the list of pardons made after the Martial Law Period.

41. See Jieyan Fa (戒嚴法) [Martial Law] (1949) (Taiwan); Taiwan Diqu Jieyan Ling (臺灣地區解嚴令) [The Order Lifting Martial Law within the Territory of Taiwan] (1987) (Taiwan).

42. The Clemency Act, art. 4 (Taiwan).

43. *Id.* at art. 5 (Taiwan).

44. ZHONGHUA MINGUO XINGFA (中華民國刑法)[THE CRIMINAL CODE] art. 36 (Taiwan).

Table 1: List of Pardon Cases in Taiwan after the Martial Law Period ⁴⁵			
Year	Recipient(s)	Type	President
1990 ⁴⁶	Hsiu-Lien Annette Lu and other eight persons	Full	Lee Teng-hui
	Chien-feng Huang and other ten persons	Partial	
2000 ⁴⁷	Chia-ming Huang and other 18 persons	Partial	Chen Shui-bian
	Mao-xing Tseng	Partial	
	Bing-kun Su	Full	
2007 ⁴⁸	Ru-men Yang	Partial	Chen Shui-bian
2021 ⁴⁹	Guang-lu Wang	Partial	Tsai Ing-wen
2022 ⁵⁰	Yu-ping Han and Yu-sen Chang	Full	Tsai Ing-wen

The four types of clemency vary in the range of their effects. Amnesty is granted for a group of persons who meet the criteria set by the government. By contrast, pardon and restitution of civil

45. Table 1 compiled by the Author.

46. Central News Agency (中央社), *Li Zongtong Fabu Teshe Ling* (李總統發佈特赦令) [*President Li Has Issued a Pardon*], ZONGYANG RIBAO (中央日報) [CENTRAL DAILY NEWS] (Taiwan), May 21, 1990, at A1.

47. Zongtongfu (總統府), *Teshe An* (特赦案) [*The Case of Pardon*], XINWEN YU HUODONG (新聞與活動) [NEWS AND ACTIVITIES] (Dec. 10, 2000), <https://www.president.gov.tw/NEWS/7515> [<https://perma.cc/3S39-ESUG>].

48. June Tsai, *'Rice Bomber' Regains His Freedom through Presidential Pardon*, TAIWAN TODAY (July 5, 2007), <https://taiwantoday.tw/news.php?unit=10,23,45,10&post=14526> [<https://perma.cc/6M4F-UZM8>].

49. Keoni Everington, *Taiwan President Issues Pardon to Bunun Hunter. Tsai Pardons Bunun Man after Mixed Constitutional Ruling on Indigenous Hunting*, TAIWAN NEWS (May 20, 2021), <https://www.taiwannews.com.tw/en/news/4206949> [<https://perma.cc/4SET-7UY2>].

50. Hsin-fang Lee, *Tsai Pardons Army General Sentenced over Unit Banquet*, TAIPEI TIMES (Apr. 23, 2022), <https://www.taipetimes.com/News/12urope/archives/2022/04/23/2003777092> [<https://perma.cc/26VH-49PM>].

rights are for individuals.⁵¹ Commutation of sentence can be either collective or individual.⁵² Considering the expansive effects of an amnesty, Section 2 of Article 58⁵³ and Article 63 of the Constitution⁵⁴ stipulate that the Ministry of Justice present an amnesty bill to the Executive Yuan for discussion and decision⁵⁵ and then submit it to the Legislative Yuan for its review and resolution.⁵⁶ Those procedures work as a check on the President's amnesty power.⁵⁷ On the contrary, pardon, commutation of sentence, and restitution of civil rights can be authorized by the President directly.⁵⁸ Nevertheless, if the President would like to grant a sentence commutation collectively rather than individually, she may go through the same procedures as she would for an amnesty bill.⁵⁹ Such a collective commutation of sentence has been granted for five times after World War II.⁶⁰

51. Chen Yuncai (陳運財), *Shemian Fa zhi Xiuzheng yu Wupan zhi Jiuji* (赦免法之修正與誤判之救濟) [*The Revisions of the Clemency Act and the Remedy for Erroneous Judgments*], 43 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 89, 89-90 (1998).

52. *Id.*

53. MINGUO XIANFA art. 58 (1947) (Taiwan).

54. *Id.* at art. 63.

55. The Executive Yuan is the highest office of the executive branch of the government of Taiwan. *See* MINGUO XIANFA art. 53 (1947) (Taiwan).

56. The Legislative Yuan is the highest legislative body. *See* MINGUO XIANFA art. 62 (1947) (Taiwan).

57. Chen, *supra* note 51.

58. *Id.* at 90.

59. The Clemency Act, art. 6, § 2 (Taiwan).

60. Liu, *supra* note 37, at 199. For the list of the instances of collective commutation of sentences after World War II, see *infra* Table 2.

Table 2: List of Instances of Collective Commutation of Sentences after World War II ⁶¹		
Year	Reason for Collective Commutation	President
1971 ⁶²	Sixtieth anniversary of the founding of the country	Chiang Kai-shek
1975 ⁶³	To mourn the death of President Chiang Kai-shek	Yen Chia-kan
1988 ⁶⁴	To mourn the death of President Chiang Ching-kuo	Lee Teng-hui
1991 ⁶⁵	Eightieth anniversary of the founding of the country	Lee Teng-hui
2007 ⁶⁶	Twentieth anniversary of the end of the Martial Law	Chen Shui-bian

B. The Court's Approaches to the Conflicts between the Power and the Right

Taiwan ratified and incorporated the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) into its domestic legal system by enacting the Act to Implement the ICCPR and the ICESCR in 2009.⁶⁷ According to Article 2 of the Act, the human rights protection provisions in the

61. Table 2 compiled by Author.

62. Zhonghua Minguo Liushi Nian Zuifan Jianxing Tiaoli (中華民國六十年罪犯減刑條例) [1971 Criminal Commutation Act], FAWUBU FAGUI ZILIAOKU, Sept. 7, 1971 (Taiwan).

63. Zhonghua Minguo Liushisi Nian Zuifan Jianxing Tiaoli (中華民國六十四年罪犯減刑條例) [1975 Criminal Commutation Act], FAWUBU FAGUI ZILIAOKU, June 5, 1975 (Taiwan).

64. Zhonghua Minguo Qishiqi Nian Zuifan Jianxing Tiaoli (中華民國七十七年罪犯減刑條例) [1988 Criminal Commutation Act], FAWUBU FAGUI ZILIAOKU, Apr. 20, 1988 (Taiwan).

65. Zhonghua Minguo Bashi Nian Zuifan Jianxing Tiaoli (中華民國八十年罪犯減刑條例) [1991 Criminal Commutation Act], FAWUBU FAGUI ZILIAOKU, Dec. 29, 1990 (Taiwan).

66. Zhonghua Minguo Jiushiliu Nian Zuifan Jianxing Tiaoli (中華民國九十六年罪犯減刑條例) [2007 Criminal Commutation Act], FAWUBU FAGUI ZILIAOKU, July 4, 2007 (Taiwan).

67. Gongmin Yu Zhengzhi Quanli Guoji Gongyue Ji Jingji Shehui Wenhua Quanli Guoji Gongyue Shixing Fa (公民與政治權利國際公約及經濟社會文化權利國際公約施行法) [The Act to Implement the ICCPR and the ICESCR], FAWUBU FAGUI ZILIAOKU, Apr. 22, 2009 (Taiwan).

two treaties have domestic legal status.⁶⁸ Thus, the right to seek clemency for death row inmates is enshrined in Article 6 (4) of the ICCPR.⁶⁹ The collision between the clemency power and right to seek pardon or commutation of capital sentence came to light when forty-four capital inmates jointly submitted the first clemency request to the President in 2010.⁷⁰ Since then, this legal battle has arisen and continued for more than a decade, but no meaningful progress has been made.

The first decision from the Supreme Administrative Court concerning the conflict between the clemency power and the right to seek pardon came out in 2011.⁷¹ In spite of that, this decision is somewhat different from the subsequent cases.⁷² The importance of this decision stems from the fact that it set the tone for courts to deal with such a controversy in future cases. The decision rejected clemency requests on procedural grounds instead of substantive ones. The legal basis for the procedural dismissal is that the clemency power is the President's sovereign power⁷³—whether to exercise the prerogative is a political question and is therefore not reviewable by the judicial branch (the Political Question Approach).⁷⁴

68. The Act to Implement the ICCPR and the ICESCR, art 2 (Taiwan); *see also* Mark L. Shope, *The Adoption and Function of International Instruments: Thoughts on Taiwan's Enactment of the Act to Implement the ICCPR and the ICESCR*, 22 *IND. INT'L & COMP. L. REV.* 159, 167 (2012).

69. ICCPR, *supra* note 12, art. 6, ¶ 4.

70. Miao, *supra* note 5, at 59.

71. Zuigao Xingzheng Fayuan 100 Niandu Cai Zidi 1535 Hao Caiding (最高行政法院100年度裁字第1535號裁定) [Year 100 Cai No. 1535 Ruling of the Supreme Administrative Court].

72. This case was brought against the Ministry of Justice and the later cases were made against the President.

73. Zuigao Xingzheng Fayuan 100 Niandu Cai Zidi 1535 Hao Caiding (最高行政法院100年度裁字第1535號裁定) [Year 100 Cai No. 1535 Ruling of the Supreme Administrative Court], sec. 5.2.

74. *Id.* The Political Question Doctrine grows out of the U.S. jurisprudence. *See* Oetjen v. Central Leather Co., 246 U.S. 297, 302-303 (1918); Nixon v. United States, 506 U.S. 224, 228-29 (1993). *See generally* Baker v. Carr, 369 U.S. 186 (1962). As to the connection between the Political Question Doctrine and Taiwan's Constitution, see discussion *infra* Section IV.A.

Three years later, the Supreme Administrative Court made another decision with regard to this conflict.⁷⁵ This decision denied the death row inmates' appeal and added pivotal support to the procedural dismissal.⁷⁶ That is, despite death row inmates' right to seek capital clemency from the President, the Supreme Administrative Court held the President still has full discretion in whether to exercise the clemency power.⁷⁷ Their requests based on the right to seek capital clemency are merely to push the President to exert the power; the President is not thus obligated to exert the clemency power and make a decision on their requests—neither granted nor declined (the No Obligation Approach).⁷⁸

The two approaches, as the Supreme Administrative Court applied them in the two decisions above, have established the primary scheme that eviscerates the right to seek capital clemency and its local realization in Taiwan. On the one hand, the No Obligation Approach allows the President not to take any meaningful steps on clemency requests. On the other, the Political Question Approach prevents the judiciary from reviewing the President's non-decisions on their merits. Both approaches circumvent the obligation and responsibility of the State, as the preamble of the ICCPR states, to "promote universal respect for, and observance of, human rights and freedoms" and to "strive for the promotion and observance of the rights recognized in the present Covenant."⁷⁹ The judiciary's use of these approaches raises questions pertaining to whether the right to seek capital clemency and the right to an effective remedy, enshrined in Article 6 (4) and Article 2 (3) of the ICCPR, have been violated.⁸⁰

75. Zuigao Xingzheng Fayuan 103 Niandu Cai Zidi 254 Hao Caiding (最高行政法院103年度裁字第254號裁定) [Year 103 Cai No. 254 Ruling of the Supreme Administrative Court].

76. *Id.*

77. *Id.* at secs. 3.2 & 3.3.

