# 場次五：兩公約與機構配套措施
# Panel V: The Two Human Rights Covenants and Institutional Arrangements for Implementation

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# 我國人權機制之發展及省思

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## 摘要

本文論述我國人權機制之發展，並提出建議。我國人權機制發展歷史所呈現之特色是行政部門所設立之人權機制有延續性，除了總統府人權諮詢委員會有四年多消失之外，其他機制都是後任政府延續前任政府之人權機制，慢慢形成共識。

本文認為總統府人權諮詢委員會最缺乏的應是專職、專業的人員，此困境恐怕會持續。在行政院部分，本文建議由專職之政務委員擔任行政院人權保障推動小組之副召集人，而該政務委員須為人權專家學者，負責整個行政院有關人權議題及法案之思考、決策及若執行。同時在行政院院本部成立「性別平等及人權處」或是「人權處」，作為行政院人權保障推動小組之行政幕僚。未來會設立之行政院性別平等促進會及在行政院院本部下新設性別平等處，應依計畫持續實踐之。而各部會人權工作小組亦需要專職且專業之核心人物，負責完整掌握其所屬部會之人權事務，這是未來應可增進之處。

本文建議監察院人權保障委員會應該規劃監察院實踐憲法及三個國際人權條約之權利的內涵及方法，如此監察院才可能扮演人權保護者之角色。立法院應該增設一個常設委員會，稱為人權委員會，如此立法院在審查法案時亦可加入人權之概念，而其成果是將人權思考提前。考試院可以設立人權保障委員會，作為考試院之內部機制，負責思考如何實踐憲法基本權保障及三個國際人權條約之權利內涵。而司法院亦可在院內設立人權委員會，以負責思考在不違背司法獨立之前提下，三個國際人權應該如何於司法院之審判實務中實踐，同時也可以作為思考司法院所負責之各種法規是否有可以增進人權保障之處之機制。

本文亦認為，幾十年來國際上設立國家人權機構之發展，不是專屬於新興民主國家，亦非民主成熟國家之專利，因而臺灣應該設立國家人權委員會。為維護其獨立性，其應是五院之外的獨立機構如此最能保護其獨立性，並妥善施行其功能。其實監察使與國家人權委員會是可以並存的，同時沒有侵犯司法權之疑慮。

關鍵字

人權機制、總統府人權諮詢委員會、政院人權保障推動小組、行政院婦女權益促進委員會、人權教育諮詢小組、監察院人權保障委員會

本文的核心議題是人權機制，希望能完整論述相關議題，因而本文一方面論述我國人權機制之發展過程，另一方面分析這些人權機制之利弊，並提出建議。本文首先分別於第壹部分及第貳部分探討行政部門、監察院已設立之人權機制，而所稱之行政部門包括總統府、行政院及各部會。接著本文於第參部分分析立法院、司法院、考試院等尚未設立人權機制之國家機關，並提出建議。本文並於肆部分論證應該成立國家人權委員會。所有結論則彙整於第伍部分。

## 壹、行政部門

思考未來我國人權機制的可能發展途徑之前，或許吾人應該先整理過去之足跡[1]。從時間順序觀之，李登輝時代設置行政院婦女權益促進委員會，此委員會歷經陳水扁時代，直到現在的馬英九時代，2012 年之後將更名為行政院性別平等促進會。

而在陳水扁時代，其在總統府成立總統府人權諮詢委員會，運作期間為 2000 年 10 月至 2006 年 5 月。陳水扁政府在行政院維持政院婦女權益促進委員會之設置，同時在 2001 年 7 月成立行政院人權保障推動小組。同時教育部在 2001 年 4 月設立人權教育委員會，從 2005 年 9 月起改名為「人權教育諮詢小組」。行政院人權保障推動小組及教育部人權教育諮詢小組一直持續到 2008 年 5 月陳水扁政府任期屆滿。

