場次七：人權保障與落實：NGOs 觀點
Panel VII: Protection and Implementation of Human Rights: the NGOs Perspective

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兩年內檢討不符合兩公約的法規—一個 NGO 工作者的經驗與省思

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摘要

在政府批准兩公約後，四十多個民間團體結合成策略聯盟組織「兩公約施行監督聯盟」。本文重點是針對兩公約施行法第八條，各級政府機關應檢討所主管之法令及行政措施，有不符兩公約規定者，應於二年內，完成法令之制（訂）定、修正或廢止及行政措施之改進。在 2010 年底公約實施週年時，兩公約聯盟動員民間團體提出 44 項對於法令及行政措施的修訂意見。本文旨在藉由行政院人權保障推動小組對民間團體之複審意見回顧，省思本國政府對於國際人權公約的態度。本文提出適用範圍不清、準備不周決心不足、消極解釋、只看條文不顧政策、只看法律不看執行等五個問題，並提出嚴格遵守兩公約施行法第 3 條廣泛採納一般性意見、加速批准施行其他國際人權公約、迅速累積國內外案例、肯認社會正義的目標，並在兩公約施行法所規定的兩年期限後，繼續推動法令與政策之檢視等建議。

關鍵詞

兩公約、非政府組織、人權、兩公約施行監督聯盟

壹、前言

臺灣 NGO 長期以來的努力，促成了臺灣政治的民主化以及對人權觀念的重視，已經有長遠的歷史，個人在這個場合的報告，顯然無法將這些努力的成果，以及各個 NGO 對於國內人權狀況的要求與批評，做一完整的回顧；事實上，任何如此的努力都將面臨抉擇的困難和掛一漏萬的風險。我的重點將放在最近兩年來，政府批准兩公約之後，國內 NGO 如何發揮其力量，提升臺灣的人權標準。尤其是民間團體針對兩公約施行法第八條的參與，以及事後的回顧。相對於部分政府人士認為民間人權團體「只會」採取跟政府對抗的立場，我想要呈現民間團體在適當的時機，如何秉持他們的信念，透過國家人權機制，積極貢獻他們的專業，並堅持國際人權的標準。本文當然無法呈現出 NGO 工作人員在過程中的熱情與奉獻，或者紀錄那些激烈的討論和爭辯，在此我先向各位工作夥伴致歉。同時，民間參與的範疇廣泛，本文無法一一提及，這僅是因為本人了解廣度和深度的限制，與議題的重要性毫不相干。此外，民間團體在這兩年中還有許多活動項目，例如辦理教育訓練，以及著力於國家人權報告的審查機制，因為篇幅有限，本文亦無法兼顧。

貳、兩公約施行監督聯盟和修法

人權兩公約的批准以及兩公約施行法的通過實施，對國家的人權提升而言，具有相當重要的意義。如果把握這個機會，經過適當的努力，就能運用聯合國既有的人權規範、慣例與機制，以督促政府提升在人權保障方面的工作。然而，我國脫離聯合國體系近四十年，一方面造成國際法適用和國際機構官方關係的雙重斷裂，另一方面由於長期脫離系統，也導致政府在組織架構上的虛弱。在行政、司法、立法三權當中，普遍缺乏人權監督機制，也欠缺足夠的專業人才，甚且連人權相關事務的知識和資訊都不完整。因此，在政府聲明要施行兩公約時，借力使力，督促政府實現其承諾，就成為民間團體的著力點。

長期關注人權事務，當時擔任國際特赦組織臺灣分會理事長的黃文雄先生，在立法院批准兩公約之後，立即發起 NGO 的聯繫工作，召集了國內四十二個人權、婦女、勞工、律師、學術等民間團體，組成策略性聯盟組織。2009 年 12 月 9 日宣布成立「兩公約施行監督聯盟」 (以下簡稱兩公約聯盟)，以期結合不同領域專長，共同監督政府落實兩公約之精神與內涵。

2009 年 12 月 10 日頒布施行的《兩公約施行法》第八條，明訂「各級政府機關應依兩公約規定之內容，檢討所主管之法令及行政措施，有不符兩公約規定者，應於本法施行後二年內，完成法令之制（訂）定、修正或廢止及行政措施之改進。」兩公約聯盟成立之初所訂定的短期目標，第一項即是：監督政府落實「兩

公約施行法」第八條之規定，檢討不符合兩公約之法令與行政措施，並提出檢討報告與修/廢/立法/改進之計劃。[1]

根據法務部公布之資料，政府行政部門在兩公約施行法施行之前，即已開始進行內部檢討，並整理出 219 則案例。[2]但是政府所提出的案例雖多，其內容林林總總，甚至「總統府總統侍從侍衛人員服裝購置要點」也堂堂佔據一席之地，對於深受民間人權團體關切的諸多法律，諸如集會遊行法、勞動基準法、環境影響評估法、刑法(死刑判決)、以及牽涉司法人權保障的諸多規定(例如被告羈押相關法制，刑事偵查規範)、原住民權益、環境保育、愛滋人權、外籍勞工人權等諸多議題，卻著墨甚少。[3]

因此，兩公約聯盟遂發動聯盟成員以及其他 NGO，檢視其日常推動處理之業務，若有因法律或行政命令而使人權維護工作窒礙難行、難以伸張者，即將此類案例由兩公約聯盟秘書處彙整，送交法務部。在進行這項工作時，NGO 也面臨相當的挑戰。原因大致如下：

(1) NGO 所處理的問題包羅萬象，每一個案例都牽涉到複雜的法律適用、管理機關、社會處境、價值差異等問題，NGO 也不斷在立法倡議以及案主服務之間來回奔波。這兩類工作在概念、方法、與實務操作上，都有極大的差異。各 NGO 或許可以試圖了解每一案例所面臨的困境，但是同一案例可能牽涉到數條法律，甚且，工作之困難常是來自於地方主管機關的一紙公文。實際工作中的困難和兩公約之間，確實有難以跨越的鴻溝。要如何確認是哪一條國內法律，該法律牴觸了兩公約的哪一條，對 NGO 而言是相當的挑戰。此外，有些侵害人權的措施來自於政府整體政策，而非單指某一條法律。例如，國光石化開發案引起的爭議，恐怕難以簡化到某一法律條文。

(2) 在諸多國際人權公約中，我國當時僅只批准了兩公約和消除對婦女歧視公約有相關的施行法(後者之施行法自 101 年才生效)。由於兩公約的內容非常精要，許多原則性的宣示還需要「一般性意見」的說明，才能釐清其意旨；何況兩公約之外，其他更具針對性的公約(例如「廢除奴隸和禁止強制勞動國際公約」、「消除一切形式種族歧視國際公約」、「兒童權利國際公約」、「原住民權利公約」、「國際移民勞工及其家屬權利公約」、「保障身心障礙者權利及尊嚴國際公約」)，更適合運用在具體的個案。[4]甚至，在 2010 年底，兩公約施行後一年，政府還無

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[1] 兩公約聯盟網站，http://covenants-watch.blogspot.com/p/blog-page.html，2011/11。

[2] 依據行政院法務部網站(http://www.humanrights.moj.gov.tw/ct.asp?xItem=223296&ctNode=27273&mp=200)，各機關在「兩公約施行法」施行前將不符兩公約規定之法令及行政措施，製作清冊函送法務部，法務部彙整成「各機關主管法令及行政措施是否符合兩公約檢討清冊」，於 98 年 12 月 7 日陳報行政院，2011/11。

[3] 請參見民間司改會林峯正律師「兩公約檢討讓人看破手腳？」，於「臺灣法律網」。http://www.lawtw.com/article.php?template=article_content&area=free_browse&parent_path=,1,6,&job_id=158086&article_category_id=19&article_id=86097。2011/11。

[4] 另，我國在退出聯合國之前曾批准「防止及懲治殘害人群罪公約」、「婦女政治權利公約」、「奴役公約(修正版)」、「關於廢除奴役、奴役交易與類似奴役之補充公約」、「已婚婦女國籍公約」及

法提供一般性意見的彙編，後來由臺灣人權促進會與兩公約聯盟於 2011 年六月率先印行繁體版。

(3) 為充分理解如何運用人權公約，NGO 需要研究這些公約在其他國家適用的案例。這方面 NGO 主要經過向學者請益，希望迅速擷取相關經驗。[5]加入兩公約聯盟的律師們，亦積極透過國內外案例學習。在 2010 年當中，政府動員各機關檢查職責相關的法令，尚且無法完整；憑民間團體之資源與人力，更難以在短時間內熟習運用兩公約的有效方式。

雖然有上述困難，但兩公約聯盟仍在短時間動員了臺灣人權促進會、臺灣勞工陣線、臺灣國際醫學聯盟、廢除死刑推動聯盟、臺灣環境行動網、中華民國全國教師會、小米穗原住民文化基金會、民間司法改革基金會、臺灣婦女團體 CEDAW 報告撰寫團隊、南洋臺灣姐妹會、臺灣農村陣線等團體，並參考其他 NGO 之公開或書面意見，就當時國內法律、政策有違反兩公約之虞者，提出 44 項修/廢法意見，送交政府進行審查。

參、「法令及行政措施是否符合兩公約規定」之檢討

政府以行政院人權保障推動小組為負責單位，檢討「各機關主管法令及行政措施是否符合兩公約規定檢討清冊」之 219 則案例及 44 則民間團體意見，並邀請人權學者專家建立「法規是否符合兩公約規定複審機制」。由法務部常務次長江惠民先生擔任主持人，自 100 年 1 月 4 日起至 5 月 18 日止，召開 21 次複審會議。

在各機關所提之 219 則案例，其中經複審不符合兩公約，確定要修法但尚未完成修法之「法律案」共計 80 案；截至 2011 年 4 月 27 日為止，於立法院審議中者計 67 案，行政院審議中者計 1 案，部會審議中者計 8 案，司法院院會通過、會銜行政院中者計 3 案，行政院院會通過、會銜司法院中者計 1 案。（曾勇夫，2011）本文之重點在討論民間團體所提之則案例。根據法務部長之報告，民間提案之處理情況如下表：

「消除一切形式種族歧視國際公約」。請參見黃昭元，臺灣與國際人權條約，《新世紀智庫論壇》，第四期，1998 年 11 月，頁 42-50.