78. *Id.*

79. See ICCPR pmb.

80. The questions are discussed *infra* Part III and Part IV.

C. *The Inattention of the Courts to the Opinion of the International Human Rights Experts*

While the death row inmates strived to save their lives in the courts, Taiwan commenced its human rights treaty review of the ICCPR and the ICESCR since their incorporation into the domestic law.⁸¹ Because Taiwan is not a UN member state, it cannot formally be a State party of the ICCPR. It follows then that Taiwan is not allowed to participate in UN treaty review sessions. In fact, Taiwan's request to deposit the instruments of ratification of the ICCPR and the ICESCR to the UN was never successful, let alone to take part in the review sessions.⁸² Therefore, Taiwan's legislature stipulates that the government has to establish Taiwan's own human rights report and review system in accordance with the two treaties.⁸³

There have been three review sessions to assess Taiwan's unique model since its creation.⁸⁴ The first two were held in 2013 and 2017; the third was scheduled to take place in 2021 but was postponed to 2022 due to the COVID-19 pandemic.⁸⁵ All the review sessions were held in Taipei instead of Geneva (or New York), where treaty body experts met with state party delegates and civil society representatives to address human rights challenges happening at the local level. This localized model of international treaty review held in Taiwan helps to ease the problems brought

81. For more details about how Taiwan integrated the international treaties in the domestic law as a non-UN member state, see Yu-Jie Chen, *Localizing Human Rights Treaty Monitoring: Case Study of Taiwan as a Non-UN Member*, 35 WIS. INT'L L. REV. 277, 288-91 (2018).

82. *Id.* at 290. For a thorough discussion on the difficulties confronted by Taiwan when depositing instruments of ratification or accession of treaties, like the ICCPR, the ICESCR, and the CEDAW, to the UN, please see generally Fort Fu-Te Liao, *Partly Virtual, Partly Real: Taiwan's Unique Interaction with International Human Rights Instruments*, in 16 ASIAN YEARBOOK OF INTERNATIONAL LAW 25 (Kevin Y.L. Tan et al. eds., 2013)(2010).

83. The Act to Implement the ICCPR and the ICESCR, art. 6 (Taiwan).

84. For the details of how Taiwan's review model was created, see Chen, *supra* note 81, at 291-95.

85. Yan Fanpei (顏凡裴), *Tai Ti Liang Gongyue Disanci Guojia Baogao Yao Guoji Zhuanjia Zaidi Shecha* (台提兩公約第3次國家報告 邀國際專家在地審查) [*Taiwan Put forward the Third National Report on the ICCPR and the ICESCR and Invited International Experts to Conduct a Local Review*], JING XINWEN (鏡新聞) [MIRROR MEDIA] (May 4, 2022) (Taiwan), <https://www.mirrormedia.mg/story/20220504inv001> [<https://perma.cc/7W2S-CJCQ>].

by the centralized (Geneva) model, such as justice from a distance, without local engagement or accessibility and visibility of the international human rights system to local communities.⁸⁶

The Taiwanese government invited distinguished international human rights experts to Taipei to review Taiwan's reports on its progress in accommodating the ICCPR and the ICESCR. They were divided into two panels, one for the ICCPR and the other for the ICESCR.⁸⁷ After three days of reviewing, the experts released a "Concluding Observations and Recommendations," that raised a number of disputed issues and highlighted a few persistent human rights problems that had not received much public attention.⁸⁸ In the first Concluding Observations and Recommendations in 2013, the experts pointed out the following in paragraph 57:

According to Article 6(4) ICCPR, anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. This implies that the execution of the sentence of death must be postponed at least until the proper conclusion of the relevant procedure. In the opinion of the Experts, this provision of the Covenant seems to have been violated in all 15 cases of executions carried out in Taiwan during the last three years.⁸⁹

In other words, the President's inaction on death row inmates' requests for pardon or commutation violated the right to seek capital clemency in the eyes of the international human rights experts.

The experts' observation, however, did not result in any changes in the President's silence or in the judiciary's non-intervention stance. Subsequently, a lawsuit filed in 2013 marked the first time death row inmates referred to the Concluding Observations and Recommendations in their arguments without a

86. Chen, *supra* note 81, at 282-88, 317-20.

87. *Id.* at 294.

88. *Id.* at 308.

89. INT'L GRP. OF INDEP. EXPERTS, REVIEW OF THE INITIAL REPORTS OF THE GOVERNMENT OF TAIWAN ON THE IMPLEMENTATION OF THE INTERNATIONAL HUMAN RIGHTS COVENANTS: CONCLUDING OBSERVATIONS AND RECOMMENDATIONS ADOPTED BY THE INTERNATIONAL GROUP OF INDEPENDENT EXPERTS (Mar. 1, 2013), ¶ 57, <https://www.humanrights.moj.gov.tw/media/12484/33516305719.pdf> [<https://perma.cc/RNY5-EUH5>].

specific mention of paragraph 57.⁹⁰ Although the case before the judiciary was ultimately dismissed, prior to that the President had directed the Ministry of Justice to study the viability of pardon or commutation of death sentence after receiving the petition for mercy. The Ministry of Justice gave a negative answer with a reason that the capital clemency contradicts the mainstream public opinion, causing a doubt on the legitimacy of the clemency power and detrimental to the prestige of the President, and therefore it does more harm than good.⁹¹ Death row inmates made another attempt in three different cases in 2018. This time they directly cited paragraph 57 of the Concluding Observations and Recommendations of 2013 to support their arguments in three different lawsuits.⁹² But the court dismissed the three cases without responding to the claims the inmates raised pursuant to paragraph 57.⁹³

The President and the judiciary's constant overlooking of the expert's opinion may reflect the unique circumstance of Taiwan's incorporation of ICCPR as a non-UN member state. As this Article explained earlier, Taiwan is not allowed to take part in the ICCPR treaty review sessions because it is not a state party to the ICCPR. Instead, distinguished international human rights experts are invited to Taiwan to review Taiwan's reports on its progress in accommodating the ICCPR.⁹⁴ This creative legal design, however, has its weaknesses. One of which is that the opinion from the Concluding Observations by the international human rights experts has no legal effects.⁹⁵ Pursuant to Articles 2 and 3 of the Act to Implement the ICCPR and the ICESCR, only the provisions

90. See Taipei Gaodeng Xingzheng Fayuan 102 Niandu Su Zidi 1526 Hao Caiding (臺北高等行政法院102年度訴字第1526號裁定) [Year 102 Su No. 1526 Ruling of the Taipei High Administrative Court].

91. See *id.*

92. See Taipei Gaodeng Xingzheng Fayuan 107 Niandu Su Zidi 273 Hao Caiding (臺北高等行政法院107年度訴字第273號裁定) [Year 107 Su No. 273 Ruling of the Taipei High Administrative Court]; Taipei Gaodeng Xingzheng Fayuan 107 Niandu Su Zidi 274 Hao Caiding (臺北高等行政法院107年度訴字第274號裁定) [Year 107 Su No. 274 Ruling of the Taipei High Administrative Court]; Taipei Gaodeng Xingzheng Fayuan 107 Niandu Su Zidi 611 Hao Caiding (臺北高等行政法院107年度訴字第611號裁定) [Year 107 Su No. 611 Ruling of the Taipei High Administrative Court].

93. See sources cited *supra* note 92.

94. Chen, *supra* note 81, at 279.

95. *Id.* at 322.

regarding human rights protection in the treaties are legally binding, and applications of the two treaties should refer to the relevant legislative purposes and interpretations thereof.⁹⁶ The opinions made by international human rights experts through the Concluding Observations are neither provisions regarding human rights protection nor are they legislative purposes or general comments, so they are only advisory and carry no legal obligations. The Human Rights Consultative Committee under the Office of the President made this stance clear in 2011 through a resolution that the government shall respect the opinions rendered by international human rights experts, but that Taiwan has no international obligation to follow those opinions. It also made clear that Taiwan is not answerable to international experts.⁹⁷ As a consequence, a thorough analysis of UN jurisprudence of the right to seek clemency in capital cases under the ICCPR is needed to address the legal conflict between the President and death row inmates.

III. THE EVOLUTION OF THE RIGHT TO SEEK CAPITAL CLEMENCY IN THE ICCPR

In this Part, this Article explores the core aspects of the right to seek capital clemency. This Part examines the resolutions of key UN political bodies such as the UN General Assembly, the UN Economic and Social Council (ECOSOC), and the UN Commission on Human Rights (now known as the UN Human Rights Council).⁹⁸ Additionally, this Part analyzes the General Comments and case law of the Human Rights Committee.⁹⁹ By studying the evolution of the right to seek capital clemency, this Part aims to provide an

96. The Act to Implement the ICCPR and the ICESCR, arts. 2 & 3 (Taiwan). Interpretations here include the General Comments and the interpretations in cases. See Liao Fort Fu-Te (廖福特), *Sifa Shenpan yu Lianggongyue Renquan Baozhang Siwei Suo Mianlin zhi Tiaozhan Xingzheng Fayuan Shiyong Lianggongyue zhi Jianshi* (司法審判於兩公約人權保障思維所面臨之挑戰—行政法院適用兩公約之檢視) [*Court's Challenges When Applying the ICCPR and the ICESCR: Review of Judgments of Administrative Courts*], 234 FAXUE CONGKAN (法學叢刊) [CHINA L.J.] 1, 7 (2014)(Taiwan).

97. Presidential Office Human Rights Consultative Committee, Meeting Minutes of the Second Meeting (Jan. 14, 2011), <https://www.president.gov.tw/Page/321/6> [<https://perma.cc/WV95-9ZE8>].

98. See discussion *infra* Section III.A.

99. See discussion *infra* Section III.B.

understanding of its development in the first two decades after it was recognized, the inactivity throughout the 2000s, and the significant progress made in the 2010s. This Part further identifies four key principles: effectiveness, transparency, fairness, and informativeness.¹⁰⁰ These principles help categorize the essential elements of the right to seek clemency in cases involving the death penalty.

A. Resolutions of the UN Political Bodies

After all judicial avenues have been exhausted, the pursuit of presidential mercy serves as the final option for a prisoner to have their capital sentence lessened or eliminated. This is the right to seek capital clemency. Article 6(4) of the ICCPR crystallizes this right by prescribing that: “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon[,] or commutation of the sentence of death may be granted in all cases.”¹⁰¹

This right was bolstered not long after the adoption of the ICCPR in 1966. The UN General Assembly adopted a resolution in 1968 asking UN member states not to implement death sentences until the appeal procedures or clemency application procedures have concluded.¹⁰² In order to bolster legal procedures and safeguards for the accused in capital cases, the UN General Assembly adopted another resolution in 1971, which requested that the UN Secretary-General arrange and submit a separate report on the practices and statutory rules that may govern the right of those on death row to petition for mercy.¹⁰³

The right to stay of execution pending appeal or pardon was further preserved in the “Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty” (the Safeguards), which was approved by the resolution of the ECOSOC in 1984.¹⁰⁴

100. See discussion *infra* Section III.C.

101. ICCPR, *supra* note 12, art. 6, ¶ 4. For the rocky process of this right to be included in the ICCPR, see Chiara Sangiorgio, *Clemency for Death Penalty Cases under International Law and Standards: Has the Tide Changed?*, in EXECUTIVE CLEMENCY COMPARATIVE AND EMPIRICAL PERSPECTIVES 35, 38-40 (Daniel Pascoe & Andrew Novak eds., 2021).