馬英九時代則是在 2010 年 12 月重新設立總統府人權諮詢委員會。同時在行政院維持行政院人權保障推動小組及行政院婦女權益促進委員會，教育部之人權教育諮詢小組亦維持。馬英九政府新設立的是各部會之人權工作小組。

以上歷史發展所呈現之特色是行政部門所設立之人權機制有延續性，除了總統府人權諮詢委員會有四年多消失之外，其他機制都是後任政府延續前任政府之人權機制，慢慢形成共識。因而經過幾任政府之努力，在各層級行政部門，不論是各部會、行政院、總統府，均有人權機制之設置，可說是相當完整。以下分別檢視各人權機制之內涵，並提出分析及建議。

### 一、總統府

在民進黨執政時代，陳水扁前總統在 2000 年 5 月其第一次就職演說中宣示：「我們也願意承諾對於國際人權的維護做出更積極的貢獻。中華民國不能也不會自外於世界人權的潮流，我們將遵守包括『世界人權宣言』、『公民與政治權利國際公約』、『經濟社會文化權利國際公約』以及維也納世界人權會議的宣言和行動綱領，將中華民國重新納入國際人權體系。新政府將敦請立法院通過批准『國際人權法典』，使其國內法化，成為正式的『臺灣人權法典』。」（陳水扁，2000）

[1] 請參見本文附錄。

這亦是人權立國之起源。

因而扁政府於 2000 年 10 月成立總統府人權諮詢小組，（行政院，2000：63）並於 2004 年改組為總統府人權諮詢委員會，這是民進黨執政時所設立的最重要人權機制。該委員會任務包括：推動人權法制化、研擬人權入憲條款、推動國家人權委員會、研議人權政策、考評人權現況、推廣人權教育、參與人權事務及其他總統交辦事項。該委員會之設置並分成六組，人權入憲、人權立法、人權政策、人權考評、人權教育、國際人權。該委員會置主任委員一人，由副總統擔任，並得置副主任委員一至二人；各組置正副召集人各一人。

設立總統府人權諮詢委員會之目的為保障及提昇人權，落實人權法制化，並參與國際人權事務，其設立依據為總統所核定的「人權諮詢委員會設置要點」。人權諮詢委員會之設置，主要是基於陳水扁前總統於競選時對於人權保障之承諾，藉由此委員會作為一主要的核心推動幕僚機關，逐步形成本委員會據設置要點所轆列目標之執行方針，並由總統交由相關部會逐步推動實現。

民進黨時代的總統府人權諮詢委員會於 2006 年 5 月結束運作，其中最主要之理由是國民黨為多數之立法院決議認為其不是法定機關，因此以刪除預算之方式，使得總統府人權諮詢委員會無法運作。

臺灣在 2008 年 5 月歷經第二次政黨輪替，國民黨執政之後並未立刻討論是否繼續設立總統府人權諮詢委員會，直到 2010 年 12 月馬政府才又在總統府之下設立人權諮詢委員會。

馬政府的說法是依據中央行政機關組織基準法第 28 條「機關得視業務需要設任務編組，所需人員，應由相關機關人員派充或兼任」之規定，總統府仍可設立總統府人權諮詢委員會。但是比較精準的說法應該是同法第 31 條規定：「本法於行政院以外之中央政府機關準用之。」因此總統府準用第 28 條規定適用之，不應將總統府看成是行政院之機關。

更重要的是中央行政機關組織基準法在 2004 年就已制訂，如果 2010 年時馬政府可以依此法設立總統府人權諮詢委員會，為何當時扁政府卻不可以呢？其中思考的矛盾，令人難以理解。當時在野的國民黨認為必須要有法源，總統府才能設立任務編組，不過國民黨執政之後不久，就在 2008 年 9 月設立財經諮詢小組，顯然與過去之想法不吻合。而在成立總統府人權諮詢委員會的過程中，其實馬政府本來希望能修改總統府組織法，但是原擬增訂設置諮詢性質委員會之條款未獲通過，這時如果是堅持過去的理念的話，應該是終止財經諮詢小組，也不成立總統府人權諮詢委員會，才會是符合馬總統常常強調的「行憲」、「依法行政」，但是馬政府卻是採用自己過去反對之方式行事，令人有昨非今是之感受。