[5] 個人經驗所及，臺灣大學張文貞教授、輔仁大學吳志光教授、中研院廖福特教授、東吳大學陳瑤華教授、陳俊宏教授，均曾大力協助民間團體對兩公約內容及其運作方式的理解。

案件類型	案件數	處理情形
涉及刑事罰法律案	1 案	經複審，認為不違反兩公約者計有 5 種法律，認為違反兩公約、建議修法者計有 6 種法律。
法律案及政策案	32 案	經複審，不違反兩公約者 18 案，違反兩公約者 10 案，與兩公約無涉者 3 案，具體個案訴訟中者 1 案。
行政措施	11 案	複審認為無違反 7 案，不處理 2 案，法律程序進行中不宜決議 2 案。

對於處理的方式，目前的爭議點之一固然是兩年期限已屆，顯示當初決策之倉促；但是本文想要對處理的內容提出一些看法。處理的內容值得重視的原因是，行政院人權保障推動小組的層級不低，而且是在法務部次長親任主持人的 21 次會議中形成結論，足以反應政府對這些民間團體所提之人權議題的重視程度。以下我把觀察到的看法歸納成五個意見：

一、對於哪些是兩公約該處理的議題，範圍界定不清：

根據 100 年 4 月 6 日在法務部召集專家所舉行之「法規是否符合兩公約第 16 次複審會議」紀錄[6]，該次會議討論了「民間團體反應我國之死刑制度顯已違憲，應停止死刑執行，訂立時間表儘快廢除死刑；及國家宣告死刑及執行死刑本身即係否定一個人民的法律人格，故已牴觸公約等問題，是否符合公政公約第 6 條第 6 款及第 16 條之規定？」其決議情形為：「本案涉及政策面之考量，與是否違反兩公約無涉；惟另將與會委員之意見送交法務部逐步廢除死刑推動小組參酌。」

此一回應的意義委實難以索解，為何涉及政策面，就與違反兩公約無涉?這樣的決定不是給了政府完全的操作空間嗎？更基本的問題是，誰有權決定哪些議題與兩公約無涉？兩公約原先的意旨就在維護所有人的基本權利，對於有心於人權者，即使是該權利在兩公約內沒有明文提及，都可以設法找到相關條文來解釋，以求人權之保障；更何況死刑早已是爭議許久的基本人權議題。由此例可見，對於國際人權爭議久不聞問的國家，暫且不論兩公約的法位階問題，即使是其運用範圍，都還待學習。

另一方面，法務部彙整之「公民與政治權利國際公約檢討法令」(同註 2)，記載某些判處死刑之罪行決應予刪除，例如違反刑法第 261 條公務員利用權力強迫他人犯前條之罪者，違反毒品危害防制條例第 4 條第 1 項製造、運輸、販賣第一級毒品者，因「上開規定並未造成生命法益之剝奪或侵害，應非屬犯罪情節重大之犯罪。」法務部聲明將於 100 年 11 月 30 日前完成檢討，修正刪除左開條文死刑之刑罰。這些做法不是已經確認死刑並非與兩公約「無涉」嗎?

[6] 行政院人權保障推動小組歷次審查「法規是否符合兩公約複審會議」之記錄，請法務部網站，http://www.humanrights.moj.gov.tw/ct.asp?xItem=223296&ctNode=27273&mp=200。2011/11。

二、政府事前準備不周，事後政治決心不足

政府當初訂定在兩年內完成修法工作，著實低估了問題的廣泛性與深度，其所規定之期限，並未參酌國外先例。就英國與加拿大之經驗而言，即使長期關注人權議題的國家都難以完整修法，更何況我國已脫離國際人權系統長達四十年？若與英國情況相比，英國於一九九八年將歐洲人權公約內國法化的時，特別設計將其生效日定於二○○○年，以便有整整兩年進行必要的培訓與法令及行政措施之檢討。脫離人權體系已三十九年的我國，準備期卻只有短短七個月又十八天（自 2009 年四月二十日施行法公布，至同年 12 月 10 日生效），（黃文雄，2010）若參考曾勇夫 (2011)，可知各機關用於檢討之時間更短，僅至 10 月 31 日。

又，目前執政黨在立法院具有絕對優勢，理論上應能盡速完成修法程序。然而，或許政府過份樂觀或過於輕忽，倉促訂下二年修法期限，卻又不盡力實現承諾。例如，根據「第 10 次複審會議」記錄，審查結論為，現行集會遊行法採許可制，對於人民透過遊行方式表達意見之言論自由有所限制，有違公政公約第 21 條規定。然而，兩年期限將至，集遊法修法仍遲未排入優先法案中。媒體報導，2011 年 10 月 4 日，臺灣人權促進會、人民火大行動聯盟與近年遭集遊法起訴或判刑的「苦主」們，於本屆第 8 會期結束前夕，赴立法院群賢樓前，要求立法院在本會期重新審議「集遊法」。（陳韋綸，2011）

三、狹義解釋減損經社文公約的適用性

由於經濟社會權牽涉到逐步實現(progressive realization) 的原則，雖是考慮到政府在資源的限制，但另一方面卻也給了政府灰色空間，以資源不足的原因來推拖社會安全方面的責任。若過於狹義解釋，則兩公約勢將無法回應社會中明顯存在的不正義。我國近年來政府推動調降遺贈稅、營利事業所得稅在內的一連串降稅措施，導致稅收降低。2010 年貧富差距加大，綜合所得申報戶 20 等分最高與最低所得組差距 66 倍為歷史新高；「每戶可支配所得」5 分位，最高所得組與最低所得組之差距亦高達 8.22 倍；落在貧窮線以下的家庭升至 10.8 萬戶，人數 26.3 萬人。另一方面，包括修正社會救助法放寬救助標準、十二年國教、托育補助、育兒津貼、營養午餐免費等措施，政府都以財政困難為藉口，而不能實施或者聲稱只能等待財政改善逐步實施。[7]甚且，行政院及所屬「財政部近年來採取

[7] **由於企業租稅優惠和資本利得之稅務減免，導致政府財源不足；臺灣的租稅負擔率，1990 年為 19%，之後一路下降至目前不到 12%。公平稅改聯盟召集人王榮璋指出，100 年的社福預算減列辦理災害救助及慰問等經費 3028 萬元，減幅 45.43%；身心障礙者居家及社區服務大砍 6 成經費；補助婦女福利的經費減列 1/4；兒少保護、輔導經費受到排擠等不合理的現象。參見中央社記者何孟奎報導：「社團：慶建國百**

寬鬆減稅政策，間有未依法事先籌妥經費或明定相關收入來源；行政院主計處未於政府總預算書上適當揭露隱藏性負債及或有負債，亦未能責成相關單位確實揭露真實負債狀況」，而遭監察院糾正。[8]

根據「第 11 次複審會議紀錄」，討論了我國產業創新條例及現行稅制中之降稅措施，是否符合經社文公約第 9 條、第 10 條及第 11 條之規定？決議認為：「本案涉及政策考量，牽涉層面甚廣，從我國現行整體稅制以觀，我國產業創新條例規定及現行稅制並無違反經社文公約。」稅制是否違反經社文公約，顯然牽涉層面甚廣，但是若根據第 19 號一般性意見：「3.由於其再分配的性質，社會保障在減少和減緩貧困、防止社會排斥以及推動社會包容等方面發揮了重要的作用。」「4b. 幾乎所有締約國都將需要非繳費性計畫(non-contributory schemes)，因為基於保險的計畫不可能顧及所有的人。」這些條文，都指向一個適當的稅制之重要性，可見稅制之檢討是在兩公約的範疇之中；至於解釋從寬或從嚴，如同審查意見所言，當從國家整體財政來判斷。然而，在此審查階段就宣稱「並無違反經社文公約」，就阻斷了進一步利用兩公約來讓國家檢視社會正義的機會。

四、只論法律，不看政策

根據「第 11 次複審會議紀錄」，就我國經濟開發與環境保護之衝突，審查委員之結論為：「環境權在經社文公約中隱而不顯，而對健康權則設有若干準則可資遵循，並非完全不得主張。儘管現行環境影響評估法確實有與時俱進之必要，仍難謂本案所指涉之現行環境影響評估法之規定與兩公約所稱之健康權有所牴觸。故我國現行環境影響評估法並不違反兩公約之規定。」環境影響評估法本身固然並不牴觸兩公約，但該法的運用條件與行政主管機關的裁量或其他干預手段，則可能曲解、減少、甚至誤用法律。如果僅聲明「法」本身不違公約，則形同放棄了以公約引導國家政策的機會。我認為，不僅該評估環境影響評估法是否違反兩公約，更要檢視該法是否足以保障經社文公約第 12 條所保障的健康權。只論法律、不論政策，將極度限縮經社文公約「積極保障」的功能。在此情況，對於政府保障人權的尊重、保護、實現(respect, protect, fulfill) 的三重任務，勢將僅只於較重視消極不干預的「尊重」一層。

與此類似，根據「第 12 次複審會議紀錄」，對於民間團體反應臺灣未婚懷孕少女缺乏家庭與社會資源、及相關托育、照顧體系支持等問題，「優生保健法」及「性別平等教育法」之相關規定是否符合公政公約第 23 條，以及經社文公約第 10 條之規定？其決議為：「現行『優生保健法』及『性別平等教育法』之相關規定尚無違反公政公約第 23 條及經社文公約第 10 條之規定，但對於未婚婦女及

年排擠社福預算」，2010/11/04。

[8] 監察院糾正案文，發文日期：中華民國 99 年 10 月 11 日；發文字號：(99)院台財字第 0992200869 號。

其子女健康權之保障，政策上宜有更積極的規劃與作為，以落實兩公約之精神。」簡言之，在審查法律是否保障人權時，不但應檢視法本身是否「違反」公約，更應發揮積極保障的精神，檢視目前法律與政策是否「足以保障」弱勢者權益。這與 Thomas Pogge 的說法相符，亦即，人權侵犯不應僅以 violate 稱之，在經濟社會權的部分更應強調 disrespect 的概念。(Pogge, 2008)

類似地，民間團體認為勞動基準法對基本工資未曾有明確的定義，基本工資應以「最低工薪」的概念取而代之，在「第 13 次複審會議」中，決議情形如出一轍：「關於基本工資的訂定方式，『勞動基準法』之相關規定尚無違反經社文公約第 7 條之規定。但日後有關基本工資之調整，建議在政策上除應考量經濟因素外，亦應將勞工及其家庭之需要納入考量，俾更落實公約保障勞工本人及家屬合理生活水平之精神。」政策與法律是一體的兩面，僅看法律不看政策，難窺全貌；審查小組做為國家最高行政機關的把關機構，應採取更積極的態度。

五、只問法律，不看執行

2010 年修法前，健保局對於積欠健保費者是以「鎖卡」方式限制其就醫，國內因而有六十萬人無法持健保卡看病。但其中卅七萬人是貧困無依的弱勢族群，引起民間團體關切；中央健保局遂於 2010/11/07 公布《弱勢民眾安心就醫方案》，規定十八歲以下青少年及兒童、近貧戶及特殊境遇受扶助家庭，即日起解除鎖卡禁令。然而，國內弱勢民眾仍可能遭鎖卡，因此民間團體認為鎖卡政策不符合經社文公約 12 條。根據「第 12 次複審會議紀錄」決議：100 年 1 月 26 日新修正通過之全民健康保險法第 37 條規定，對於經查證及輔導後，有能力繳納健保費而拒不繳納者，始暫行停止保險給付。又主管機關對弱勢民眾之健保欠費與健保就醫權已採脫鉤方式處理，並有相關協助措施。故新修正通過之全民健康保險法第 37 條[9]尚無違反經社文公約第 12 條規定。」

然而，實際的情況是，即使放寬鎖卡，政府若未能徹底清查，必定仍有許多貧困、弱勢民眾未能獲得解卡；仍可能陷入貧病交迫困境，不符合經社文公約 12 條。例如，立委陳瑩於 2011/10/06 總質詢提出，原住民納保率較低(93.6%)，約有三萬人未納保，且全國被鎖卡的 20 萬人，其中原住民佔了高達 13%。（Nakaisulan/阿力夫，2011）由此可見，雖然健保法已經修法，但實際狀況可能在執行面出現落差。除了看法律本身之外，還應當考慮法律執行面是否容易導致違反兩公約的情況；例如，在本例中，人權觀點不僅要問健保局打算如何確保沒有人被誤判為拒絕繳費，政府如何照顧中低收入者健康，也要問以鎖卡來應付拒繳保費者是否符合正當性。

類似的情況發生在民間團體認為外交部對外籍配偶簽證申請之拒絕處分未採書面方式亦未附理由、且未載明不服時的救濟管道，但「第 19 次複審會議」

[9] 保險人於投保單位或保險對象未繳清保險費及滯納金前，經查證及輔導後，得對有能力繳納，拒不繳納之保險對象暫行停止保險給付

決議，「外交部對於外籍配偶簽證申請之拒絕，均須製作拒件書面處分書，並載明駁回理由及教示救濟途徑，故尚無違反公政公約第 23 條第 1 款、第 24 條第 1 款、第 26 條以及經社文公約第 10 條第 1 款之規定。」如此決議，想必無法回應當事人實際遭受之待遇；我們除了知道外交部是否做成書面紀錄，還要問該紀錄是否主動告知、是否詳細說明、是否對無法通過者待之以尊嚴?