102. G.A. Res. 2393 (XXIII), Capital Punishment, at art. 1(a)(ii) (Nov. 26, 1968).

103. G.A. Res. 2857 (XXVI), Capital Punishment, at art. 6 (Dec. 20, 1971).

104. Economic and Social Council Res. 1984/50, annex (May 25, 1984).

The Safeguards reiterates the mission of the member states to ensure that those sentenced to death have the rights to appeal and to seek capital clemency.¹⁰⁵ Member states must also ensure that no capital punishment shall be carried out before such procedures come to an end.¹⁰⁶ The ECOSOC further adopted another resolution: “Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty” (Implementation of Safeguards) in 1989, which advocated for member states to provide for mandatory review with provisions for clemency in all cases of capital offenses.¹⁰⁷

Despite these instruments offering strong support for the right to seek capital clemency, their inadequacy is, however, that they do not provide any specific procedural requirements to ensure this right is properly realized in member states’ practices.¹⁰⁸ This status quo has been in place for more than two decades—from the 1990s through the mid-2010s. Only a few meaningful strides were made to the right to seek capital clemency during this period. An ECOSOC resolution in 1996, for example, called upon member states to allow more time for death row inmates to prepare clemency requests and for the completion of clemency proceedings.¹⁰⁹ It also called for member states to ensure that officials involved in decisions to carry out an execution are fully informed of the status of clemency requests.¹¹⁰ The UN Commission on Human Rights,¹¹¹ in its 2005 resolution, urged member states maintaining the death penalty “to ensure . . . the right to seek pardon or commutation of [death] sentence.”¹¹²

Things began to change in the second half of the 2010s. The Human Rights Council made five resolutions in 2015, 2017, 2019, 2021, and 2023, respectively, that called upon member states to

105. *Id.* ¶¶ 6-7.

106. *Id.* ¶ 8.

107. Economic and Social Council Res. 1989/64, ¶ 1(b) (May 24, 1989).

108. Sangiorgio, *supra* note 101, at 42.

109. Economic and Social Council Res. 1989/64, ¶¶ 5 -6 (May 24, 1989).

110. *Id.*

111. This body was succeeded by the Human Rights Council in 2006. See BBC News, *UN Creates New Human Rights Body*, BBC NEWS (Mar. 15, 2006), <http://news.bbc.co.uk/2/hi/world/europe/4810538.stm> [https://perma.cc/EV8E-AMLD].

112. UN Commission on Human Rights Res. 2005/59, ¶ 7(d) (Apr. 20, 2005).

increase transparency regarding the use of clemency power by disclosing the number of cases in which amnesty or pardon requests were granted.¹¹³ The resolutions foregrounded the significance of transparency in the exercise of the clemency power.

Following the steps of the Human Rights Council, the UN General Assembly also approved four resolutions in 2016, 2018, 2020, and 2022, respectively, to ensure that “those facing the death penalty can exercise their right to apply for pardon or commutation of their death sentence by ensuring that clemency procedures are fair and transparent and that prompt information is provided at all stages of the process.”¹¹⁴ So, in addition to the transparency requirement, the UN General Assembly resolutions added two more fundamental elements to clemency procedures: fairness and informativeness (prompt information available at all stages).

B. General Comments and Case Law of the Human Rights Committee

In accordance with Part IV of the ICCPR,¹¹⁵ the Human Rights Committee was formed to interpret the treaty and oversee the state parties to carry out their responsibilities under the treaty.¹¹⁶ One of the Committee’s central duties is to release the authoritative “General Comment,” which interprets the provisions of the Covenant.¹¹⁷ In addition to the State parties, the General Comments are also legally binding for Taiwan.¹¹⁸ The Committee commenced to issue the General Comments in 1981.¹¹⁹

113. Human Rights Council Res. 30/5 (Oct. 1, 2015); Human Rights Council Res. 36/17 (Sept. 29, 2017); Human Rights Council Res. 42/24 (Sept. 27, 2019); Human Rights Council Res. 48/9 (Oct. 8, 2021); and Human Rights Council Res. 54/35 (Oct. 13, 2023).

114. G.A. Res. 71/187, ¶ 7(f) (Dec. 19, 2016); G.A. Res. 73/175, ¶ 7(f) (Dec. 17, 2018); G.A. Res. 75/183, para 7(f) (Dec. 16, 2020); G.A. Res. 77/222, para 7(g) (Dec. 15, 2022).

115. ICCPR, *supra* note 12, arts. 28–45.

116. *Id.*

117. ICCPR, *supra* note 12, art. 40, ¶ 4. See Sangiorgio, *supra* note 101, at 42-43.

118. The Act to Implement the ICCPR and the ICESCR, art. 3 (Taiwan).

119. General Comment No. 1 was about the reporting obligation of State parties and published in 1981. See Hum. Rts. Comm., General Comment No. 1: Reporting Obligation (July 27, 1981).

There have been thirty-seven General Comments so far; the most recent one is about Article 21 of the ICCPR (the Right of Peaceful Assembly), which was published in 2020.¹²⁰

In 1982, the Committee published the first General Comment about the right to life and the death penalty in General Comment No. 6.¹²¹ This Comment did not make any consequential advances regarding the right to seek capital clemency. Instead, the Committee restated the importance of this right by merely repeating the words in Article 6(4) of the ICCPR.¹²² On the other hand, General Comment No. 14 (1984) is the second comment about protecting the right to life.¹²³ This Comment focused on the threat of nuclear weapons to human beings, but made no reference to the right to seek capital clemency.

For the nearly three and half decades that followed General Comment No. 14, the Committee did not issue any General Comments in relation to the death penalty or right to life. In the meantime, there were five notable cases, decided by the Committee, related to the right to seek capital clemency. The first case is *Thompson v. St. Vincent and the Grenadines*, which was related to the issue of mandatory death penalties, concluded in 2000.¹²⁴ In this case, the Committee held that the right to seek capital clemency involves the exercise of the clemency power, which is rather discretionary in comparison with the judicial process. Consequently, the right to seek capital clemency alone cannot provide adequate safeguards against the arbitrary deprivation of life.¹²⁵ The second case is *Kennedy v. Trinidad and Tobago*, which the Committee decided in 2002.¹²⁶ One crucial issue of the case is whether the exercise of the right to seek capital

120. The General Comments are publicly accessible on the website of UN Treaty Body Database, General Comments, U.N. Human Rights Treaty Body (last visited Aug. 13, 2023), https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11 [https://perma.cc/NS5T-GK54].

121. Hum. Rts. Comm., General Comment No. 6: Article 6 (Right to Life) (June 30, 1982).

122. *Id.* ¶ 7.

123. Hum. Rts. Comm., General Comment No. 14: Article 6 (Right to Life) Nuclear Weapons and the Right to Life (Nov. 9, 1984).

124. *Thompson v. St. Vincent & the Grenadines*, Communication No. 806/1998 (2000).

125. *Id.* ¶ 8.2.

126. *Kennedy v. Trinidad & Tobago*, Communication No. 845/1998 (2002).

clemency should be governed by the procedural guarantees of Article 14 of the ICCPR. The Committee denied such a contention by claiming that Article 6 (4) does not prescribe a particular procedure for the modalities of the exercise of the clemency power and that states parties retain the discretion to design the modalities for fulfilling the requirements of Article 6 (4).¹²⁷ In 2005, in the case of *Chisanga v. Zambia*,¹²⁸ the Committee followed its precedent in an earlier case¹²⁹ and affirmed that the mercy of the President is an extraordinary approach to remove or commute one's death sentence and thus cannot be viewed as part of the regular remedies in the context of Article 5, paragraph 2 (b) of the Optional Protocol.¹³⁰ The last case is *Chikunova v. Uzbekistan (2007)*,¹³¹ in which the Committee echoed the requirement of stay of execution pending appeal or pardon preserved in the Safeguards by concluding that it is a violation of Article 6 (4) if an execution is carried out while the condemned has submitted a request for pardon and is awaiting the response from the President.¹³²

We are able to learn from the above five cases that the Human Rights Committee maintained a rather conservative position on interpreting the right to seek capital clemency. In each case, the Committee merely restated the long-established elements on the one hand while reaffirming the prerogative nature of the clemency power on the other.¹³³ The Committee merely repeated that state parties shall ensure the right to seek pardon or commutation of the sentence.¹³⁴

127. *Id.* at ¶ 7.4.

128. *Chisanga v. Zambia*, Communication No. 1132/2002 (2005).

129. *Singarasa v. Sri Lanka*, Communication No. 1033/2001 (2004).

130. *Chisanga v. Zambia*, *supra* note 128, ¶ 6.3. See Optional Protocol to the International Covenant on Civil and Political Rights, art. 5, ¶ 2(b), Dec. 16, 1966, 999 U.N.T.S. 302 ("The Committee shall not consider any communication from an individual unless it has ascertained that . . . [t]he individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.").

131. *Chikunova v. Uzbekistan*, Communication No. 1043/2002 (2007).

132. *Id.* ¶ 7.6.

133. Sangiorgio, *supra* note 101, at 55.

134. See, e.g., Hum. Rts. Comm., Concluding Observations of the Human Rights Committee: Uganda, ¶ 13, UN Doc. CCPR/CO/80/UGA, (May 4, 2004).

As to the most important part of the right—that is, the specific procedures for seeking clemency—the Committee left that question unanswered. This conservative stance was in place until the late 2010s when General Comment No. 36 was released in 2018.¹³⁵

Comment No. 36 replaces Comments No. 6 and No. 14 with longer and more detailed accounts of the right to life enshrined in Article 6 of the ICCPR.¹³⁶ In addition to reaffirming the right to seek clemency in capital sentence cases as a pivotal shield against the arbitrary deprivation of life, paragraph 47 of this Comment further includes a number of thought-provoking principles when applying this right¹³⁷:

1. Different from previous resolutions or comments, which merely repeat the text of Article 6(4) of the ICCPR, Comment No. 36 has reinforced that not only does the person sentenced to death have the right to seek clemency, but also the state parties have the obligation to allow such a right to be materialized. Also, this Comment requires state parties to ensure clemency requests will be granted in appropriate circumstances.

2. Following the requirement to stay an execution pending pardon or commutation, two additional points are provided: (1) the requests for pardon or commutation must be meaningfully considered and conclusively decided upon, and (2) the procedures for considering and making decisions on the requests must be applicable.

3. No category of sentenced persons will be *a priori* excluded from clemency,¹³⁸ and the conditions for acquiring mercy shall not be ineffective, unnecessarily burdensome, discriminatory, or arbitrary.

4. Despite the fact that Article 6(4) does not prescribe a particular procedure for the exercise of the right to seek capital

135. Hum. Rts. Comm., General Comment No. 36: Article 6 (the Right to Life) U.N. Doc CCPR/C/GC/36 (2018).

136. *Id.* ¶ 1.

137. *Id.* ¶ 47; see also Andrew Novak & Daniel Pascoe, *Emerging Trends and Best Practices in Comparative Clemency*, in EXECUTIVE CLEMENCY COMPARATIVE AND EMPIRICAL PERSPECTIVES 187, 192-93 (Daniel Pascoe & Andrew Novak eds., 2021).

138. The Author uses the term “clemency” in this sentence to refer not only to the right to seek clemency, but also to the due process requirements and procedures governing clemency requests.

clemency and that state parties retain discretion in spelling out the relevant procedures,¹³⁹ such procedures must be crystallized in domestic legislation and shall not afford the victims or their families a preponderant role in deciding whether to carry out the death sentence.