總統府之說法也令人感受時間上之弔詭，如果可以依據中央行政機關組織基準法設立總統府人權諮詢委員會，那麼從馬政府就任的第一天就可以成

立了，可是卻在就任兩年多之後才成立，也難自圓其說，其實主要還是在於總統府組織法修法不順利，因此馬政府必須有自我解套之說法。如果人權是馬政府施政重點，而成立總統府人權諮詢委員會是實踐此目標之重要機制，那麼馬政府應該在就任之後立刻依據中央行政機關組織基準法成立總統府人權諮詢委員會，或是以最快之速度促使總統府組織法修改，以利總統府人權諮詢委員會之成立，但是結果兩者都不是，這也可以顯示馬政府雖然同時掌握行政權及立法權，卻無法清楚構思及實踐執政之步驟及內容，形成政治與法律兩邊失據的現象。

在扁政府時代，總統府人權諮詢委員會之成員來自於民間，然而馬政府的總統府人權諮詢委員會之成員還包括行政院副院長、司法院副院長、監察院副院長，這是最令人匪夷所思之處，就我國行政體系而言，行政院副院長擔任總統府任務編組織成員，提供總統及副總統諮詢意見，有行政倒置之疑慮，因為本來行政院應該扮演執行總統決策之角色。而司法院及監察院本應是獨立之憲法機關，當其副院長擔任總統府任務編組之成員，豈非自我廢棄獨立之身分。

展望未來總統府人權諮詢委員會是否可以為臺灣帶來正面的人權貢獻，關鍵在於人員的組成及對於人權之理念。在人員組成部分，馬政府延續扁政府之策略，由副總統擔任總統府人權諮詢委員會之主任委員，而其個人之專長及特質亦將主導總統府人權諮詢委員會之未來走向。而其他來自於民間之成員，因為是任務編組，所有委員均是兼職，而且是提供諮詢意見，政府恐怕不能完全依賴委員之意見。如果政府沒有仔細思考應有的人權政策，而只想依賴總統府人權諮詢委員會的委員提出意見，顯然難以建構完整的人權政策。

總統府人權諮詢委員會最缺乏的應是專職、專業的人員，因為主任委員是副總統，政務已相當繁忙，而所有委員均是兼任，總統府秘書長及副秘書長或許會協助人權諮詢委員會，但是他們亦有眾多其他事務要處理，而總統府之資政及國策顧問均為無給職，亦難以扮演專職之角色，因而此困境恐怕會持續，總統及副總統能夠做的應是在其任職內聘任他們所信任且具備人權專業之人士，擔任人權諮詢委員會之委員、資政及國策顧問，同時維持其穩定性，以提供總統及副總統有關人權政策之諮詢意見，而其可能成果就必須靠總統及副總統自己的智慧及運作能力了！

總統府設立之人權諮詢委員會不應該被誤認為是國家人權委員會，當時扁政府時代的人權諮詢委員會的重要工作之一是創設國家人權委員會，其目標是依據聯合國之巴黎原則，參考諸多國家之經驗，設立獨立的國家人權委員會。而馬政府對此事項幾年來都沒有確定之理念，其實全世界已有超過一百個國家已經設立了國家人權委員會，是近代國際人權非常重要的發展趨勢，因此馬政府不應該誤以為成立總統府人權諮詢委員會就是建立國家人權委員會，同時如果真的著重與國際人權接軌的話，那就應該宣示成立國家人權委員會之決心[2]。