肆、結論

對於民間所團體所提之法律，有多項在複審會議中被判定確實有違兩公約，例如，迄今尚有 400 萬勞工不在勞工安全衛生法之適用範圍、現行勞工保險條例僅規定 5 人以上之事業單位強制納保等問題、禁止教師行使罷工權、教師僅得組織及加入產業工會及職業工會而不得組織及加入企業工會、禁止教師罷工、刑事訴訟法對判決時言詞辯論之機會、死刑犯強制辯護之保障等。從這些法令看來，政府也在某個程度上肯認了民間團體的用心和貢獻。本文所描述之問題，包括對於公政公約的適用範圍、缺乏積極保障的意識、對政策和法律執行面的考量不夠嚴謹等，都是國家初次運用人權公約所會遇到的情況。從行政院的職責來看，由於兩公約施行法具體要求者也僅只於「法令及行政措施」，是否「不符兩公約規定」，或許限制了行政院人權保障推動小組的權限與解釋範圍；但是我仍然認為，將法律逐條檢驗，而脫離整體政策大綱的脈絡，恐有見樹不見林之憾。究竟是司法系統或行政系統才有足夠的能力來審視人權(特別是經濟社會文化權)之達成，或仍有爭議，但目前並未看到我國政府機關任何單位有系統地檢視國內的稅制、社會福利、社會保險等政策，是否符合 ICESCR 的要求。這種審查在政府不顧財政困難幫公務員加薪、立法院修法提高公保年金的詭譎時刻，更顯其必要。

針對本文所述及之諸多限制，我認為政府應該以這兩年的學習經驗為基礎，持續努力，因而提出下列建議(1)嚴格遵守兩公約施行法第 3 條：適用兩公約規定，應參照其立法意旨及兩公約人權事務委員會之解釋，以求在條文解釋上符合國際人權觀念之通說；(2)加速批准施行更有特殊性的國際人權公約；(3)迅速累積國內外運用公約的案例，從中學習經驗；(4)肯認社會正義的目標，採取積極態度保障人民基本權利；(5)在兩公約施行法所規定的兩年期限後，繼續推動法令與政策之檢視。

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Reviewing the Regulations that do not Meet the Act to Implement the Two Covenants – the Experience and Reflection from a NGO Worker

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Abstract

After the government ratified the two covenants, more than 40 civil groups organize a strategic alliance, "Covenant Watch" together. This article focuses on the Article 8 of the enforcement act of the two covenants- all levels of governmental institutions and agencies should review laws, regulations, directions and administrative measures within their functions according to the two Covenants. All laws, regulations, directions and administrative measures incompatible to 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. After implementing for one year, at the end of 2010, Covenant Watch mobilized civil groups to propose 44 comments to modify the laws and administrative measures. This article focuses on how the Executive Yuan's Promotion and Protection of Human Rights Group face civil groups' comments, and then reflect upon the government's attitude toward international human rights covenants. This article proposes five problems- unclear adopting range, lacking of preparation and determination, negative omissions, only paying attention to the articles but ignoring policies and the implementations in reality. And it also proposes that the government should comply with the Article 3 of the enforcement act strictly, involves adopting the general comments, accelerating the sign of other international covenants of human rights, accumulating the domestic and abroad cases quickly, and affirming the justice society. Moreover, the government should keep enforcing the reviewing of laws and moving the policies after two years of implementing the enforcement act.

Keywords

Two Covenants, NGOs, Human Rights, Covenant Watch

I. Preface

Because of the long efforts of the NGOs in Taiwan, they promote the democratization of the politics in Taiwan and pay attention to the conception of human rights. My report, in this situation, obviously cannot do a well-review to their efforts and NGOs' requirements and critics to the situation of the domestic human rights. In fact, no matter any efforts would face the choosing problems in reality and the risk of implementing. This report focuses on how the domestic NGOs did their best to upgrade the standard of the human rights in Taiwan in recent two years after ratifying the two covenants, especially the participation of the civil groups to the Article 8 of the enforcement act and the reviewing. Comparing to the governmental officials who think that the civil groups of human rights "only" would take the opposite position to the government, I would rather like to show how the civil groups insist their faith at appropriate timing and contribute their proficiency and insist on the International Human Rights Standard through the national human rights mechanisms. Of course this report cannot show the enthusiasm and dedication of the NGOs' workers or record those seriously debates and arguments. Therefore, I must apologize to every partner; meanwhile, I can not mention all the civil participation. This is due to my limited knowledge, nothing to do with the importance of the issues. Besides, there are still many activities held by the civil groups in these two years; for instance, the educational training and the devotion to the reviewing mechanism of the Taiwan National Human Rights Reports. But for the limitation of the space, this report cannot mention all of them.

II. Covenant Watch and Modifies the Laws

It means a lot to the improvement of the national human rights that the government ratifies and implements the two covenants. If we can grab the chance and adequately hard-working, we can take advantage of the UN regulations, conventions, and mechanism to urge the government to improve the protection of the human rights. However, R.O.C has departed from the United Nations for about forty years. On the one hand, the implementation of international laws and official relation with international organization cannot connect with Taiwan directly. On the other hand, the departure results in the weakness of the structure of the government. Within the administrative, judicial, and legislative powers, they generally lack for the human rights monitoring mechanisms and do not have enough professional people, either,

even lack for the related knowledge of human rights. Therefore, the civil groups urge the government to realize its promise when it claims the implementing.

Concerning with the issue of human rights for a long time, Huang Wen-shiung, the president of Amnesty International, Taiwan Section at that time, started to contact with the NGOs immediately after the Legislative Yuan ratified these two covenants. He assembled 42 civil groups of the human rights, women, workers, lawyers, and academy together to organize a strategic alliance. On December 9, 2009, he claimed that "Covenant Watch" was found. This alliance was looking forward to guard the government carrying out the spirit of the covenants through combining the different proficiencies.

The Article 8 of the Enforcement Act of the two Covenants which was claimed on December 10, 2009 concludes that all levels of governmental institutions and agencies should review laws, regulations, directions and administrative measures within their functions according to the two Covenants. All laws, regulations, directions and administrative measures incompatible to 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. The first short-term target of Covenant Watch is to review the acts and administrative measures which don't meet the covenants and then propose the reviewing reports and the plan of changing, abolishing, legislating or improvement.[1]

According to the information from the Ministry of Justice, before implementing the enforcement act, the government had already started to do internal review and conclude two hundreds and nineteen cases.[2] However, though the government proposed so many cases, its attention to some strongly concerned laws even cannot compare to "the Clothing-purchasing Plan of the Attendants who Guards the President." The issues were concerned by the civil groups; for instance, Assembly and Parade Act, Enforcement Rules of the Labor Standards Act, Environmental Impact Assessment Act, Criminal law (death penalty), and other regulations about the justice

[1]See http://covenants-watch.blogspot.com/p/blog-page.html

[2]See http://www.humanrights.moj.gov.tw/ct.asp?xItem=223296&ctNode=27273&mp=200，Before implemented the Enforcement Act of the two Covenants, all levels of governmental institutions has reviewed those laws, regulations, directions and administrative measures which did not meet the criterion of the two Covenants, sent it to Ministry of Justice. Ministry of Justice put them together as" Reviewing List of whether laws, regulations, directions and administrative measures of all levels of governmental institutions and agencies meet the criterion of the two Covenants", then reported it to Executive Yuan on December 7, 2009.

protecting the human rights (the acts about the detained-defendants or the regulations of the investigation of criminal law), the rights of aboriginal, the protecting of environment, the human rights of AIDS, the rights of foreign workers and so on,[3] but the government didn't pay much attention to.

Therefore, Covenant Watch and other NGOs started to review the daily business, if these human rights businesses could not work successfully because of the laws or administrative orders, and then the condition would be reported to the Ministry of Justice by the Secretariat of Covenant Watch. During this process, NGOs also faced many challenges. The reasons are below:

1. There are so many different kinds of problems that NGOs face. Every case involves the complicated laws, the management authorities, the society's situation, and the different values and so on. NGOs also keep working hard on the issue of legislation and serving between the cases' people. These two issues are very different, no matter the concepts, methods, or practical operation. NGOs perhaps can try to understand every case's difficulty but the case may involve many laws and the more difficulty is the official document from the local institution. There are many problems in reality and the difference between two covenants. It's a big challenge to NGOs that which articles in the covenants belong to national laws or which national laws conflict with which articles of the two covenants. In addition, some measures violating the human rights may come from the overall policy of the government instead of the single law. For example, the controversy of the case of Kuo-Kuang Petrochemical is unlikely to simplify to a single law.

2. There are so many international human rights covenants in the world but only two covenants and Elimination of Discrimination against Women have the enforcement act in Taiwan and the act even has to wait to implement until 2012. And because the contents of the two covenants are very simple, they need the general comments' explanations to clear its purposes. Moreover, beyond the two conventions, many other covenants are more specific and more suitable for some cases; such as Convention on the Rights of the Child, Convention on the Rights of Indigenous People, International Convention on the Protection of the Rights of All Migrant, International. Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities. Even at the end of 2010, one year after implementing, the government cannot provide the collection of general comments. Later, Taiwan Association for Human Rights and Covenant Watch

[3] See http://www.lawtw.com/article.php?template=article_content&area=free_browse&parent_path=,1,6,&job_id=158086&article_category_id=19&article_id=86097

publish the version of traditional Chinese in June, 2011.

3. For completely understanding how to use the covenants of human rights, NGOs need to study overseas cases. In this way, NGOs ask help to the scholars, hoping that they can learn related experiences quickly from them. [4]The lawyers who join this alliance also study the domestic and overseas cases actively. In 2010, the government pushed every administration to check their related regulations but not succeeded completely; still less did the civil groups. It's hard for them to be familiar with the covenants well in a short time only depending on their own sources and people.