5. Two requirements are added to the clemency procedures, including the procedures shall be conducted with certainty and the criteria for determining on pardon or commutation shall be substantive.¹⁴⁰

6. Individuals facing the possibility of carrying out the death penalty must have the rights to initiate the capital clemency process, to make representations to the clemency authority, to receive advance notice of when their request will be reviewed, and to be promptly notified of the decision.

These principles were later substantiated in the case of *Ahmed v. Maldives*,¹⁴¹ in which the Committee cited the words of the paragraph 47 of General Comment No. 36 and declared that the state party didn't meet its obligations under Article 6 (4) for the lack of certainty in the law regarding the clemency process and its effectiveness and that the state party thus constituted a violation of Article 6(4) of the treaty.¹⁴² On the contrary, some scholars have criticized General Comment No. 36 for its inadequacy in some aspects.¹⁴³ These inadequacies include its failure to ask state parties to disclose 1) their criteria for deciding whether to grant a pardon or commutation and 2) their criteria for informing petitioners of the reasoning behind the clemency decisions. Those omitted elements are crucial, and their inclusion would contribute to a more robust procedure for ensuring clemency requests to be fully and substantively considered.¹⁴⁴

139. ICCPR, *supra* note 12, art. 6, ¶ 4.

140. The Committee did not provide a definition for the term of "substantive" in General Comment No. 36.

141. *Ahmed v. Maldives*, Communication No. 2785/2016, Hum. Rts. Comm., (Aug. 16, 2019).

142. *Id.* ¶ 9.9.

143. See Sangiorgio, *supra* note 101, at 54-56.

144. *Id.*

C. Summary of Findings and the Steps Ahead

Thus far, this Article has traced the development of the right to seek capital clemency through resolutions of relevant UN political bodies, General Comments, and case law released by the Human Rights Committee. This Section builds off those developments to create a list of the right's fundamental elements and categorizes them under the four guiding principles extracted from the resolutions, comments, and cases.¹⁴⁵ They are: (1) the clemency procedure must be an effective remedy for death sentences (effectiveness); (2) the numbers of capital clemency grants and denials shall be disclosed to the public (transparency); (3) the clemency procedures shall not be discriminatory or arbitrary (fairness); and (4) the inmate requesting capital clemency shall be informed of the reasoning and the outcome of the case at the proper time (informativeness). It should be noted that these guiding principles are not mutually exclusive and may overlap with each other under some circumstances.¹⁴⁶

Table 3: List of Elements of the Right to Seek Capital Clemency¹⁴⁷			
Element	Source	Category	Effect
Stay of execution pending pardon or commutation.	UN General Assembly Resolution of 1968; Safeguards	Effectiveness	Advisory
Mandatory review with provisions for clemency in all capital cases.	Implementation of Safeguards	Effectiveness	Advisory
Sufficient time for the condemned to prepare for clemency requests and for the clemency proceedings to be completed.	ECOSOC resolution of 1996	Effectiveness	Advisory

145. *See infra* Table 3. The interpretations of the ICCPR by the Human Rights Committee through the General Comments and cases are legally binding to state parties; by contrast, the resolutions of UN General Assembly or the Human Rights Council (previously the UN Commission on Human Rights) are the political expression of the views of its state members on specific issues or problems and thus advisory rather than legally binding. *See* Stephen M. Schwebel, *The Effect of Resolutions of the UN General Assembly on Customary International Law*, 73 AM. SOC'Y INT'L L. 301(1979); Margaretha Wewerinke, *The Role of the UN Human Rights Council in Addressing Climate Change*, 8 HUM. RTS. & INT'L LEGAL DISCOURSE 10 (2014).

146. *See infra* Table 3.

147. Table 3 compiled by the Author.

Table 3: List of Elements of the Right to Seek Capital Clemency¹⁴⁷			
Element	Source	Category	Effect
Officials involved in decisions to carry out an execution shall be fully informed of the status of clemency requests.	ECOSOC resolution of 1996	Effectiveness	Advisory
To disclose the number of granted capital clemency cases.	Human Rights Council resolutions of 2015, 2017, 2019, 2021 & 2023	Transparency	Advisory
Prompt information shall be provided at all stages of the process.	UN General Assembly resolutions of 2016, 2018, 2020, & 2022	Informativeness	Advisory
State parties have the obligation to allow the right to seek capital clemency to be materialized.	General Comment No. 36	Effectiveness	Binding
State parties shall ensure clemency requests to be granted in appropriate circumstances.	General Comment No. 36	Effectiveness	Binding
Requests for capital clemency must be meaningfully considered and conclusively decided upon.	General Comment No. 36	Effectiveness	Binding
The procedures for clemency requests must be applicable.	General Comment No. 36	Effectiveness	Binding
No certain category of persons with the death sentence will be <i>a priori</i> excluded from clemency.	General Comment No. 36	Fairness	Binding
Conditions for mercy shall not be ineffective, unnecessarily burdensome, discriminatory, or arbitrary.	General Comment No. 36	Effectiveness; Fairness	Binding
Clemency procedures must be crystallized in domestic legislation.	General Comment No. 36	Effectiveness	Binding
Victims or their families shall not have a preponderant role in deciding whether to carry out the death sentence.	General Comment No. 36	Fairness	Binding
Clemency procedures shall be proceeded with certainty.	General Comment No. 36	Effectiveness; Fairness	Binding
The criteria for determining on clemency requests shall be substantive.	General Comment No. 36	Fairness	Binding

Table 3 lists the essential elements of the right to capital clemency established by the resolutions, comments, and cases. This table is not exhaustive as new elements may be added. This list can similarly shed a light on some of the essential elements that have not yet been included. The state parties, for example, are not required to make available the information about the number of clemency requests that are denied (transparency).¹⁴⁸ They also do not have to disclose their criteria for deciding on pardon and commutation requests or how the merits of each petition are considered against those criteria (transparency).¹⁴⁹ State parties are neither asked to inform those rejected of the reasoning behind their decisions (informativeness).¹⁵⁰ In addition, research suggests that those seeking capital clemency should enjoy a right to legal representation in their cases, including the provision of legal aid for indigent applicants (fairness).¹⁵¹ Finally, research also suggests that an advisory body during the clemency deliberation procedure may help improve the decision-making in clemency cases (effectiveness).¹⁵²

IV. CONSTITUTIONAL CONSTRAINTS ON THE EXERCISE OF CLEMENCY POWER

This Part discusses how Taiwan's Constitution may restrict the President's power of granting clemency, thereby providing more opportunities for individuals to seek capital clemency. Specifically, it focuses on two Constitutional principles that govern the President's exercise of clemency power. The first principle is the principle of legality, which mandates that the President must act in accordance with the law when exercising the clemency power.¹⁵³ This means that international agreements like the ICCPR, General Comments, and domestic case law are factors that may

148. Novak & Pascoe, *supra* note 137, at 212.

149. Sangiorgio, *supra* note 101, at 56.

150. *Id.*

151. Novak & Pascoe, *supra* note 137, at 209.

152. Andrew Novak, *Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States*, 49 U. MICH. J.L. REFORM 817, 851 (2016).

153. See discussion *infra* Section IV.A.

limit the President's discretion in granting clemency.¹⁵⁴ This Part also explores the connection between ICCPR jurisprudence and Taiwan's legal system.¹⁵⁵ The second principle this Part discusses is the requirement of due process.¹⁵⁶ When deciding clemency requests, the President must adhere to the procedural requirements outlined in the Constitution and General Comment No. 36.¹⁵⁷ These requirements include the right to be informed, the right to present arguments, the right to be heard, the obligation to meaningfully consider and conclusively decide upon capital clemency requests, and the prohibition of excluding specific categories of death row convicts from clemency without proper consideration.¹⁵⁸

A. *The Principle of Legality*

As Part I stated, the clemency power is traditionally treated as a presidential prerogative: a sovereign power that is exerted at the President's discretion. Nonetheless, a prerogative does not necessarily mean that a President may exert it arbitrarily and unlimitedly. In a rule-of-law country, the clemency power is exercised within the bounds of the constitution because it originates from and is formed by the constitution.

It is the same in Taiwan. Article 40 of the Constitution vests the President with the clemency power, specifying four types of clemency: amnesty, pardon, commutation, and restitution of civil rights.¹⁵⁹ Accordingly, the President should not exert the clemency power beyond the scope set by Article 40 of the Constitution. In other words, the President may not create, for example, a fifth or even more types of clemency, such as reprieve, which is a temporary delay or suspension of punishment and a form of mercy in the United States,¹⁶⁰ but not applicable in Taiwan. Neither can

154. *Id.*

155. *Id.*

156. See discussion *infra* Section IV.B.

157. *Id.*

158. See discussion *infra* Section IV.B.2.

159. MINGUO XIANFA art. 40 (1947) (Taiwan).

160. The U.S. Constitution provides that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." U.S. CONST. art. II, § 2. See Novak, *supra* note 152, at 819.

the President change the nature of the four types of mercy, nor bypass the designated procedures at the President's own will.¹⁶¹ Therefore, exercising the clemency power shall not contradict the core nature or purposes of the Constitution in its entirety.¹⁶²

Article 40 of the Constitution prescribes, "The President shall, in accordance with law, exercise the power of granting amnesties, pardons, commutation of sentences and restitution of civil rights."¹⁶³ The text of Article 40 states that the exercise of clemency power shall be, "in accordance with law."¹⁶⁴ In other words, Article 40 describes the principle of legality, which is a necessary condition for the rule of law.¹⁶⁵ The principle of legality is a check and a balance on the presidential clemency from the legislature.¹⁶⁶ This principle of legality requires the Taiwanese government operate in two manners: (1) government's actions shall not contradict the law (the priority of law), and (2) no government actions without the authorization of law (the reservation for law).¹⁶⁷ In other words, if a President would like to exert the clemency power, Article 40 of the Constitution itself is not enough: there must be specific laws for the exercise of presidential clemency (the reservation for law). Additionally, when exerting the clemency power, the President shall not violate any legal provisions (the priority of law). In summary, the clemency power is not self-fulfilling: its content and scope are shaped and bound by law.

161. The process for granting an amnesty, for example, needs to go through the reviews by the Executive Yuan and the Legislative Yuan. *See supra* Section II.A.

162. Chen, *supra* note 51, at 90.

163. MINGUO XIANFA art. 40 (1947) (Taiwan).

164. *Id.*

165. A. W. BRADLEY & K. D. EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 99 (14th ed. 2007).

166. Liu, *supra* note 17, at 90.

167. Zuigao Xingzheng Fayuan 109 Niandu Pan Zidi 644 Hao Panjue (最高行政法院 109 年度判字第 644 號判決) [Year 109 Pan No. 644 Judgment of the Supreme Administrative Court]; *see also* Wu Geng (吳庚), *Yifa Xingzheng Yuanze de Shijian: Huigu yu Zhanwang* (依法行政原則的實踐—回顧與展望) [*The Practice of the Principle of Legality: Review and Prospect*], 12 XIN SHIJI ZHIKU LUNTAN (新世紀智庫論壇) [NEW CENTURY THINK TANK F.] 24, 24 (2000).