[2] 本文於第肆部分討論國家人權委員會之相關議題。

## 二、行政院

行政院系統下有兩個主要之人權機制之形成，分別為人權保障推動小組及行政院性別平等促進會，以下分別討論之。

(一) 行政院人權保障推動小組

扁政府時代另一個重要之人權機制是在行政院設立人權保障推動小組。行政院為了研究各國人權保障制度與國際人權規範，推動並落實基本人權保障政策，於 2001 年 7 月訂定行政院人權保障推動小組設置要點，設立行政院人權保障推動小組。其任務包括：各國人權保障制度與國際人權規範之研究及國際人權組織合作交流之推動事項、國家人權保障機關組織設置之研議及推動事項、人權保障政策及法規之研議事項、人權保障措施之協商及推動事項、人權教育政策之研議及人權保障觀念之宣導事項，及其他人權保障相關事項。（行政院人權保障推動小組設置要點第 2 條）本小組由相關機關首長及民間學者專家共二十一至二十七人組成委員會，委員皆為無己職，院長擔任召集人，原則上六個月開會一次。（行政院人權保障推動小組設置要點第 3 條、第 5 條）在扁政府時代，行政院人權保障推動小組持續運作。

馬政府在 2008 年 5 月執政之後亦延續扁政府所設立之行政院人權保障推動小組，並未做變動。

行政院人權保障推動小組之優點在於由行政院長擔任召集人，具有行政團隊對人權事務重視之象徵意義。而其對於行政部門範疇之人權事務推動及調整，有決策上之制高性與靈活性。

但是行政院人權保障推動小組之運作可能有幾個問題。首先，組織編制問題，行政院人權保障推動小組屬任務編組，並非常設機關，開會時間不定亦不密集，且與會政府代表與學者及民間代表間，不容易形成共識。在欠缺明確組織編制、權限及地位下，無法做成具實質執行效果之決議，其決議之真正落實，尚須透過行政院院會之機制處理。其次，預算編列問題，行政院人權保障推動小組是在研考會或法務部以其他預算科目項下經費辦理，未來預算編列問題恐因不足而不易推動人權保障相關業務。第三，機關組織職掌問題，我國並無專責人權組織，任務編組之架構未能完全掌握各機關人權施政動態，無法發展完整人權政策圖像。（財團法人中華民國乾淨選舉促進會，2000：9-10）

在討論行政院組織法之修改時，並未討論是否改組行政院人權保障推動小組，因此未來行政院不會設立常設之人權機制，這是非常可惜的，在政府改造的過程中，人權機制居然沒有列入考量。

或許可以從兩個方向思考改進行政院人權保障推動小組之運作，第一，因為其為任務編組之機制，並無核心決策之人，秘書單位不論是研考會或是法務部，可以作為行政之支援，但是卻難以作為初步決策者，而行政院長更是因為政務繁忙而無法只關注人權議題，因此或可思考由**專職之政務委員**擔任行政院人權保障

推動小組之副召集人，而該政務委員須為人權專家學者，負責整個行政院有關人權議題及法案之思考、決策及若執行。此方式可以兼顧設立之靈活性，同時不需要修法，應是最簡易之方式。

第二，或可思考在行政院院本部成立**「性別平等及人權處」**或是**「人權處」**，作為行政院人權保障推動小組之行政幕僚。如下所述，其實未來行政院院本部下會新設「性別平等處」作為行政院婦女權益促進委員會的秘書單位，然而如上所述，在行政院組織改造過程中卻沒有思考設立行政院之人權機制，因而或應增補之。行政院組織法第 14 條規定:「行政院為處理特定事務,得於院內設專責單位。」因而未來行政院應可在院本部下將「性別平等處」擴充為「性別平等及人權處」，如果此方案有降低或貶抑婦女權利地位之疑慮，亦可考慮增設「人權處」，以協助上述人權專職政務委員，同時作為行政院人權保障推動小組的秘書單位。