Although having the problems above, Covenant Watch mobilized Taiwan Association for Human Rights, Taiwan Labor Front, Taiwan International Medical Alliance, Taiwan Alliance to End the Death Penalty, Taiwan Environmental Action Network, National Teachers' Association R.O.C., Millet Foundation, Judicial Reform Foundation, Taiwanese Women's Group Written Report of CEDAW Team, TransAsia Sisters Association Taiwan, and Taiwan Rural Front and so on. The alliance also considered the public opinions and written comments from other NGOs. According to the domestic laws and policies, the alliance proposed forty-four comments of modifying or abolishing and then turned to the government for going through.

III. Review the Policies and Political Procedures in Front of Two Covenants

The Executive Yuan's *Promotion and Protection of Human Rights* represented the government to review the collection of policies and regulations against two covenants. They went through 219 cases and 44 comments from civil groups, and invited the expert of human rights to set a system of reexamining the policies whether to obey two covenants or not. The vice minister of the Ministry of Justice, Mr. Jiang Hui-ming, being the chairperson of this system, in 2010, from Jan. 4th to May. 18th , had raised 21 reexamining conference. In those 219 cases which were raised by every one of political institutions, there were 80 of them needed to be modified. Until Apr. 27th, 2011, there were 67 cases still in the discussion of the Legislative Yuan, 1 case in the discussion of the Executive Yuan, 8 cases in the discussion of ministries and agencies. There were 3 cases passed the Judicial Yuan and still needed the agreement of the Executive Yuan; 1 case had passed the Executive Yuan and still needed the

[4] Based on my experience, many professors have helped civil groups for understanding the content and the operation of the two covenants; professors such as Chung Wen-zhen from National Taiwan University, Wu Zhi-guang from Fu Jen Catholic University, Liao Fu-te from Academia Sinica, Chen Yao-hua and Chen Ju-hong from Soochow University.

agreement of the Judicial Yuan. [5]The purpose of this article is discussing the cases raising by civil groups. According to the report of the Minister of Justice, I made a form dealing with the condition of those cases:

Type of case	**amount**	**After Reexamine**
Criminal Laws	1	There were 5 laws which were thought that did not violate two covenants, and there were 6 laws were thought to be repealed and adjusted.
Laws and Policies	32	There were 18 cases that did not violate two covenants, 10 cases that violated two covenants, 3 cases had nothing to do with two covenants, and 1 case was in concrete litigation.
Political Procedures	11	There were 7 cases that did not violate two covenants, and 2 cases were dropped out. There were 2 cases that were thought inappropriate to discuss.

The controversy is that we have already arrived the 2-year-deadline, and obviously, the decision that the government made was too hasty. I want to present my opinions toward those reviewed cases in this article. The reason why the content of reexamine cases worth to discuss is that the government did not ignore these issues, instead, they put much more emphasis on human rights issues. As a result, they made the group of *Promotion and Protection of Human Rights* lead by the vice minister of the Ministry of Justice; Mr. Jiang is the chairman. After 21 reexamining conferences, I concluded 5 comments of the outcome:

1. The range of which issues are concerned with two covenants is vague.

According to the report of 16th reexamining conference on Apr. 6th, 2010[6], the discussion was mainly about the civil groups proposed the government for substantially changing the death penalty policies—to abolish death penalty. The government executed the death penalty was objecting a person's lawful right, and this might violate International Covenant on Civil and Political Rights(ICCPR), Article 6 and 16. The government should set a timetable as soon as possible to abolish the death penalty. The outcome was: "this case had something to do with the policies instead of

[5] Tseng Yung-fu. "Promote and Implement Two Covenants—Human Rights Protection." RDEC，35-3, June, 2011.
[6] See http://www.humanrights.moj.gov.tw/ct.asp?xItem=223296&ctNode=27273&mp=200

violating two covenants. But we will still send the comments of committees in this conference to the group of promoting death penalty abolishment to consult."

This outcome is confusing. The reason is that why this case concerned with the policies then had nothing to do with the two covenants? This kind of decision gave government full powers to control these issues, and they might cheat to the people. The fundamental doubt is that who has the right to decide which issues concern about two covenants, and which do not? The main point of the two covenants is to protect people's basic rights. Even though the rights are not completely be mentioned in the two covenants, we can still find the related articles to explain and support it; not to mention people has disputed for years over the issue that whether to abolish death penalty or not. In this case, we can see that no matter what class the two covenants should be, being a country that has been ignoring international human rights for a long time, Taiwan still has a long way to learn how to administer two covenants well.

On the other side, based on ICCPR, the Ministry of Justice has promulgated the laws which should be reviewed. On those laws, the penalty for some crimes is death, which need to be abolished. For instance, if the government official violates Criminal Law, article 216: do not use the coercive power of government to force people committing crimes which violate Statute for Narcotics Hazard Control, article 4-1: to produce, smuggle, and sell the first-grade drugs, the penalty is death. However, the crime which I just mentioned did not harm people's lives, so the Ministry of Justice decided to emend the penalty of it before Nov. 30th, 2010. Above all, those cases explain that death penalty surely concerns with the two covenants.

2. The preparation was not enough, and the action is not thoroughgoing.

The government set the deadline of emending laws within 2 years, and this totally underestimated the problem. If the government refers to other countries' examples, they should have known that 2 years is not enough. Even United Kingdom and Canada, the countries that concern with human rights issues a lot, have difficulties in emending laws, not to mention Taiwan, the country that had already left the international human rights' system for 40 years. Compared to United Kingdom, after signed European Convention on Human Rights, ECHR in 1998, they set the deadline in 2000, so they could have enough time to emend laws and regulations. Taiwan had left the system of international human rights for 39 years, but we just gave ourselves and also the government only 7 months and 18 days to prepare it (from Apr. 20th, 2009, promulgating the law, to Dec. 10th, 2010, the

emended law taking effect)[7]. According to the note 6, some governmental institutions even took less time to review and emend, only from Apr. 20th to Oct. 31st.

Since the ruling party has full power in the Legislative Yuan, they should be able to emend laws as soon as possible. However, our government is too optimistic or too neglectful to the issue; set the 2-year-deadline is an unchangeable fact, but the government has not tried their best to fulfill this agreement. For instance, according to the 10th reexamining conference, the present Assembly Law stipulates that people need government's agreement to hold a demonstration, and this law violates ICCPR, article 21. We are now approaching the deadline, but this law has not emended yet. The press reported that Taiwan Association for Human Rights (TAHR), Raging Citizens Act Now (RCAN), and those groups who had been under indictment due to assembly law are going to put on a demonstration in front of The Legislative Yuan on October 4th, 2011. Before the 8th session finished, those groups will claim to emend the Assembly Law.8

3. The constricted explanation harms the scope of The International Covenant on Economic, Social, and Cultural Rights (ICESCR)

The progressive realization was set for concerning about the limited resources of government. Since ICESCR should follow the progressive realization, this may give the government an excuse to dodge the responsibility of social safety. If the explanation of the two covenants is too constricted, it may not make good use of solving rooted unjust things in the society. Started from previous years, the government has been promoting to decrease Estate and Gift Tax and Profit-seeking Enterprise Income Tax, and the outcome makes the government has less tax-income. In 2010, the gap between the poor and the rich became lager. The Annual Income Tax Return has divided individuals into 20 classes, and the highest is 66 times higher than the lowest, and that made a new record. Disposable Income has divided into 5 classes, and the highest is 8.22 times higher than the lowest. Families that under the "Poverty Line" have increased to 108 thousand, total 263 thousand people. Moreover, including loosing the standard of applying Society-helping Law, 12-year-obligated education, grant of Day-care, grant of bringing up children, and free school lunch, the government claimed that R.O.C. has difficulties in finance, so these issues cannot be realized. [9] Besides,

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[7] Huang, Wen-hsung, 2010. "International Human Rights Day Review Two Covenants." China Times, Forum, 2010/12/10。

[8] See http://www.coolloud.org.tw/node/64356

[9] The policies of tax incentives for corporate and tax deduction on capital gains, which has led to nation's financial difficulties. Tax Burden rate in Taiwan, has decreased from 1990's 19% to less than

According to the report of 11th reexamining conference, the main issues were the regulations of companies renewing and the measures of decreasing tax of acting taxation system. They wanted to know whether those measures violate ICESCR, article 9, 10, and 11. The outcome is: this case has concerned with policies, so the range is pretty broad. Through the present system of taxation, the regulations of companies renewing and the measures of decreasing tax did not violate ICESCR. Whether the present system of taxation violates ICESCR or not, obviously, the concerning area is broad, but according to number 19, general comment: "3. Due to re-distribution, the society protection makes important effect in soothing poverty, avoiding society-isolation, and promoting society-tolerance." "4b: Almost all the treaties will need the non-contributory schemes, because the plan of insurance, not everyone can be taken care of." These articles all point out the importance of an appropriate taxation system, and we could see that the reexamination of taxation system is under the category of the two covenants. The explanation to be strict or not, just as the comments from reexamining conference, should be judged by financial condition. However, if the government claims "it does not violate ICESCR." during the examining process, then it may abANDOn the opportunity of examining society justice by means of using the two covenants.

4. Neglect Policies, Focus on Law.

Based on the record of eleventh-reexamination conference, the committee aims to the conflict between economical-development and environment-protection, and concludes that the environmental rights are not obvious in ICESCR. But even so, there are still some principles that can be followed and claimed.

Even though the Environmental Impact Assessment Act needs to be advance with the times, we can't ignore the problem that the Environmental Impact Assessment Act violates the two covenants on the health rights. The Environmental Impact Assessment Act itself does not violate the two covenants, but the administrative institutions may misunderstand, or even misuse the laws. If only declares that the law itself does not violate the covenants, it is just like giving up the chances to guide the nation policies. In my opinions, we should not only estimate whether the Environmental Impact Assessment Act violates the two covenants, but also survey

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12% now. Convener of the Alliance for Fair Tax Reform (公平稅改聯盟) Wang Jung-chang (王榮璋)pointed out that, because of 100 years Anniversary of ROC, many kinds of social welfare budgets have been cut severely. Aid for disaster was cut by 45.43%; budgets for disabled community care have been truncated 60%; assistance to women was cut 25%; children care and were also cut unreasonable.

whether the law is enough to ensure the health rights in ICESCR. If Only focuses on laws rather than policies, then it may limit and decrease the “active protection” of ICESCR. Therefore, for the government’s three assignments of protecting human rights - respect, protect, and fulfill, it may only emphasize “respect”, and it violates the spirit of the covenants.

Similarly, according to “the twelfth conference record”, the civil groups propose the issues, such as unmarried women who are pregnant, and are lack of family and social sources, the taking care system. Whether the rules of Prenatal Health Care Law and Sex Equality Education Law fit the rules of *ICCPR* Article 23 and *ICESCR* Article 10 or not? The resolution is the rules do not violate the covenants, but the problems are about protecting unmarried women and children’s healthy rights. The government should take more positive actions to follow the spirits of the covenants. In short, to survey the laws whether protect human rights or not, we should not only see the law itself, but also spread the spirit of active protection to review whether the policies are good enough. The decision may not review the reality that the person involved. We should not only know if Foreign Affairs Ministry makes the report, but also know if the report is told, is described in detail, or treated those who don’t pass in dignity. It can be traced from Thomas Pogge; instead of using the word “violate” to describe human rights violating, we should emphasize the concepts of the economical social rights.