In accordance with Article 2 of the Act to Implement the ICCPR and the ICESCR, the provisions about human rights protection in the two treaties have the same legal effect as the domestic law.¹⁶⁸ In addition, Article 3 of the Act to Implement the ICCPR and the ICESCR stipulates that when any government agency is about to apply the two treaties, it must follow the purposes of the treaties and the interpretations by the competent committees.¹⁶⁹ That is to say, the above two Articles have integrated the human rights provisions, interpretations by the competent committees,¹⁷⁰ and the legislative purposes of the two treaties into Taiwan's law.¹⁷¹ Accordingly, there are three primary laws, in addition to the Constitution, governing the President's clemency power: the Clemency Act; the ICCPR and the relevant interpretations out of the General Comments and case law by the Human Rights Committee; and the Act to Implement the ICCPR and the ICESCR. The President shall follow the guidance of the three sources of laws when wielding the clemency power.¹⁷²

As to the effects of the General Comments, paragraph 47 of the General Comment No. 36 provides that "States parties are required pursuant to Article 6 (4) to allow individuals sentenced to death to seek pardon or commutation."¹⁷³ This clearly affirms that Article 6(4) of the ICCPR obliges state parties to allow the right to seek

168. The Act to Implement the ICCPR and the ICESCR, art. 2 (Taiwan) ("Human rights protection provisions in the two Covenants have domestic legal status.").

169. *Id.* at art. 3 ("Applications of the two Covenants should make reference to their legislative purposes and interpretations by the Human Rights Committee.").

170. For the Human Rights Committee for the ICCPR, see *supra* Section III.B. See also Human Rights Committee, *Introduction to the Committee*, UN HUM. RTS. OFFICE OF THE HIGH COMM'R, <https://www.ohchr.org/en/treaty-bodies/ccpr/introduction-committee> [https://perma.cc/RY3L-XNXT] (last visited Dec. 23, 2023). For the Committee on Economic, Social and Cultural Rights for the ICESCR, see Committee for Economic, Social, and Cultural Rights, *Introduction to the Committee*, UN HUM. RTS. OFFICE OF THE HIGH COMM'R, <https://www.ohchr.org/en/treaty-bodies/cescr/introduction-committee> [https://perma.cc/EF85-SGGF] (last visited Dec. 23, 2023).

171. Zhang Wenzhen (張文貞), *Yanjinzhong de Fa Yibanxing Yijian Zuowei Guoji Renquan Gongyue de Quanwei Jieshi* (演進中的法：一般性意見作為國際人權公約的權威解釋) [*Evolving Law: General Comments as Authoritative Interpretations of Human Rights Covenants*], 1(2) TAIWAN RENQUAN XUEKAN (台灣人權學刊) [TAIWAN HUM. RTS. J.] 25, 26 (2012).

172. See Liu, *supra* note 17, at 90-91.

173. Hum. Rts. Comm., General Comment No. 36: Article 6 (Right to Life), ¶ 47, U.N. Doc. CCPR/C/GC/36 (2018).

capital clemency to materialize. Therefore, the No Obligation Approach,¹⁷⁴ which was crafted by the Supreme Administrative Court through its decisions and denotes that the President is not obligated to exert the clemency power and make a decision on their requests, clearly violates paragraph 47 of General Comment No. 36. In other words, the No Obligation Approach, which allows the President not to answer the requests, eviscerates the core part of the right to seek capital clemency.

Moreover, paragraph 47 requires clemency procedures to be crystallized in domestic legislation, which resonates with the principle of legality. Article 8 of the Act to Implement the ICCPR and the ICESCR also specifies that Taiwan's legislature has a duty to revise relevant laws so that the human rights preserved in the ICCPR and the ICESCR can seamlessly materialize in Taiwan's legal context.¹⁷⁵ Accordingly, the Legislative Yuan has a duty to establish appropriate procedures for individuals to seek mercy and for presidents to review such capital clemency requests and make decisions on them. In 2014, the Death Penalty Project published a report on Taiwan's death penalty published which reaffirmed that state parties of the ICCPR have an obligation to ensure death row inmates are equipped with "adequate and effective" capital clemency procedures:

The decision is one of life or death and, as such, domestic law is required to make provision for a proper functioning, transparent, and fair system that allows for the proper consideration of clemency in all cases.¹⁷⁶

As to the practice in Taiwan, the report's evaluation reveals that Taiwan "is under a strict obligation to provide effective measures for the proper consideration of clemency in all cases." It also states, "death sentences cannot be executed whilst mercy procedures

174. See discussion *supra* Section II.B.

175. The Act to Implement the ICCPR and the ICESCR, art. 8 (Taiwan) ("All laws, regulations, directions and administrative measures incompatible with the two Covenants should be amended within two years after the Act enters into force by new laws, law amendments, law abolitions and improved administrative measures.").

176. THE DEATH PENALTY PROJECT, THE DEATH PENALTY IN TAIWAN 21, (2014), <https://deathpenaltyproject.org/wp-content/uploads/2014/06/The-death-penalty-in-Taiwan.pdf> [<https://perma.cc/3XPZ-ZNG6>].

remain pending determination, something that keeps happening in Taiwan.

It is thus evident that Article 6(4) of the ICCPR guaranteeing the right of death row inmates to seek pardon is not being complied with.¹⁷⁷ Therefore, the right to seek capital clemency in Taiwan still exists on paper only and awaits further materialization.

B. *Due Process in the Government's Decision-making*

This Section discusses the due process requirements owed to death row inmates. First, it discusses the inadequacy of the due process protections in the Clemency Act.¹⁷⁸ Second, it discusses the due process requirements in Taiwan's Constitution.¹⁷⁹

1. The Inadequacy of Due Process Protection in the Clemency Act

Prior sections have established the President has the obligation to actualize the right to seek capital clemency of those sentenced to death; this Section turns to the next issue: the procedures the President shall adhere to after receiving such pardon or commutation requests. The Constitution has provisions only on the two-step reviewing process for an amnesty bill: the first checkpoint is the Executive Yuan,¹⁸⁰ and then the inspection by the Legislative Yuan.¹⁸¹ As for the procedures for pardon, commutation of sentences, and restitution of civil rights, the Constitution is silent and allows the legislature, per the principle of legality, to make up the specific proceedings for the three forms of clemency. The Legislative Yuan thus enacted the Clemency Act in 1953 and amended it in 1991.¹⁸²

177. *Id.* at 23.

178. *See infra* Section IV.B.1.

179. *See infra* Section IV.B.2.

180. MINGUO XIANFA art. 58 (1947) (Taiwan).

181. *Id.* at art. 63. *See supra* Section II.A, for a detailed description of the process.

182. *Shemian Fa Yanga* (赦免法沿革) [*History of the Pardon Law*], FAWUBU FAGUI ZILIAOKU (法務部全國法規資料庫) [Ministry of Justice Laws and Regulations Database of the Republic of China] (TAIWAN),

The Clemency Act has only eight articles in total; two of them are related to clemency procedures. Section 1 of Article 6 prescribes that the President may mandate the Executive Yuan to order the competent subordinates, that is, the Ministry of Justice, to study and discuss the requests for amnesty, pardon, commutation of sentences, and restitution of civil rights.¹⁸³ Section 2 of Article 6 stipulates that if the President would like to commute sentences collectively, she may follow the same procedures for an amnesty.¹⁸⁴ Article 7 provides that the competent ministry shall confer a verification to individuals granted a pardon, commutation of sentence, or restitution of civil rights.¹⁸⁵ It follows then that there is only one provision of the Clemency Act regarding the procedure of pardon, which merely touches the procedure *after* a pardon is granted and does not provide any procedural requirements prior to the granting of a pardon. Such inadequacy of procedural protections for mercy requests in the Clemency Act has rendered the President's decisions entirely discretionary and permissibly arbitrary to the extent that she need not reply to the requests. This has been attacked by legal scholars as well as international organization since as early as two and half decades ago and to the more recent years.¹⁸⁶

The Legislative Yuan used to pay attention to the dearth of the procedural safeguards for pardon cases. In 1998, a group of legislators proposed a bill to amend the Clemency Act that would, among other reforms, create an independent Clemency Review

<https://law.moj.gov.tw/LawClass/LawHistory.aspx?pcode=C0010005>
[<https://perma.cc/SJ8M-4V8B>](last visited Dec. 29, 2023).

183. The Clemency Act, art. 6, § 1 (Taiwan). See Zhu Chaoliang (朱朝亮), *Yuanan Pingfan Kunjing Xia de Xinsiwei* (冤案平反困境下的新思惟—以總統設立獨立覆審機關依法行使赦免權為中心) [*New Thoughts on the Difficulty to Redress Wrongful Convictions: Focus on Establishing an Independent Review Body by the President to Exercise the Clemency Power in Accordance with Law*], *JIANCHA XINLUN* (檢察新論) [TAIWAN PROSECUTOR REV.] 187, 203 (2021).

184. The Clemency Act, art. 6, § 2 (Taiwan).

185. *Id.* at art. 7.

186. See Wu Zhiguang (吳志光) & Lin Yongson (林永頌), *Woguo Tingzhi Zhixing Sixing zhi Celue Yi Xianxing Fazhi ji Guoji Renquan Fa zhi Jingshen Wei Hexin* (我國停止執行死刑之策略—以現行法制及國際人權法之精神為核心) [*The Strategy for Our Country to Stop Executing: Focusing on the Essence of the Existing Law and the International Human Rights Law*] 113 *YUEDAN FAXUE ZAZHI* (月旦法學雜誌) [TAIWAN L. REV.] 82, 89-90 (2004); see also Chen, *supra* note 51, at 90-91; Zhu, *supra* note 183, at 204; Lin, *supra* note 16, at 28-29; Liu, *supra* note 17, at 90-91; THE DEATH PENALTY PROJECT, *supra* note 176, at 21.

Committee that would assist the President in reviewing clemency requests and would offer advisory opinions.¹⁸⁷ In the end, the Legislative Yuan did not pass the bill.¹⁸⁸ Since then, the procedure for reviewing pardon and commutation requests remains as a wasteland: the President still has unlimited discretion on the procedural side in such cases. Hence, critics urge the legislature to resolve the deficiency of pardon procedures in accordance with Article 8 of the Act to Implement the ICCPR and the ICESCR.¹⁸⁹

2. Due Process Requirements from the Constitution

As stated in the previous Section, the ICCPR, the relevant General Comments, and its case law are now part of Taiwan's domestic law. Therefore, in accordance with Article 40 of the Constitution and the principle of legality, the due process for the President to exert the clemency power shall follow the direction of the ICCPR, the relevant General Comments, and case law from the Human rights Committee. Also, as the clemency power comes from the Constitution, its exercise undoubtedly shall not go beyond the scope of the Constitution and its interpretations nor judgments by the Constitutional Court.¹⁹⁰

The Constitutional Court of Taiwan¹⁹¹ announced that due process in the government's decision-making is one of the quintessential principles of the Constitution and specified its core requirements through a series of Interpretations. The term "due

187. Chen, *supra* note 51, at 91.

188. Wu & Lin, *supra* note 186, at 90.

189. *Id.* at 92; Lin, *supra* note 16, at 29.

190.— In Taiwan, the Constitutional Court, composed of fifteen Grand Justices, made interpretations of the Constitution rather than judgments when reviewing cases until January 4, 2022, when the Constitutional Court Procedure Act took effect. The Constitutional Court now makes judgments instead of interpretations. Except for their names and a few procedural designs, there are no substantive differences between the effects of an interpretation and a judgment. In other words, both interpretations and judgments are final and binding on the government and the people. *See* Xianfa Susong Fa (憲法訴訟法) [Constitutional Court Procedure Act], art. 38, § 1 (2019), <http://law.moj.gov.tw> [<https://perma.cc/X8GG-X5G3>] (Taiwan).