Similarly, the civil groups think that the Labor Standards Act doesn’t have the exact definition of the basic wages, and it should be placed by the concept of lowest wages. In the reexamination conference, the conclusion is the same, “the rules about basic wages in the Labor Standards Act do not violate *ICESCR* No.7. But the economical elements, and the labors and their family should be considered when adjust the basic wages. It can put into effect that reaches the spirit of protecting labors and their family’s rights. If only consider the laws, we can’t see the whole body. And as the review panel, the highest administrative institution of Taiwan, the committee should take more positive attitude toward these issues.

5. Neglect Execution, Focus on Law

Before 2010, the Health Insurance Bureau took the actions of locking the cards to limit those who didn’t pay the fare from seeing the doctor; therefore, 6 hundred thousand people can’t go to the doctor. However, among them, three hundred and seventy thousand people are poor and careless disadvantages groups. It made many civil groups start to care about this problem. Therefore, the Health Insurance Bureau announced a plan on“disadvantages public taking medical treatment safely”, and it regulated that teenagers under 18, children, poor families and supported families in

special condition are free from this limitation. But disadvantages groups might have been locked up the cards. Therefore, the civil groups think that the policy violates *ICESCR* No12. According to the conference resolution, the law No.37 of the Health Insurance Bureau on January 6, 2011, says that people who have ability but don't hang over the expenses after investigating and persuading, the institution can have their cards be locked. Moreover, they deal with the cards controversy and the rights for seeing doctors in different ways. Therefore, the new National Health Insurance Act No.37 does not violate *ICESCR* No.12.

However, even if the government loosens the limitation of locking the cards, there are still many impoverished and the disadvantages groups are not able to have their cards unlocked. They probably get stuck into the difficulties, and it doesn't fit in with the *ICESCR* No.12. For example, the lawmaker Chen-Yin said on 6, October, 2011 that there are thirty thousand aboriginals have no national health insurance (93.6%); and the aboriginal take percentage 13% of the twenty thousand people whose cards are locked. It shows that it still can't take into account at the side of execution even the Laws & Regulations were modified. We should not only consider the laws, but also think about the side of execution. For examples, in the viewpoints of human rights, we should not only make sure that there is no one judged erroneously; how the government takes care of the disadvantages groups; the legitimacy of cards controversy.

We can find the similar situation in the Ministry of Foreign Affairs. The Ministry of Foreign Affairs rejects foreign spouses' visa applications without giving reasons. The resolution of the nineteenth conference says,

IV. Conclusion

The civil groups have mentioned many laws that violate the covenants in the reexamine conference. For instances, 4 million labors are not applicable in the labor law; prohibit teachers' strike rights; teachers can only organize or join the industrial trade unions not enterprise unions; the chance of arguing when adjudication; protect the arguing rights to those who face the death penalty, and so on. From those examples, we can see that the government approves the determination of civil groups in some way.

This article points out many problems, such as the applicable range of the covenants, lack of the conscience of protecting, and not being conscientious of the execution of laws, these are the problems that countries have to face when implement human rights covenants for the first time. The two covenants focus on the regulations

and administrative measures, but from the authority of the Executive Yuan, it limits the Group for Promotion and Protection Human Rights' authority. While I personally think that if review the single laws rather focus on the whole system, it turns out to be can't see the wood for the trees. It is still controversial that whether the judicial system or executive department has the rights to review human rights, but there is no any governmental institution reviews whether the tax system, social welfare, and social health insurance compliance with the two covenants' requirements.

According to the limitation this article mentions above, I think the government should keep working on the issues based on this two-year experience. The suggestions are as follow. First, obey strictly the two covenants No. 3; applies the rules and the explanations of the covenants, so that we can meet the concepts of international human rights. Second, approve and implement more international human rights covenants. Third, collect the cases applying the covenants and learn from the experiences. Fourth, affirm the goal of social justice, and take the positive attitude toward protecting the essential human rights. Finally, keep reviewing the laws and regulations after two years.

廢除死刑：臺灣司法改革和政府落實兩公約的照妖鏡*

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摘要

本文以「廢除死刑」來檢視政府是否落實兩公約，發現臺灣政府說一套做一套，簽署公約並未讓生命權的保障更嚴謹，卻反而讓司法體系更輕忽公正審判的權利。其具體例證就是，法務部長依兩公約應提出初次國家人權報告（Initial Report）的初稿說要「減少死刑」，但是今年迄今已經有 15 位死刑犯判決定讞，破了近十年來的紀錄。此外，本文也檢視了初次國家人權報告初稿以及主計處公佈的政府預算中與公民與政治權利國際公約第 6 條生命權的部份，發現政府對於兩公約知識程度有待加強。

因此，我們建議政府應該接受兩公約施行監督聯盟的建議，依據聯合國的標準提出報告及建立人權報告審查制度，模擬聯合國的機制，邀請獨立的國際人權專家審查臺灣的人權報告，讓人民和政府有一個對話的平台，並面對簽署兩公約後的國家義務。對於公約解釋的爭議，可以在獨立的國際人權專家審查過程中獲得解決，也藉由報告審查制度的循環，持續地促進人權。

關鍵字

廢死、司法改革、兩公約、生命權、公民與政治權利國際公約

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壹、前言

當一般性的談到「臺灣應該要司法改革」或「政府應該要落實兩公約的人權保障」，大部份的臺灣民眾都不會反對。當然，臺灣的政府單位也如此宣稱著。但是，當實際面臨人權議題（爭議）時來檢視這兩句話，就會發現說與做之間存在極大的落差。

筆者參與臺灣人權及司法改革運動多年[1]以來，發現司法改革人人會喊，包括重要的政治人物，但是司法改革的內涵卻是不被政府重視的。2009 年臺灣批准《公民與政治權利國際公約 ICCPR》和《經濟社會文化權利國際公約 ICESCR》，並以施行法將兩公約的內容國內法化至今，政府說得一口好人權，但是距離真正落實卻是越來越遙遠。

例如，批准兩公約後，法務部馬上呼應而有「人權大步走」的計畫，要檢討國內的法令及行政措施，如有不符兩公約規定者，要在兩年內修正；司法院也不落人後，在極短的時間內，以特快車的速度推出「刑事妥速審判法」草案，號稱要依公約的規定，保障人民適時受審的權利，不讓案件無限期稽延。司法院在未徵詢學者專家意見的情況下，於 2009 年 8 月提出刑事妥速審判法草案，2010 年 4 月由執政黨全力護盤支持下，快速立法，通過了一個空有美名，卻讓死刑疑案快速確定的「速死法」。

例如，臺灣自 2005 年 12 月開始停止執行死刑，但卻在批准兩公約後不久，重啓死刑執行，更遑論臺灣的死刑制度有許多問題不符合兩公約的要求。是以，批准了兩公約後，臺灣反而對生命權的保障更倒退。

因此，筆者認為，要從 NGO 的觀點來評論基本人權是否被保障與落實，廢除死刑是一個很適合的檢驗指標和照妖鏡，本文即試著提出具體的例證來說明。

貳、說一套、作一套

回顧臺灣的死刑存廢爭議，整體來看，自 2000 年以來，臺灣政府（不管是民進黨或者國民黨執政)的政策都是「逐步廢除死刑」。(廢除死刑推動聯盟，2011）不過，卻主張逐步廢除死刑不須要以停止死刑執行做為配套措施，這和聯合國連續於 2007 年、2008 年及 2010 年通過的「全球停止死刑執行」決議，呼籲尚未廢除死刑的國家應暫停執行死刑的要求剛好相反。

對於廢除死刑的政策問題，當前的執政者口徑幾乎是一致：廢除死刑是長遠

[1]林峯正從 1995 年至 2000 年間擔任臺灣人權促進會執行委員，2000 年至 2003 年出任該會會長；2006 年擔任民間司改會的執行長至今。林欣怡則是於 1999 年近入民間司改會工作，一頭栽入廢除死刑運動中，於 2007 年擔任廢死聯盟執行長至今。

目標，但卻不是現在的主流民意。「長遠目標」是拐個彎間接承認廢除死刑是人權目標之一，但卻拿民意來當作不作為的擋箭牌，鮮少對廢除死刑做實質的討論。

2010 年臺灣重啓死刑執行以來，馬英九總統、吳敦義行政院長以及法務部長曾勇夫，都還是一再宣示，臺灣長期的目標是廢除死刑，要逐步廢除，但要尊重民意。針對民間所提出，這兩次的死刑執行違反 ICCPR 的規定（廢除死刑推動聯盟，2011），法務部卻從不正面回應，只是攏統的說：一切合法、一切依法行政、一切符合兩公約。

至於法務部成立的逐步廢除死刑研究推動小組，也並未積極的研議。甚至中華人權協會在小組成立之初，就已經針對最有爭議的赦免法[2]修正提出草案，但是遲遲無法在小組中討論[3]。

最近（2011 年 10 月 25 日），總統府人權諮詢委員會[4]公佈兩公約初次國家人權報告（Initial Report）初稿[5]（以下簡稱初稿），在 ICCPR 初稿的第 6 條，並未針對臺灣死刑存廢提出國家立場（連長期的目標是廢除死刑都憑空消失）。

法務部長曾勇夫在立法院接受質詢時甚至表示，「現行死刑政策為『盡量減少死刑使用』，而非廢死，政策未有變更，但經法院判決確定的死刑犯仍要執行，另要求檢察官盡量不求處死刑。」[6]當媒體追問時，曾勇夫再次的澄清「法務部是希望減少死刑的使用，而不是要廢除死刑。」

我們並未天真地以為，簽署了 ICCPR 就可以廢除死刑。但是，我們認為既然簽署兩公約就應該要遵守這最低的人權標準，否則誠信何在？

參、對兩公約的知識不足：從人權報告初稿談起

兩公約施行法第 3 條規定「適用兩公約規定，應參照其立法意旨及兩公約人權事務委員會之解釋」。所以，「包括總統、行政、立法、司法、考試、監察等所有政府機關，而其在行使職權時，與兩公約所保障之人權有關的事項，都必須從國際人權法的角度切論，並應參照兩公約人權事務委員會之解釋（尤其是一般性評議 General Comments），不能再以慣用的法制思維處理。」[7]而根據 Manfred Nowak 教授的意見「所有有關個人來文的案例法、委員會根據第 40 條第 4 款所

[2]關於赦免法是否違背兩公約，本文不贅述，請見高涌誠律師於本次研討會所提出的＜兩公約與其施行法之適用與解釋—並評論我國實務運作之幾個事例＞一文。

[3] 中華人權協會的赦免法修正草案於 2010 年 4 月份就提出，但至今尚未有機會在法務部逐步廢除死刑研究推動小組中討論。筆者林欣怡是這個小組的成員之一，但是今年以來，每月固定會議已經流會 6 次。

[4] 總統府人權諮詢委員會負責統籌兩公約初次國家報告的撰寫，法務部為幕僚單位。

[5]初稿下載請至 http://www.humanrights.moj.gov.tw/ct.asp?xItem=247008&ctNode=30640&mp=200

[6]2011 年 10 月 27 日，中央社報導。

[7]見前註 3。

作出的一般性意見以及針對具體國家所做出的『結論性意見』都被當作是對《公約》有關條文的權威性意見。」（曼佛雷德 諾瓦克，2008）

因此，解讀兩公約，不能只看條文，還必須參照聯合國「人權事務委員會」及「經濟、社會及文化權委員會」所作的一般性評議、個人來文的案例以及針對國家所作的結論性意見，這樣才算是窺得兩公約的全貌。

就筆者參與幾次初稿審查會議，清楚感受到政府單位對於公約的陌生以及對於條文以外解釋的抗拒，例證如下：

一、只有流水帳，沒有具體政策

從這份初稿當中，反而看不出臺灣對於廢除死刑的具體政策到底如何？看不出總體性的願景，只有相關政務的流水帳。筆者不用「死刑『存廢』的政策」原因是，依據聯合國人權事務委員會第 6 號一般性評議中第 6 段指出「...本條款也一般性的提到廢除死刑，採取強烈語氣建議各國廢除死刑。委員會總結認為，所有廢除死刑的措施都應視為使人民享有生命權的進展...」，加上 ICCPR 第 6 條第 6 款也很明確「本公約締約國不得援引本條，而延緩或阻止死刑之廢除」，因此臺灣以目前的狀況來說，要討論的不是「死刑要不要廢除？」而是「死刑應該如何廢除」。

由民間司法改革基金會、臺灣人權促進會、台北律師公會及東吳大學張佛泉人權研究中心等團體所組成的廢除死刑推動聯盟在 2003 年成立之初，就不斷地要求政府要有具體的規劃、步驟、措施、時間表來推動廢除死刑。因為沒有這樣的總體性、有步驟的計畫，政府很容易將不廢除死刑的結果歸因於民意反對，只有口號，對策闕如。

二、真心要「減少死刑」？

在初稿中，花了 8 段的篇幅來闡述「逐步減少死刑之規劃」，連篇累贅的現狀描述像是作文比賽。

「在任何情況下，都不能對財產犯罪、經濟犯罪、政治犯罪以及一般不涉及使用暴力的罪行規定死刑。」（（曼佛雷德 諾瓦克，2008；136）這幾乎已經成為國際人權專家對於最嚴重之罪的共識，而廢死聯盟早已經在 2009 年 9 月向法務部提出修法建議，但是兩年過去了，在報告中依舊只是「提出修正案」，進度嚴重落後，完全不理會公約施行法第 8 條所規定「兩年內完成法令之制（訂）定、修正或廢止及行政措施之改進」的時限。

此外，為達逐步減少死刑使用之目的，所採取的相關立法與措施，其中關於刑事訴訟法第 388 條有關第三審不適用強制辯護的規定，所造成死刑犯沒有受到完全有效辯護的狀況，廢死聯盟也於 2010 年聲請釋憲，可惜大法官並未受理。去年和今年總計 9 位被執行的死刑犯中，有 7 位在第三審沒有律師辯護，法務部卻視若無睹，只是提出前述刑事訴訟法 388 條的廢止案，而不為任何補救措施，

包含由檢察總長為被告提起非常上訴。因為在聯合國人權事務委員會的第 32 號一般性意見書中的第 59 段就提到，「審判未遵守《公約》第 14 條而最終判以死刑，構成剝奪生命權（《公約》第六條）」

關於判決死刑法官要一致決的建議，以及檢察官不求處死刑、法官不判處死刑，都是舊聞，但是法務部、司法院遲遲沒有進度，現在寫在這份國家報告上，就代表能夠真正實踐嗎？

關於量刑的部份，初稿中說，量刑的辯論司法院已經提出刑事訴訟法第 289 條的修正草案，審判期日於調查證據、事實及法律辯論完畢後，應就科刑範圍進行辯論。同時也提出最高法院的死刑量刑標準。[8]但依照臺灣的司法實務，若沒有將有罪確定及量刑的程序分開，即便法院洋洋灑灑列出這些量刑標準，而這些量刑標準又這麼的抽象，還是很容易淪為自由心證。今年七月有一個案，一審判無期徒刑，二審改判死刑。當事人提起上訴，最高法院認為事涉死刑，最好經過「量刑辯論」，並將全案發回高等法院更審。律師認為最高法院要求高等法為院量刑辯論，因此也針對量刑辯論的部份下了許多工夫，並且引用其他國家關於量刑的論述，但開庭的結果，高等法院法官僅是請律師在量刑辯論的部份補上書狀，完全無視律師要求調查證據的要求，就認為這樣有達到「量刑辯論」的要求，結果高等法院更一審還是維持死刑判決。

截至 2011 年 11 月底，今年已經有 15 位死刑犯定讞，創下近十年來最高的紀錄。且每個定讞個案都有程度程度不等，不符合 ICCPR 公正審判標準。以今年第 13 位定讞的死刑犯為例，竟然是一位 76 歲的老人。在尚未廢除死刑的國家中，大多會盡力限縮死刑的適用範圍，除了 ICCPR 第 6 條規定不對青少年和孕婦執行死刑外，聯合國經社理事會在《保護面臨死刑者權利的保障措施的補充規定》中也要求保留死刑的國家，要「確定不可判處死刑或執行死刑的年齡上限」。再以今年第 10 位定讞的死刑犯為例，這是一個僅憑同案被告自白就定罪，根本沒有其它補強證據，尤其是當事人逃亡多年，而同案被告死刑確定後已經執行，兩人根本沒有機會對質，但還是判決死刑。以具體數字對照法務部長的宣誓及初稿的內容，「減少死刑」成為最大的諷刺。

三、修法計畫：何時會過？

檢視這份初稿，有很多修法的「計畫」(這些計畫幾乎都是舊聞)，但是計畫提出後，法務部和司法院是否善盡職責，願意和立法院溝通，讓這些修法計畫早日實踐，還有待觀察。

[8] 初稿內所列的最高法院量刑標準為「判決除應就刑法第 57 條各款審酌情形加以說明外，並須就行為人事後確無悛悔教化遷善之可能，視人命如草芥，惡性重大，罪無可逭，顯非死刑以外之其他教育矯正刑所得導正教化，權衡公平正義之理念及社會公義之需求，並為維護國家治安、公序良俗及增進公共利益所必要，認被告罪在不赦，求其生而不得，有與社會永久隔離之必要，以及從此主觀惡性及客觀犯行，加以確實考量，何以必須剝奪其生命權，詳加敘明，以昭慎重，務求無可指摘，始能確定。」

但是另外一項擔憂則是，萬一這些修法計畫很快速的通過，但內容真的是人民需要的嗎？以法官法為例，《法官法》在眾人引頸企盼超過 20 年後，終於在今年六月完成立法。這部以規範法官為主要目標的《法官法》，從法官評鑑委員會，到最終決定不適任法官懲戒結果的職務法庭，全都設置在司法院內；法官評鑑委員雖然納入外部代表，但半數提名權交由法務部，還將最終的擇定權交給司法院長，此舉無異將就要萌芽的外部機制，又丟回官方主控的老路。整體而言，《法官法》最後通過的版本，充其量只是一部五十分的《法官法》。（林峯正，2011）

前面提及的速審法以及法官法，都是名不符實的立法，以臺灣的司法和立法品質，筆者可以預見，初稿中的這些修法計畫，也可能都在這樣的狀況下，妥協再妥協，被草率通過，與草案的理想漸行漸遠。

四、預算

兩公約施行法第 7 條「各級政府機關執行兩公約保障各項人權規定所需之經費，應依財政狀況，優先編列，逐步實施」。因此，主計處也特別整理了 2010 年和 2011 年「中央各機關執行兩公約保障各項人權規定經費編列情形表」[9]。其中關於第 6 條生命權的部份摘要如下：

	2010 年	2011 年 11 月
第六條生命權	7,827,915,000 元	13,140,817,000 元
預算說明（編列項目）	教育部：辦理一系列師資人力培訓、研究發展與評估等活動經費 8,700,000 元。 衛生署：辦理代理孕母法之制定、人工生殖與不孕宣導模式計畫及營造母嬰親善的哺乳環境等經費 32,039,000 元。 內政部：照顧生活困難之低收入戶與救助遭受災害者之生活、發放老年年金、身心障礙年金、喪葬給付、遺屬年金及推動馬上關懷救助專案等經費 7,787,176,000 元。	教育部：辦理一系列師資人力培訓、研究發展與評估等活動經費 16,800,000 元。 衛生署：辦理代理孕母法之制定、人工生殖機構許可作業及營造母嬰親善的哺乳環境等經費 24,920,000 元。 內政部：照顧生活困難之低收入戶、救助遭受災害者之生活、發放老年年金、身心障礙年金、喪葬給付、遺屬年金及推動馬上關懷救助專案等經費 13,099,097,000 元

依據聯合國人權諮詢委員會所作的第 6 號和第 14 號關於生命權的一般性意

[9]行政院人權保障推動小組第 17 次委員會議紀錄「1、為讓兩公約具體落實，各部會在 98 年 12 月 10 日兩公約施行後，除依「兩公約施行法」第 8 條檢討主管之法令及行政措施是否符合兩公約規定外，應積極的依「兩公約施行法」第 7 條規定，依財政狀況，優先編列執行兩公約保障各項人權規定所需之經費，逐步實施。 2、請本院主計處逐年調查各部會執行兩公約保障各項人權規定所需之經費，並將調查結果函送本小組列管。」

見可以發現，限制死刑和限制核武器是生命權兩大重要的核心。在主計處的經費編列表上卻是列出衛生署代理孕母、人工生殖或者是低收入戶照顧及年金...做為主要預算編列項目。不是說這些項目的預算不重要，而是這些項目本來就可以列在其他更合適的社會福利條項下，列在這裡並不是最恰當的。這只能再次佐證，臺灣政府對於兩公約內容的不了解，只憑自己的想像來理解兩公約。

對於兩公約的不了解，目前首要的工作就是要教育與訓練。民意反對廢除死刑，那就要讓人民瞭解生命權保障的意涵，要有規劃和具體行動來達成這個目標。因此，針對落實生命權，到底要做什麼事情，到底要如何讓人民理解，這才是這個項目的預算應該要呈現的。但是，整個政府不從這個角度思考，只是將原有的工作，分配列在不同的條約項目中，就覺得符合了施行法第 7 條的規定，在在令人搖頭。

肆、讓政府重回人權保障的舞台：兩公約人權報告及審查制度

為了監督政府施行兩公約，在 2009 年國際人權日的前夕，兩公約施行監督聯盟（the Covenants Watch）成立[10]。

但根據兩公約施行監督聯盟召集人高涌誠律師的分析，過去兩年來，臺灣法院適用兩公約的比例非常的低，甚至有錯誤理解公約的狀況。

臺灣雖然不是聯合國的成員，但兩公約施行監督聯盟還是要督促政府對兩公約的規定要確實遵守，尤其是兩公約施行法通過後，更是法律義務。因此兩公約施行監督聯盟於今年 4 月提出說帖，要求政府除了依據聯合國的標準提出人權報告外，也應該要依照聯合國的標準，建立人權報告審查制度（Reporting System），模擬聯合國的機制，組成獨立的國際人權專家審查臺灣的國家人權報告。

臺灣需要有一個和政府對話的平台，讓法務部及其它政府單位接受民間的監督。兩公約施行監督聯盟的成員們，在今年六月以來已經開始組織各種人權議題讀書會，希望可以產出一份好的民間影子報告，藉由人權報告的審查機制，和政府有對話人權議題的機會。

因此，對於公約解釋的爭議，就可以在獨立的國際人權專家審查中獲得解決，也藉由報告審查制度的循環，持續地促進人權。

更進一步說，聯合國有 193 個會員國，在兩公約的報告審查上，或許不見得能夠針對每個國家都投注最大的關注，但是臺灣不須要受限於聯合國有限資源限制，或許我們能做得更好。

臺灣正在嘗試一個前所未有模式，我們期待政府追上臺灣民間團體的腳步，真正在國內落實人權公約的要求。

[10]民間司法改革基金會和廢除死刑推動聯盟都是兩公約施行監督聯盟的發起及核心成員。

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The Abolition of the Death Penalty: A True Picture of the Implementation of Judicial Reform and the ICCPR[29]

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Abstract

This report examines the Taiwan government's implementation of the ICCPR and the ICESCR, taking the abolition of the death penalty as a case study. Despite having ratified the Two Covenants, the government has so far failed to apply strict guarantees to the right to life. In fact, the judicial system neglects the right to a fair trial as before. A case in point is the justice minister, who in accordance with the Two Covenants must produce the first initial report on the ICCPR and the ICESCR in Taiwan, and who has in the past stated that decreasing the use of the death penalty is a long-term aim. This year, however, fifteen people have had their death sentences confirmed, a record number in the last ten years. This report also examines the government's first initial report on the Two Covenants, and the section of the government budget that relates to Article 6 of the ICCPR, on the right to life. From this evidence, the report concludes that the government's understanding of the Two Covenants remains incomplete.