191. The Constitutional Court of Taiwan takes on the issues of constitutional interpretation (*see* Constitutional Court Procedure Act, art. 1, sec. 1 (Taiwan)), whereas the Supreme Administrative Court, which has already been referenced throughout this piece, resolves cases with regard to administrative law (*see* Xingzheng Fayuan Zuzhi Fa (行政法院組織法) [Administrative Court Organization Act] art. 1 (2019), <http://law.moj.gov.tw> [<https://perma.cc/KXN2-8VSS>](Taiwan)).

process in the government's decision-making" made its debut in Interpretation No. 663, which articulated that the requirement of due process in the government's decision-making comes from the principle of rule of law.¹⁹² That is, in a rule-of-law country, the process for a government's decision-making must be reasonable and just. In this case, the Interpretation specifies that the right to be informed is one of core elements of the due process in the government's decision-making.¹⁹³ Later in Interpretations No. 731¹⁹⁴ and No. 763,¹⁹⁵ the Constitutional Court stressed again the significance of the right to be informed when the government makes a decision that infringes on one's rights.¹⁹⁶

In addition to the right to be informed, Interpretations No. 709¹⁹⁷ and No. 739¹⁹⁸ spelled out more requirements of due process that the government must follow while making decisions. These requirements include the right to make representation, the right to be heard, and the government's duty to provide reasons for its decisions.¹⁹⁹ Moreover, in borrowing from the principle of due process of law in the common law regimes, legal academics assert that the impartiality of a deciding authority is also a core requirement of due process the government must follow in making decisions.²⁰⁰

192. Sifa Yuan Dafaguan Jieshi No. 663 (司法院大法官解釋第 663 號) [Judicial Yuan Interpretation No. 663] (2009) (Taiwan).

193. *Id.*

194. Sifa Yuan Dafaguan Jieshi No. 731 (司法院大法官解釋第 731 號) [Judicial Yuan Interpretation No. 731] (2015) (Taiwan).

195. Sifa Yuan Dafaguan Jieshi No. 763 (司法院大法官解釋第 763 號) [Judicial Yuan Interpretation No. 763] (2018) (Taiwan).

196. *See id.*; Sifa Yuan Dafaguan Jieshi No. 731 (司法院大法官解釋第 731 號) [Judicial Yuan Interpretation No. 731] (2015) (Taiwan).

197. Sifa Yuan Dafaguan Jieshi No. 709 (司法院大法官解釋第 709 號) [Judicial Yuan Interpretation No. 709] (2013) (Taiwan).

198. Sifa Yuan Dafaguan Jieshi No. 739 (司法院大法官解釋第 739 號) [Judicial Yuan Interpretation No. 739] (2016) (Taiwan).

199. The rationale for the duty to give reasons is to lead the government body to make better and more accurate decisions, to promote public confidence in and their support for government's decisions, and to enable applicants to feel that they have been treated as individuals with respect rather than simply as cases. *See* Daniel T. Kobil, *Should Clemency Decisions Be Subject to a Reasons Requirement?*, 13 FED. SENTENCING REP. 150, 151 (2001); Jarrod Hepburn, *The Duty to Give Reasons for Administrative Decisions in International Law*, 61 INT'L & COMP. L.Q. 641, 644 (2012).

200. Tang Dezong (湯德宗), XINGZHENG CHENGXU FA LUN (行政程序法論) [STUDY ON THE ADMINISTRATIVE PROCEDURE ACT] 9-20 (2d ed. 2003).

This includes the recusal of judges and the prohibition against *ex parte* contact with presiding judges.²⁰¹ The impartiality requirement parallels the mandate from Interpretation No. 709, which stipulates that the reviewing body be impartial, professional, and diverse in its organization.²⁰²

Accordingly, the due process requirements for the government's decision-making originates from the principle of rule of law. These requirements include the right to be informed, the right to make representation, the right to be heard, the duty to give reasons for decisions, and the duty of the reviewing body to be impartial, professional, and diverse. Such requirements also match some of the procedural elements of capital clemency cases elaborated in the paragraph 47 of General Comment No. 36, including that requests for capital clemency must be meaningfully considered and conclusively decided upon; that no certain category of persons sentenced to death will be *a priori* excluded from clemency; and that neither victims nor their families shall play a preponderant role in deciding whether to carry out the death sentence.²⁰³

In short, although the Clemency Act does not mandate any procedural specifications for the President in deciding whether to grant clemency requests from death row inmates, it does not necessarily follow that the President is allowed to disregard such requests arbitrarily. On the contrary, in accordance with the principle of legality, the President shall follow the procedural requirements designated by the Constitution and General Comment No. 36 when those with capital sentences ask for mercy. Therefore, the President's persistent neglect of capital clemency requests, as expounded previously,²⁰⁴ has violated certain due process and General Comment 36's requirements, such as the right to be informed,²⁰⁵ the right to make representation, the right to be heard, the requirement that requests for capital clemency be meaningfully considered and conclusively decided upon, and the

201. *Id.*

202. Sifa Yuan Dafaguan Jieshi No. 709 (司法院大法官解釋第 709 號) [Judicial Yuan Interpretation No. 709] (2013) (Taiwan).

203. *See supra* Table 3 for the full list.

204. *See discussion supra* Section II.B.

205. *See Liu, supra* note 17, at 91, n.48.

requirement that no particular category of persons sentenced to death be *a priori* excluded from clemency.

V. *JUDICIAL OVERSIGHT AS AN EFFECTIVE REMEDY FOR
CAPITAL CLEMENCY SEEKERS*

In this Part, this Article examines the impact of the Political Question Approach on the court's ability to evaluate capital clemency cases on their merits. The following Sections explore how Taiwan adopted and adapted the political question doctrine from the United States and analyzes the specific criteria under Taiwan's version of this doctrine. Based on these criteria, this Part argues that the issues surrounding the clemency power should not be considered political questions and should be subject to judicial review. Furthermore, this Part highlights that even in the United States, the President's pardoning power is subject to judicial review and not considered a political question. Drawing from this, this Part advocates for a stronger sense of responsibility on the part of the courts by invoking Article 2(3) of the ICCPR. By neglecting to review capital clemency cases on their merits, the courts not only allow violations of the right to capital clemency to persist, but also impede death row inmates' access to an effective remedy. This disregard for their rights runs against the principles outlined in Article 2(3) of the ICCPR.

A. *Clemency Power Is Not a Political Question Free from Judicial
Review*

This Section argues that courts are able to review the presidential exercise of the clemency power—or lack thereof—because it is not a political question. It first begins by detailing the history of the Taiwan's political question doctrine.²⁰⁶ It then turns to the United States and discusses the US Supreme Court's jurisprudence regarding presidential clemency power.²⁰⁷

206. *See infra* Section V.A.1.

207. *See infra* Section V.A.2.

1. The Development of Political Question Doctrine in Taiwan

As earlier Sections mentioned, in addition to the No Obligation Approach, the Political Question Approach is another strategy the Supreme Administrative Court applies in order to avoid reviewing capital clemency controversies on their merits.²⁰⁸ The Supreme Administrative Court argues that mercy is the President's sovereign power, and whether to exercise such a prerogative is a political question rather than a legal one. Therefore, the relevant issues are not reviewable by the judiciary.²⁰⁹

This is not the first time Taiwan's courts drew on this doctrine in the reasoning of their decisions. Its debut was in Interpretation No. 328 in 1993 when the Constitutional Court was confronted with the question of whether the court could preside over the dispute regarding the delimitation of the country's territorial boundaries.²¹⁰ In this Interpretation, the Grand Justices unanimously decided that the question of boundaries of the country's territory, as stated in Article 4 of the Constitution,²¹¹ involves political and historical aspects and could be altered only through the resolution of the National Assembly.²¹² Therefore, in accordance with the separation of powers principle, this is a political question and beyond the reach of the Court's review.²¹³

208. See discussion *supra* Section II.B.

209. *Id.*

210. Sifa Yuan Dafaguan Jieshi No. 328 (司法院大法官解釋第 328 號) [Judicial Yuan Interpretation No. 328] (1993) (Taiwan).

211. MINGUO XIANFA art. 4 (1947) (Taiwan) (providing that the territory of the country according to its existing national boundaries shall not be altered except by the resolution of the National Assembly).

212. In accordance with Article 27 of the Constitution, the functions of the National Assembly were to elect the President and the Vice President, recall the President and the Vice President, amend the Constitution, and vote on proposed Constitutional amendments submitted by the Legislative Yuan by way of referendum. But the National Assembly has stopped working since Section 2 of Article 1 of the Amendments to the Constitution became effective in 2005. See MINGUO XIANFA, Additional Articles, art. 1, § 2 (2005)(Taiwan) (“The provisions of Articles 25 through 34 and Article 135 of the Constitution shall cease to apply.”).

213. See Sifa Yuan Dafaguan Jieshi No. 328 (司法院大法官解釋第 328 號) [Judicial Yuan Interpretation No. 328] (1993) (Taiwan). This Interpretation was criticized for its reasoning being too short and obscure. See Liu Hongen (劉宏恩), *Sifa Weixian Shencha yu Zhengzhi Wenti Dafaguan Huiyi Shizi Sanerba Hao Pingxi* (司法違憲審查與「政治問題」：大法官會議釋字三二八號評析) [*Constitutional Review by the Judiciary and the “Political*

Later, in Interpretation No. 387, Grand Justice Geng Wu's dissenting opinion articulated that the connection between non-justiciability and political question, as explicated in the Interpretation No. 328, came from the US Supreme Court decision *Baker v. Carr*, 369 U.S. 186 (1962).²¹⁴ Interpretation No. 387 focuses on the roles and functions of the different Constitutional branches. The question the Court intended to address was whether the Premier (the President of the Executive Yuan),²¹⁵ together with cabinet members, must resign before the swearing in of the newly elected legislators. Grand Justice Wu dissented that this is a political question and therefore not subject to the Constitutional Court's review, whereas the majority did not think so and gave an affirmative response to the question.²¹⁶

Later in Interpretation No. 419, the Constitutional Court faced similar issues among the constitutional branches. The issues were: (1) whether the Vice President may concurrently assume office of the Premier; (2) whether the Premier shall resign when the President-elect assumes office; and (3) whether the Legislative Yuan's resolution to urge the President to expedite the nomination process of the Premier is constitutionally binding on the President.²¹⁷ The Constitutional Court decided that the first question is not a political one: although the Constitution does not explicitly elaborate on this controversy, it implicitly does. The order of succession when the President is unable to perform official duties begins with the Vice President and after whom is the

Question: "Comment on the Interpretation No. 328], 32 (3) SI YU YAN (思與言) [THOUGHT & WORDS] 175, 205 (1994).

214. See Sifa Yuan Dafaguan Jieshi No. 387 (司法院大法官解釋第 387 號) [Judicial Yuan Interpretation No. 387] (1995) (Taiwan), Wu, G. J., dissenting, at 1-3 (citing *Baker v. Carr*, 369 U.S. 186 (1962)).

215. In order to avoid confusion or ambiguity, this Article uses the term "Premier" to refer to the President of the Executive Yuan.

216. Sifa Yuan Dafaguan Jieshi No. 387 (司法院大法官解釋第 387 號) [Judicial Yuan Interpretation No. 387] (1995) (Taiwan).

217. Sifa Yuan Dafaguan Jieshi No. 419 (司法院大法官解釋第 419 號) [Judicial Yuan Interpretation No. 419] (1996) (Taiwan). Section 1 of Article 55 of the Constitution stipulated that the Premier shall be nominated and, with the consent of the Legislative Yuan, appointed by the President. That provision, however, was replaced by the Section 1 of Article 3 of the Amendments to the Constitution in 1997, which removes the requirement of the consent of the Legislative Yuan, so now the Premier is directly appointed by the President. *Id.*

Premier.²¹⁸ Consequently, allowing the Vice President to assume the role of Premier concurrently may frustrate the purpose of the constitutional design. The Constitutional Court concluded that the second question is rather a political one because it is about courtesy and respect instead of a constitutional requirement and thus beyond the scope of the Court's review.²¹⁹ The Constitutional Court also concluded that the third question is not political because the legislature does not have the constitutional authority to urge the President to do so. Hence, the resolution by the Legislative Yuan is merely advisory.²²⁰

Following from the third question above as to whether exercises of legislative power are political questions and therefore not reviewable by the judiciary, there are three interpretations.²²¹ In Interpretation No. 342, the Constitutional Court proposed the principle of parliamentary autonomy for the first time—announcing that legislative procedures are not subject to the Court's scrutiny unless there is a clear contravention of the Constitution.²²² Subsequently, Interpretation No. 381 addressed the question concerning the quorum requirement and the amount of affirmative votes to be cast for the National Assembly to hold a meeting.²²³ The Constitutional Court invoked the principle of parliamentary autonomy and concluded that unless a meeting is about making Constitutional amendments,²²⁴ the meeting is subject to the discretion of the National Assembly in accordance with the principles of the constitutional structure of free

218. MINGUO XIANFA art. 49 (1947) (Taiwan).

219. Sifa Yuan Dafaguan Jieshi No. 419 (司法院大法官解釋第 419 號) [Judicial Yuan Interpretation No. 419] (1996) (Taiwan).

220. *Id.*

221. Li Nianzu (李念祖), *Quanli Fenli Zhidu zhi Weixian Shencha Jizhun Chutan Woguo yu Meiguo Xianfa Anli zhi Duizhao Guancha* (權力分立制度之違憲審查基準初探—我國與美國憲法案例之對照觀察) [*An Initial Search for Doctrinal Tests for Judicial Review in Separation-of-Power Cases: From both Taiwan and US Precedents*], 34 XIANZHENG SHIDAI (憲政時代) [THE CONST. REV.] 41, 65-66 (2008) (Taiwan).

222. Sifa Yuan Dafaguan Jieshi No. 342 (司法院大法官解釋第 342 號) [Judicial Yuan Interpretation No. 342] (1994) (Taiwan).

223. Sifa Yuan Dafaguan Jieshi No. 381 (司法院大法官解釋第 381 號) [Judicial Yuan Interpretation No. 381] (1995) (Taiwan).

224. MINGUO XIANFA art. 174 (1947) (Taiwan) (providing that there shall be two-thirds of the delegates to the National Assembly to be present and a three-fourths affirmative vote to be cast).

democracy.²²⁵ The third interpretation is Interpretation No. 499, which addressed the problem of whether the process of amending the Constitution and the Constitutional Amendments may be unconstitutional.²²⁶ The Constitutional Court made a conclusion that both could be unconstitutional and thus not political questions if there were any significant and clear flaws in the amendment procedures or the amendment itself. The Court finds that a flaw is “significant” when the facts of the flaw alone are able to render the procedure illegitimate.²²⁷ It defines a flaw as “clear” when the facts of that flaw can be directly determined without investigation.²²⁸ Such flaws will contravene the quintessential principles of the Constitution, such as the principle of a democratic republic (Article 1); the principle of popular sovereignty (Article II); the protection of human rights (Chapter II); and those providing for the separation of powers and the principle of checks and balances.²²⁹

Based on the abovementioned interpretations regarding the political question doctrine, some scholars have written that, in Taiwan, this doctrine is derived from the separation of powers requirement and that the criterion for determining whether an issue is a political question is whether the Constitution has definitely designated a certain category of issues to a political branch.²³⁰ Otherwise, pursuant to Article 78 of the Constitution

225. See Sifa Yuan Dafaguan Jieshi No. 381 (司法院大法官解釋第 381 號) [Judicial Yuan Interpretation No. 381] (1995) (Taiwan).

226. Sifa Yuan Dafaguan Jieshi No. 499 (司法院大法官解釋第 499 號) [Judicial Yuan Interpretation No. 499] (2000) (Taiwan).

227. *Id.*

228. *Id.*

229. *Id.*

230. Li Nianzu (李念祖), *Zailun Zhengzhi Wenti Lilun Zai Woguo Xianfa Jieshi Shang zhi Yunyong* (再論「政治問題」理論在我國憲法解釋上之運用) [*Re-comment on the Use of the Political Question Theory in the Constitutional Review of Our Country*], 29(2) TAIDA FAXUE LUNCONG (臺大法學論叢) NAT'L TAIWAN U.L.J. 43, 60-61 (2000); Liao Yuan-hao (廖元豪), *Cong Zhengzhi Wenti Lilun Lun Liangan Guanxi Xianfa Dingwei zhi Ke Sifa Xing* (從政治問題理論, 論兩岸關係憲法定位之可司法性) [*On the Justiciability of Constitutional Definition of Cross-Strait Relationship in Light of Political Question Theory*], 71 ZHENGDA FAXUE PINGLUN (政大法學評論) [CHENGCHI L. REV.] 27, 64-65 (2003)(Taiwan). Article 111 of the Constitution stipulates that, for illustration, if any matter not enumerated in the Constitution has a national nature, it shall fall in the jurisdiction of the central government rather than a local government; in case of dispute over the nature of a matter, it shall be settled by the Legislative Yuan. Therefore, such controversies are within the reach of the political doctrine so won't be addressed by the judiciary. *Id.*

and Section 1 of Article 1 of the Constitutional Court Procedure Act,²³¹ the Constitutional Court possesses the general power to interpret the Constitution and to address relevant disputes accordingly. This criterion for the political question doctrine is similar to the first element proposed by *Baker*.²³²

Accordingly, we can thereby analyze the issue respecting whether the clemency power is a political question and thus free of judicial review. The Constitution only requires an amnesty to go through a two-step process consisting of the Executive Yuan and the Legislative Yuan pursuant to the text of Section 2 of Article 58 and Article 63.²³³ As for pardon (either partial or full), commutation of sentence, or restitution of civil rights, there are no provisions in the Constitution designating a certain political branch to handle the potential matters thereof. As a result, in accordance with the criterion for Taiwan's political question doctrine, the controversies with reference to pardon, commutation of sentence, and restitution of civil rights are not political questions. This is because the Constitution has not assigned a specific branch to grapple with those issues. On the contrary, these questions are still subject to judicial oversight, despite the courts' high degree of deference to the President and low level of scrutiny when reviewing such cases.²³⁴ Therefore, the Political Question Approach adopted by Taiwan's Supreme Administrative Court, which oversees clemency requests, is inconsistently applied in Taiwan's legal context.

2. Clemency Power Is Subject to Judicial Review in the United States

The previous Section posited that the issues over pardon, commutation of sentence, and restitution of civil rights are not within the scope of the political question doctrine in the jurisprudence of Taiwan's Constitutional Court. In this Section, this Article turns to the origin of the doctrine—that is, the United

231. MINGUO XIANFA art. 78 (1947) (Taiwan); Constitutional Court Procedure Act, art. 1, § 1 (Taiwan).

232. *Baker*, 369 U.S. at 217; see Li, *supra* note 221, at 64; see also *Nixon v. United States*, 506 U.S. 224, 228 (1993).

233. See discussion *supra* Section II.A.

234. Liu, *supra* note 17, at 91.

States—to assess whether the clemency power is a political question not subject to judicial oversight.

Article II, Section 2 of the US Constitution empowers the President to grant reprieves and pardons for offences against the United States, except in cases of impeachment.²³⁵ Although the text mentions only reprieve and pardon, the US Supreme Court has held that the power extends to all sorts of pardons, which are known in the English common law as “pardons” regardless of their names.²³⁶ As a consequence, such an executive clemency power is embodied in five forms in the American legal system: pardon, amnesty, reprieve, commutation, and remission of fines,²³⁷ and mercy can also be granted with conditions.²³⁸

As to whether the political question doctrine will exempt the clemency power from judicial oversight, the literature on the subject has suggested that, if the President abuses the clemency power and grants a pardon arbitrarily, for example, upon a coin toss, a judicial response may be appropriate.²³⁹ The US Supreme Court at times implies in its decisions that the federal judiciary falls short of the constitutional authority to interfere in the exercise of the President’s clemency power.²⁴⁰ In *United States v. Klein (1871)*, for example, the Supreme Court invoked the principle of the separation of powers and held that the executive branch alone is entrusted with the power of pardon, which is granted without limit.²⁴¹ Therefore, Congress and the Judiciary shall not intervene in the President’s pardoning power.²⁴²

235. U.S. CONST. art. II, § 2, cl. 1.

236. *Ex parte Wells*, 59 U.S. 307, 314 (1855).

237. Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575-78 (1991); see also Jorgensen, *supra* note 33, at 348-49.

238. *But see* Note, *The President’s Conditional Pardon Power*, 134 HARV. L. REV. 2833 (2021).

239. Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 143 (2002); see also *Nixon v. United States*, 506 U.S. at 253-54 (Souter, J., concurring).

240. Daniel T. Kobil, *Compelling Mercy: Judicial Review and the Clemency Power*, 9 U. ST. THOMAS L.J. 698, 700 (2012).

241. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871).

242. Kobil, *supra* note 240, at 700.

In recent decades, the Court re-emphasized this stance by noting, “pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.”²⁴³

There have been, however, many decisions in which the Supreme Court did not adopt this non-involvement approach and meddled in the exercise of the President’s pardoning power. In *United States v. Wilson (1833)*, for example, the Justices came to a unanimous conclusion that a pardon is a deed that a recipient may refuse or to which a prosecutor may object—even where death sentences are involved. Any issues regarding a pardon, “like any other deed, ought to be brought ‘judicially before the court by plea, motion, or otherwise’. . . and expounded by the court.”²⁴⁴ Following *Wilson*, the Court reaffirmed the same conclusion in *Burdick v. United States (1915)* by nullifying a presidential pardon because it was in contravention of the Fifth Amendment.²⁴⁵ In this case, George Burdick, an editor at a newspaper, refused to disclose his sources for a report exposing corruption in the US Customs Office. He invoked his Fifth Amendment right against self-incrimination during the federal grand jury inquiry. President Woodrow Wilson granted a pardon covering all federal crimes Burdick may have committed in relation to the report but was rejected. The Supreme Court held that even though the President possesses the power to grant a pardon, the petitioner reserves the right to refuse it. The Supreme Court thus invalidated the pardon by holding that the pardon was not effective because of Burdick’s refusal to accept the pardon.²⁴⁶

In *Ex parte Grossman (1925)*, the issue before the Court was whether criminal contempt of court is an offense against the United States and whether the President may grant a pardon for such offense as Article II, Section 2 of the US Constitution prescribes.²⁴⁷ The Supreme Court gave an affirmative answer to this question without even questioning whether it had the

243. *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981).

244. 32 U.S. (7 Pet.) 150, 161 (1833).

245. 236 U.S. 79 (1915).

246. *Id.* at 94.