Therefore, we hope that the government will accept the recommendations of Covenants Watch: to issue a report that conforms to United Nations standards, and establish a human rights reporting system that simulates that of the United Nations. Independent international human rights experts should be invited to examine Taiwan's report. This system would not only create a platform for human rights dialogue between the government and Taiwanese citizens, but would also fulfill the standard obligations of a country that has ratified the Two Covenants. During the investigation by independent international human rights experts, questions surrounding the interpretation of the ICCPR and ICESCR could also be worked through. Through this human rights reporting system, human rights will continue to be promoted in Taiwan.

Keywords

Abolition of Death Penalty, Judicial Reform, the Two Covenants, Right to Life, ICCPR

[29] This essay was written for the 2011 Conference on International Human Rights Covenant, December 8 to 9, Taipei.

I. Preface

Most Taiwanese citizens would not reject the statements “judicial reform should be carried out in Taiwan” and “the Government should put the human rights protection in the two Human Right Covenants into practice”. Despite the Taiwanese government claiming to support these goals we find on closer examination that there is a large gap between these claims and the Government’s actions when they face controversial human rights situations.

Through the co-writers extensive experience in Taiwan human rights and judicial reform movements, we have found that “Judicial Reform” has become a catchword, especially for important political figures, yet the full implications of judicial reform have been ignored by the government. In 2009, Taiwan ratified the “International Covenant on Civil and Political Rights” and the “International Covenants on Economic, Social and Cultural Rights”, and instituted the contents of the two Covenants through the Implementation Act. However, in the last three years, the government has spoken a lot about the importance of human rights but in practice has distanced itself from applying the principles in practice.

For example, after the two covenants have been ratified, the Ministry of Justice instantly drew up a “Human Rights Strides” project for examining domestic regulations and administrative measures, and requiring that regulations inconsistent with the two covenants be modified within two years. Shortly afterwards, the Judicial Yuan drafted the Speedy Criminal Trials Act claiming that this protected the rights of those facing trial, in accordance with the Covenants, by reducing the number of cases where the accused were held in prolonged indefinite duration. The Judicial Yuan proposed the draft of Speedy Criminal Trials Act in August 2009 without consulting relevant scholars and experts in advance. In April 2010, the Act was quickly approved by the Legislative Yuan, enjoying the full backing of the ruling party’s majority. However, it could be argued that whilst the Act had an appealing name, it in fact was a ‘Speedy Death Act’ for cases where capital punishment had been a questionable sentence.

Taiwan had stopped the executions of convicts between December 2005 and April 2010, but resumed executions again not long after the Two Covenants were ratified. Moreover, there are many problems in the regulations concerning the death penalty in Taiwan, which makes them not consistent with the requirement in the Two Covenants. Consequently, despite ratification of the Covenants protection of the right to life in Taiwan has in fact degraded.

As a result, speaking from the perspective of the NGOs on the protection and implementation of human rights, we hereby argue that the abolition of the death penalty is a critical indicator of the extent to which the Government is complying with the Two Covenants. The article will then try to provide concrete examples for illustration.

II. Talking the talk but not walking the walk

Reviewing death penalty controversies in Taiwan as a whole, the policy of Taiwanese governments under both Democratic Progressive Party or Chinese Nationalist Party administrations has been “to abolish the death penalty gradually". However, this policy has not required the Government to "stop executions" as a supplementary measure, contrary to the United Nations' calls for countries who have not abolished capital punishment to abide by a moratorium on executions (according to the resolution "Universal Moratorium on Executions" passed in succession by the General Assembly in 2007, 2008 and 2010).

The current government’s policy on the death penalty has not changed: the abolition of death penalty remains its long-term goal but it also currently runs against mainstream public opinion on the issue. The use of the phrase "Long-term goal" reveals that the Government indirectly admits that the abolition of death penalty is a human rights goal, but it has used ‘public opinion’ as an excuse for nonfeasance and rarely discusses the abolition of the death penalty in a practical way.

Since 2010, Taiwan has twice carried out the batch execution of prisioners yet President Ma Ying-jeou, Premier Wu Den-yih and Justice Minister Tseng Yung-fu have all declared that the abolition of death penalty is their long term goal, but that abolition should be carried out step by step, and with respect for public opinion. On both occasions the Ministry of Justice ignored criticisms from civil societies that these executions violated the Articles of the ICCPR[30], instead claiming in ambiguous language that it acted in accordance with the law, consistent with the two human rights covenants.

In addition, the Group of Research and Promotion on Gradually Abolishing the Death Penalty, itself established by Ministry of Justice, has convened a number of times yet not achieved anything of substance. The Chinese Association of Human Rights had proposed a draft to amend the most controversial Amnesty Act, however the

[30] Same as note 3.

Group has yet to discuss the draft[31].

On October 25th 2011, the Presidential Office Human Rights Consultative Committee[32] announced the first draft of the Initial Report[33](or the First Draft) required by the two Covenants. In the sixth Article of the draft, the national position on the abolition of the death penalty was not proposed and even the long term goal (the abolition of the death penalty) was absent.

While being questioned in the Legislative Yuan, Justice Minister Tseng said, "the current policy on the death penalty is to *try our best to reduce the use of the death penalty* instead of seeking abolition. [34] The policy has remained unchanged and convicts whose death sentences have been confirmed will be executed. In another way, we will require prosecutors to reduce the number of recommendations for capital punishment" Following repeated questioning by the press, Tseng clarified again that "Ministry of Justice wishes to reduce the use of capital punishment instead of abolishing it".

We do not naively believe that the signing of the ICCPR will result in the abolition of the death penalty. How can we trust the government's integrity when it can not even comply with the most basic human rights standard required?

III. Lack of Full Knowledge of the Two Covenants: Start with the First Draft of the Initial Report

The third Article of the Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (the Implementation Act) states that "applications of the two Covenants should make reference to their legislative purposes and interpretations by the Human Rights Committee." According to Kao "all governmental institutions - including the Presidency, Executive Yuan, Legislative Yuan, Judicial Yuan, Examination and Control Yuans - should carry out their duties in accordance with international human rights law, interpretations made by the UN Human Rights Committee (especially the

[31] The Chinese Association of Human Rights proposed the draft in April 2010. However, the draft has never been discussed in the Group of Research and Promotion on Gradually Abolish the Death Penalty. Author Lin Hsin-yi is a member of this Group. The monthly regular meeting of the Group has failed to be convened six times this year.

[32] The Presidential Office Human Rights Consultative Committee is the coordinator of the drafting on the Initial Report required by the two covenants, the Ministry of Justice providing aides and staff support.

[33] Download the first draft from http://www.humanrights.moj.gov.tw/ct.asp?xItem=247008&ctNode=30640&mp=200

[34] Report from Central News Agency (CNA), October 27th, 2011.

General Comments) taking precedence over conventional legal institutional practices." [35] Moreover, according to Professor Manfred Nowak, "all case law concerning with individual communications, general comments made by the committee based on the fourth paragraph in Article forty, and 'Concluding Observations' made for specific country members are seen as authoritative comments of the Covenant (ICCPR)" [36]

Consequently, in order to interpret the two Covenants we can't only read into the Articles, but must also refer to the general comments, cases of individual communication and concluding observations for specific countries made by United Nations Human Rights Committee and Economic, Social and Cultural Rights Committee. Only then, can we claim to fully understand the scope of the two Covenants.

Following the the co-writers participation in a conferences examining the first draft of the Initial Report, we can tell that governmental institutions are unfamiliar with the Covenants and are resistant to interpretations not within the written Articles of the Covenants from the following examples:

1. A series of ledgers instead of concrete policies

Reading through the ledgers of the First Draft from relevant departments involved in the drafting, we are not able to discern a concrete policy or complete vision from the Government on the abolition of the death penalty in Taiwan. We do not use the phrasing "policies on *existence or abolition* of death penalty" here, because paragraph six of Article six in the general comments of United Nations Human Rights Committee has pointed out that ".....The Article also refers generally to abolition in terms which strongly suggest that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life.....".

In addition, paragraph six of Article six in the ICCPR is also clear; "Nothing in this Article shall be invoked to delay or to prevent the abolition of capital punishment by any State party to the present Covenant". Therefore, as to the status quo in Taiwan, the question is not "should the death penalty be abolished?" but "how should the death penalty be abolished?".

In 2003, the Judicial Reform Foundation, Taiwan Association of Human Rights, Taipei Bar Association and Soochow University Chang Fo-Chuan Center for Human

[35] See note 5.

[36] *U.N. Covenant on Civil and Political Rights CCRP Commentary*, Manfred Nowak, SDX Joint Publishing Company, Shanghai, December 2008

Rights co-established the Taiwan Alliance to End the Death Penalty (TAEDP), and organisation which continuously calls on the government to set out concrete plans, steps, measures and a time table to promote the abolition of the death penalty.

In the absence of an overall and organized plan for abolition, the government can easily attribute their nonfeasance to public opposition and avoid constructing policies of substance regarding a method and timetable for abolition whilst claiming that they have taken steps towards that goal.

2. Is the Government sincere in its claim it wishes to "reduce the use of capital punishment"?

In the First Draft, there were eight paragraphs used to illustrate "the plan to gradually reduce the use of capital punishment", yet in reality this was little more than an elaborate way to describe what is essentially the status quo.

Another quote from the First Draft is notable: "Under all circumstances, the death penalty must not be applied to laws covering property crimes, economic crimes, political crimes and crimes generally not involved with violence." [37] This is almost a consensus amongst international human rights experts in relation to serious crimes.