247. 267 U.S. 87 (1925). *See generally* U.S. CONST. art. II, § 2, cl. 1.

authority to review such a case.²⁴⁸ *Schick v. Reed* (1974) involves the issue of whether the President is allowed to attach a condition that is not authorized by law to a sentence commutation.²⁴⁹ The Court held that the President's pardoning power, including commutation of sentence, derives from the Constitution alone—not from any legislative enactments—and shall not be frustrated by any statute.²⁵⁰ The Court thus upheld the validity of the President's conditional commutation of sentence, despite the fact that it was incompatible with the Uniform Code of Military Justice.²⁵¹ In this case, neither the majority opinion nor the dissenting opinion questioned whether the Court has the authority to review the President's conditional commutation decision. Also, the US Supreme Court stressed that such conditions shall not offend the Constitution.²⁵² This could be indicative of the fact that judicial oversight would be the most appropriate way to prevent the President's mercy from going beyond the ambit of the Constitution because it is the authority of courts to preside on such issues.²⁵³

More recently in *Ohio Adult Parole Authority v. Woodard* (1998), there was a 5-4 split within the Supreme Court as to the extent of due process protections required in clemency proceedings.²⁵⁴ Chief Justice Rehnquist, together with three other Justices, opined that grant of mercy is a matter of grace and thus not entitled to due process protection.²⁵⁵

248. *Id.* at 108.

249. 419 U.S. 256 (1974).

250. *Id.* at 266-68.

251. *Id.* at 260-68.

252. *Id.* at 266.

253. Kobil, *supra* note 240, at 701.

254. 523 U.S. 272 (1998).

255. *Id.* at 284-85.

By contrast, Justice O'Connor, joined by three other Justices, and Justice Stevens agreed that despite clemency decisions having not traditionally been the business of courts, some minimal or basic procedural safeguards still apply to clemency proceedings.²⁵⁶ Justice O'Connor further explained:

Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.²⁵⁷

Therefore, the majority of Justices acknowledged that the clemency process could prompt certain due process concerns, which are reviewable by the courts.

In summary, even though there are differing viewpoints, the judicial review of the clemency power is not considered a political question in US law. In practice, the controversies arising from the clemency power are indeed subject to judicial review, in spite of the fact that some safeguards apply. Judges are also increasingly willing to examine pardon cases to determine whether the mercy procedure meets the constitutional basic requirements or to ensure the decisions are not produced arbitrarily or discriminatorily.²⁵⁸ Consequently, the Political Question Approach, adopted from the United States by Taiwan's Supreme Administrative Court to avoid reviewing capital clemency cases on their merits, is unacceptable in both Taiwan's legal context and in the American legal context.²⁵⁹

However, we have to keep in mind that unlike the US President, who is vested with the executive power and acts as head of the federal government,²⁶⁰ the highest administrative office of the government in Taiwan is the Executive Yuan,²⁶¹ and the Premier, as the head of the Executive Yuan,²⁶² leads the executive

256. *Id.* at 288 (O'Connor, J., concurring) & 292 (Stevens, J., concurring in part and dissenting in part).

257. *Id.* at 289 (O'Connor, J., concurring).

258. Novak, *supra* note 152, at 830.

259. See discussion *supra* Section V.A.

260. U.S. CONST. art. II, § 1, cl. 1.

261. MINGUO XIANFA art. 53 (1947) (Taiwan).

262. MINGUO XIANFA art. 54 (1947) (Taiwan).

power of the country.²⁶³ In addition, there has been more than two hundred years of jurisprudence in the United States in which the judiciary has been able to review Presidents' actions,²⁶⁴ but Taiwan's judiciary only began to provide a meaningful check on presidential actions after the end of the Martial Law in 1987. Therefore, different design in the separation of constitutional powers between the United States and Taiwan and their constitutional histories may to a certain extent explain why the development of the presidential clemency power has followed different paths. However, as this Section has elucidated, the political question doctrine, as developed and used in the United States, cannot function as the basis for the President's pardoning power to be free of judicial review in either the United States or Taiwan.

B. The Right to an Effective Remedy and Judicial Review

From the discussions in the last Section about Taiwan and the United States this Article has demonstrated the ineffectiveness of the argument that clemency power disputes are non-justiciable political questions that are beyond the reach of judicial oversight. In other words, when such clemency-related controversies are brought for judicial review, this Article has thus far sought to demonstrate that courts still possess the authority to examine or assess these cases on their merits. However, having such a reviewing power does not necessarily mean courts will exercise it in capital clemency cases. Hence, the question this Section explores is whether the judiciary has the legal duty to review these mercy requests from inmates on death row.

In accordance with the Roman law principle *ubi jus ibi remedium* ("where there is a right, there must be a remedy"), the presence of a legal right shall be accompanied by an effective remedy for possible violations, and some scholars have argued that courts are the most appropriate authority to determine

263. In Taiwan, the President is the head of the country, not just the executive branch. She has power over certain matters like clemency, military forces, war, and treaties. See MINGUO XIANFA arts. 35, 36, 38, and 40.

264. See, e.g., *Marbury v. Madison*, 5 U.S. 137 (1803).

remedies.²⁶⁵ Research also shows that the right to seek capital clemency under the ICCPR no longer denotes waiting passively for the President's decision or even just the right to submit their requests.²⁶⁶ Instead, if requests are not considered in good faith or the possibility of mercy has been already foreclosed,²⁶⁷ that would constitute a contravention of the right.²⁶⁸ Many countries have permitted the clemency power to be subject to judicial review and challenged by the principles of the Constitution, at least in some controversial cases, such as England, New Zealand, Canada, South Africa, and India.²⁶⁹ By contrast, the courts in Taiwan still refuse to serve as a check on the presidential clemency power despite the fact that the Presidents' inaction has violated General Comment No. 36. Taiwan's Presidents were worried about the potential public distrust that might ensue by granting mercy to death row inmates, so they decided repeatedly to ignore such petitions without any responses.²⁷⁰ By specifically excluding death row inmates and no other inmates, there is a foreclosure of the possibility of certain category of cases, which violates General Comment No. 36's prohibition of the *a priori* exclusion of certain categories of persons seeking clemency.²⁷¹

Furthermore, Article 2(3) of the ICCPR also provides the right to an "effective remedy" to any person whose rights or freedoms preserved in the ICCPR are violated.²⁷² Under this provision, each state party is obligated to ensure that: (1) victims of human rights violations have an effective remedy; (2) victims have the right to have their claims determined by competent judicial, administrative or legislative authorities, or any other competent

265. Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1636-37 (2004).

266. Andrew Novak & Daniel Pascoe, *Emerging Trends and Best Practices in Comparative Clemency*, in EXECUTIVE CLEMENCY COMPARATIVE AND EMPIRICAL PERSPECTIVES 187, 192 (Daniel Pascoe & Andrew Novak eds., 2021).

267. For example, the purposeful blanket denials of certain groups of cases like drug trafficking in Indonesia. *See id.*

268. *Id.*

269. *Id.* at 196-9; *see also* Novak, *supra* note 152, at 832-34.

270. *See* discussion *supra* Section I.

271. The Ministry of Justice explained via a press release that it was told by the President that no pardon will be granted to any persons on death row. *See* THE DEATH PENALTY PROJECT, *supra* note 176, at 22-23, 23 n.51.

272. ICCPR, *supra* note 12, art. 2, ¶ 3.

authority of the State, and to develop the possibilities of judicial remedy; and (3) the competent authorities enforce such remedies.²⁷³ Similar provisions regarding the right to an effective remedy can be found in other international human right treaties, such as Article 8 of the Universal Declaration of Human Rights (UDHR);²⁷⁴ Article 6 of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD);²⁷⁵ and Article 2(c) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).²⁷⁶ Some regional human rights treaties have similar requirements, including Article 13 of the European Convention on Human Rights (ECHR);²⁷⁷ Article 25 of the American Convention on Human Rights (ACHR);²⁷⁸ and Article 7(1)(a) of the African Charter on Human and Peoples' Rights (ACHPR).²⁷⁹

The core component of the right to an effective remedy is the access to a competent court. Paragraph 15 of General Comment No. 31 affirms that state parties, are obligated to, "ensure that individuals also have accessible and effective remedies to vindicate those rights" if those rights are encroached upon or otherwise violated.²⁸⁰ It also reinforces that the right to an effective remedy:

can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law.²⁸¹

273. *Id.*

274. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 8 (Dec. 10, 1948).

275. G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, art. 6 (Dec. 21, 1965).

276. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women, art. 2, ¶ c (Dec. 18, 1979).

277. Council of Europe, European Convention of Human Rights art. 13 (Nov. 4, 1950).

278. Organization of American States, American Convention on Human Rights art. 25, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

279. Org. of African Unity [OAU], African Charter on Human and Peoples' Rights art. 7, § 1, ¶ a (June 27, 1981).

280. Hum. Rts. Comm., General Comment No. 31, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

281. *Id.*

This means that the judiciary may serve as a strong shield against rights violation through its power of interpretation and application of treaties, Constitution, and domestic laws. The literature also suggests that judicial review is the most direct means to enforce the constitutional limitations on the clemency power of the President.²⁸²

Accordingly, the persistent disregard of capital clemency requests by Taiwan's Presidents is a gross infringement on the right to seek capital clemency of death row inmates. To address such a serious error, the inmates must be able to enjoy the right to bring their cases to the court in accordance with Article 2(3) of the ICCPR. To be an "effective" remedy under the requirement of this provision, courts ought to review the cases on the merits rather than repeatedly dismiss them on procedural grounds. Even though the Supreme Administrative Court acknowledged that the right to capital clemency is indeed a legal right in Taiwan,²⁸³ such a right is considered a mere "push" to prompt the President to exert clemency power and has nothing essential in its nature.²⁸⁴ Therefore, without this substantive review by the judiciary, not only does the infringement of the right to capital clemency remain, but the right to an effective remedy, enshrined in Article 2(3) of the ICCPR, is also encroached when the judiciary stays silent in such disputes.

VI. CONCLUSION

The presidential clemency power has roots in both the common law regime and the civil law regime, and such a power is traditionally considered an executive prerogative—an emblem of the sovereignty of a state. That is not the story in Taiwan. Once Taiwan incorporated the ICCPR into its domestic law, inmates on death row began submitting clemency requests to the President. The legal basis of such requests comes from the right to seek pardon or commutation of the sentence, stipulated in Article 6(4) of the Covenant. The Presidents, however, ignored the requests

282. Kobil, *supra* note 240, at 701.

283. Zuigao Xingzheng Fayuan 103 Niandu Cai Zidi 254 Hao Caiding (最高行政法院103年度裁字第254號裁定) [Year 103 Cai No. 254 Ruling of the Supreme Administrative Court].

284. See Liu, *supra* note 17, at 91.

constantly without any responses to the inmates. The judiciary also made decisions that favored the President's inaction by repeatedly dismissing the inmates' cases. The two central justifications for the court decisions are "the President has no obligation to take any action because the clemency power is an executive prerogative" and "the exercise of the clemency power is not subject to judicial oversight because the issue at the heart of cases questioning such exercise raises a political question."²⁸⁵ This Article argues against those justifications.

For the first justification, this Article argues that the presidential clemency power is constrained by the principles of legality and due process in the government's decision-making. Consequently, the President is obligated to respond to requests in accordance with the relevant laws, including due process requirements. For the second justification, this Article argues that the presidential clemency power never meets the criteria for the political question doctrine in Taiwan. In the United States, which provides the model that Taiwan's courts have relied on for justifying its decisions in these cases, the pardoning power of the President is also subject to judicial review and never treated as a political question. Further, pursuant to the right to an effective remedy, preserved in Article 2(3) of the Covenant, Taiwan's judiciary shall adjudicate cases brought by inmates on the merits because their right to seek capital clemency has been violated by the inaction of the President. Through these adjustments in the presidential clemency power, it would no longer be a prerogative without any limitations, but an executive power exerted under the framework of human rights with the checks and balances of the legislature and the judiciary.

285. See discussion *supra* Section II.B.