The TAEDP had recommended amending existing laws to comply with the above quote in September 2009 but two years later the phrase "to *propose* amendments" still remains in the wording of the First Draft. The government has completely ignored the deadline required by the Implementation Act which requires the "amendment of relevant law and administrative measures by the government within two years" and is currently lagging far behind schedule.

Besides, among the relevant legislation and measures adopted for achieving the goal of gradually reducing the use of capital punishment, mandatory defence was not applicable in the final appeal court owing to Article 388 in the Code of Criminal Procedure. This law has caused death-row inmates to suffer from a lack of a full and effective defense. The TAEDP also applied for a constitutional interpretation in 2010 on this point but unfortunately the Council of Grand Justices did not accept the application.

There were nine death-row inmates executed last year and this year. The Ministry of Justice ignored the fact that seven out of the nine death-row inmates were not defended by any attorney during the final appeal court, and only proposed to abolish said Article 388 in the Code of Criminal Procedure. No remedial measures

[37] See note 11, p.136

were taken, including the extraordinary appeal filing by the chief public prosecutor on behalf of the defendants. However, paragraph 59 of Article 32 in General Comments mentioned that, "the imposition of a sentence of death upon conclusion of a trial, in which the provisions of Article 14 of the Covenant have not been respected, constitutes a violation of the right to life (Article 6 of the Covenant)."

Suggestions such as the need for a death sentence to require a unanimous resolution, public prosecutors refusing to ask for the death penalty and judges not rendering death sentences are not 'new' ideas. However, the Justice Ministry and Judicial Yuan has made no progress on these ideas, and the question remains whether these suggestions will be implemented despite the fact that they were written into the Initial Report.

As to the determination of sentencing, according to the First Draft of the Initial Report the Judicial Yuan had proposed an amendment to Article 289 of the Code of Criminal Procedure, saying that the debate on determining the sentence should be carried out only after the investigation of evidence and a debate of the case in terms of its facts and in relation to the law. In addition, it suggested a set of standards be applied for sentence determination by the Supreme Court. [38] However, in the light of current judicial practice in Taiwan, the abstract standards of sentence determination are still subject to free evaluation, especially when the procedures for judgement of guilt and the determination of sentence are not separated.

In a case that took place in July this year, a life sentence was handed down in the first instance and death in the second. The parties filed an appeal and the Supreme Court remanded the judgement and recommended that the High Court hold a "debate on determination of sentence" since this case dealt with the death penalty. The defense lawyers put great effort into preparing for the debate, and referenced analysis on determination of sentencing from other countries. However, the judges in the High Court rejected the debate in favour of written pleadings and completed ignored the lawyers' requirement on the investigation of evidence. The High Court believed that

[38] The standard of sentence determination for the Supreme Court listed in the First Draft reads as follows: "The judgement shall illustrate the conditions required by Article 57 of the Criminal Code and will explain in a detailed way why it is necessary to deprive the defendants' right to life. Suggested reasons can be that: it is impossible for the actor to show remorse or regret, impossible for them to be a moral person or be reformed (since they are unable to value human life and are innately evil and must take responsibility for their crimes), that they are apparently unable to be educated and corrected by any educational and correctional punishment except for death penalty, to balance the ideals of fairness and justice, and the public's need for social justice, the necessity for protecting the national public order, good order and social norms, improving public benefits, to consider not to remit the defendants' crimes or where there is no just reason for not applying the death penalty, where it is necessary to segregate them from the society for good, and where serious examination of the subjective maliciousness of the accused criminal acts has been objectively determined. The judgement can be confirmed only when it can in no way be criticized and when it demonstrates the prudence of the judges".

the requirement of "holding a debate on determination of sentencing" was reached and sustained the death sentence in this trial.

As of the time of writing, fifteen people have been sent to death row in 2011 alone, more in this year than in any of the previous ten. Moreover, the convicted crimes of finalized cases were set on uneven degrees, failing to comply with the standards of a 'just trial' as set out in the ICCPR.

For example, the 13th finalized convict sent to death row was unexpectedly a 76-year-old man. Most countries which have not abolished the death penalty try to narrow the range for which the death sentence can be applied. Article 6 of ICCPR requires that executions should not be carried out on juveniles and pregnant women. Moreover, in "Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty" the UN Economic and Social Council also requires countries which have not abolished the death penalty to "establish an upper age limit for those who can be sentenced to death". Another example is the 10th convict whose death sentence was finalized. His prosecution was the result of the confession of a co-defendant, despite a lack of other reinforcing evidence. The death sentence was still given to this defendant who had been a fugitive for years and who had not had the chance to confront his co-defendant who had already been executed. Checking the statistics against the Justice Minister's pledge and the content of the First Draft to "reduce the use of the capital punishment" has become a source of great irony.

3. When will the plan to amend the laws pass?

Examining the First Draft, there are many "plans" to amend the laws though most of these plans are not new ideas. The question is whether the Ministry of Justice and the Judicial Yuan are willing to do their duty to communicate with the Legislative Yuan and make these plans to amendments a legal reality. We wait to see whether this will happen.

There is another concern. If the amendment plans above are passed, will they fit the peoples' needs? Take the Judges' Act for example. After public calls for more than twenty years for judicial reform, this law was finally enacted in June this year (2011).

Though the Act is intended to regulate judges and possible judicial malpractice, the core mechanisms of achieving this lie still with the Judicial Yuan, from the Judicial Personnel Review Committee to the Internal Tribunal, which has the final say on any disciplinary action to be meted out. Though a number of people unaffiliated with the judicial system will be able to sit on the Judicial Personnel Review Committee, the Ministry of Justice still holds the nomination power for half of its

members and the final say lies with the President of the Judicial Yuan. Those moves handed the budding external mechanism on supervising judges back into the governments' hands. Overall, we give the final version of the Judges' Act a score of only 50 out of 100. [39]

The Speedy Criminal Trials Act and Judges' Act mentioned above are misleadingly named pieces of legislation. Owing to the quality of the judiciary and legislation in Taiwan, we can foresee that the amendment plans in the First Draft will also drift far from the intended ideals in the draft as they become modified by compromise and are passed in a brash way.

4. Budgets

Article 7 in Implement Act states that "All levels of governmental institutions and agencies should preferentially allocate funds to implement human rights protection provisions in the two Covenants according to their financial status, and take steps to enforce." Therefore, the Directorate-General of Budget, Accounting and Statistics (or Directorate-General of BAS) charted a "Table of budgets for Central Governmental Agencies to Carry Out Human Rights Protection Listed in the Two Covenants".[40] The budget items about the right to life in Article 6 in ICCPR are summarized below:

	Year 2010	November, 2011
Article 6, Right to Life	NT$7,827,915,000	NT$13,140,817,000
Descriptions on Budgets	Ministry of Education: NT$8,700,000 for holding activities include a series of teachers human resources training, research and developments, and evaluation etc.	Ministry of Education: NT$16,800,000 for holding activities include a series of teachers human resources training, research and developments, and evaluation etc.

[39] *Justice score of only 50%.* Lin Feng-cheng. June 16th, 2011, Apple Daily Taiwan.

[40] The 17th Meeting Minutes of the Group for Protection and Promotion of Human Rights, Executive Yuan (or Group of PPHR) are as follows: "1 - In order to implement the two Covenants, all Ministries and Commissions, after the Implementation Act come into force on December 10th 2008, shall examine regimented laws and regulations (Article 8, Implementation Act), and preferentially allocate funds to implement human rights protection provisions in the two Covenants according to their financial status, and take steps to enforce them (Article 7, Implementation Act). 2 - Request the Directorate-General of BAS to research the budgets needed for all Ministries and Commissions in enforcing the human rights provisions of the two Covenants on an annual basis, and send the research results to the Group of PPHR for filing."

	Department of Health: NT$32,039,000 for enactment of Surrogate Mother Act, project on Human Procreation and Sterility Promotion, and create a breast-feeding friendly environment etc. Ministry of the Interior: NT$7,787,176,000 for low-income families care, salvage for natural disaster victims, senior pension payment, physically challenged pension, funeral expense, survivor's pension and project on immediate care and salvation etc.	Department of Health: NT$24,920,000 for enactment of Surrogate Mother Act, project on Human Procreation and Sterility Promotion, and create a breast-feeding friendly environment etc. Ministry of the Interior: NT$13,099,097,000 for low-income families care, salvage for natural disaster victims, senior pension payment, physically challenged pension, funeral expense, survivor's pension and project on immediate care and salvation etc.

According to Article 6 and Article 14 in the ICCPR General Comments made by the UN Human Rights Committee, two core values concerning the right to life are: 1) to impose restrictions on the death penalty and 2) to impose restrictions on the use of nuclear weapons. However, the Directorate-General of BAS listed Surrogate Mother, Human Procreation and Low-income families support and pensions etc. as items in the funds allocation table. Whilst the budget of these items is important they should be listed in provisions relevant to social welfare rights. The right to life is not the most suitable category for these items. This again supports our position that the Taiwan Government lacks a full understanding of the Two Covenants, and interprets the provisions based on what they imagine the Covenants might mean.

The primary work of enhancing the understanding of the Two Covenants is education and training. Public opinion is opposed to the abolition of the death penalty. As a result the government should set a series of concrete plans and actions to make people understand the implication of the concept ‘the protection of right to life’. Consequently, the fund allocation table should have revealed what means would be used to carry out the education on implementing right to life. It is perplexing to see that the government felt that they had reached the requirements of Article 7 in Implementation Act by reallocating previous budget expenditure items, unrelated to

the right to life, as if they were somehow relevant to the two covenants.

IV. Making our government return to the path of human rights protection: State Report (of the two covenants) and the Consideration Mechanism

In order to supervise the implementation of the Two Covenants, the Covenants Watch was established one day before International Human Rights Day in 2009. [41]

Kao Yung-cheng, the convenor of the Covenants Watch, analysed the two Covenants and found that they have rarely been applied and have even been wrongfully interpreted in Taiwanese courts over the past two years.

Though Taiwan is not yet a member of the United Nations, the Covenants Watch still works hard to supervise the Government so that it abides by the two Covenants it has been legally obliged to follow since the passing of the Implementation. Therefore in April this year, the Covenants Watch demanded that the Government do more than just proposing an Initial Report which is required by the UN standards, but also: establish a Reporting System, form a panel of independent international human rights experts for considering the Taiwan Initial Report via imitating the UN mechanism.

Taiwan needs a platform for dialogue where the Ministry of Justice and other governmental institutions can be supervised by civil society groups. Members of the Covenants Watch have started to organized study groups on various human rights issues and wish to produce a good Shadow Report, that is, to create opportunities for communicating over human rights issues with the Governments through consideration mechanisms provided by the Initial Report.

Consequently, disputes over interpretation of the Covenants can be solved by consideration of independent international human rights experts, the human rights situation being improved continuously through this consideration system.

In addition, Taiwan may do better since we are not restricted by the limited resources in the United Nations, which itself may not pay full attention to every single one of the 193 State Reports required by the two Covenants.

Taiwan is making an attempt on an unprecedented path. We are looking forward to helping the Taiwanese Government catch up with civil society groups, and finally truly implement the two Covenants' requirements at a national level.

[41] The Judicial Reform Foundation and the Taiwan Alliance to End the Death Penalty are both initiators and core members of the Covenants Watch.