由**專職之政務委員**及**「性別平等及人權處」**或是**「人權處」**所形成之組織結構，可以與行政院婦女權益促進委員會及各部會之人權工作小組合作，此有利於人權政策指揮及執行之水平擴張。而人權業務由行政院院本部及各部會執行，並與地方政府相對應機關或單位合作，則會利於人權政策指揮及執行之垂直管理。

(二) 行政院婦女權益促進會

行政院婦女權益促進委員會應該是我國最早之人權機制，歷經李登輝、陳水扁、馬英九三個時代。1996 年發生「彭婉如命案」，本案更加喚醒社會應對婦女人權更加重視與保障，因此行政院在 1996 年 12 月所召開的全國治安會議，做成決議設立專責促進婦女權益之機構，並訂定「行政院婦女權益促進委員會設置要點」[3]。1997 年 5 月行政院婦女權益促進委員會正式設立，婦權會共設置委員十五人，由行政院各部會首長、社會專業人士及婦女團體代表所組成。婦權會之主要任務包括：關於婦女權益政策及重大措施之規畫事宜、關於研定(修)婦女權益相關法令之審議事項、關於重大婦女權益計畫之審議事項、關於重大婦女權益工作之諮詢評議事項、關於婦女權益措施及法令之宣導審議事項，及其他有關婦女權益促進事項。

第一次政黨輪替之後，扁政府維持行政院婦權會，而自 2002 年 2 月 29 日開始，行政院婦權會為健全運作機構並提昇議事效率，採三層級模式運作，以有效推動婦女權益各項政策與措施。第一層級為議題分工小組會議，依「就業、經濟及福利」、「教育、媒體及文化」、「健康及醫療」、「人身安全」、「國際參與」五組分工運作研擬相關提案，以強化婦權會之專業運作功能。第二層級為會前協商會議，針對委員會議議程及各分工小組所提議案進行協調整合，充分溝通以凝聚共識。第三層級為委員會議，就已協調完竣並具共識之重要議案做最後確認[4]。

行政院婦權會之設立對婦女人權保障之促進，雖有象徵性意義。但是行政院

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[3] 行政院台 86 內 11557 號函核定。

[4] 參見婦權會網址：http://cwrp.moi.gov.tw/WRPCMain/Page_Show.asp?Page_ID=1&CarryStr=1。

婦權會之運作同樣必須面對幾點困難與缺失（郭惠玲，2008）：第一、非常設機構：同樣地行政院婦權會並非常設機構，同時又歷經數次之內閣改組、召集人更換，使其組織呈現較不穩定之狀況。因其無設專責委員，亦無正式編制人員及固定預算，致各委員時有力不從心之慨。在欠缺常設地位及專屬公務員及預算編制下，對婦女權益保障事務之專門與寶貴經驗無法獲得累積與傳承，業務推行與運作亦會欠缺時效性與穩定性。

第二、委員會之組成。委員會之組成依該要點是由各部會首長、社會專家及民間團體組成，人數共十五人。對於實際從事婦女權益促進工作者而言，確實無法有集思廣益之效用，且因人力之缺乏，亦僅能針對少數議題，提出建議。又因各部會首長雖身兼委員，然公務繁忙，所委派參加會議之人員，又往往無決定權限，致時有議而不決，決而不行之事例，致行政院婦權會之實際運作，往往達不到實際之效用。

第三、決議事項無法落實。行政院婦權會之委員，特別是專家學者及民間團體，雖然積極地提案並提出許多建言，然礙於設置要點之規定，仍無法將會議決議，列入行政院研考會追蹤考核，而行政院婦權會之正式會議又礙於各種因素，無法時常舉行，徒使許多決議流於形式而遲遲無法落實。亦是因行政院婦權會欠缺法定常設地位，其他部會在研擬相關政策時，亦不一定會請行政院婦權會官員參加。此狀況不僅不易使得婦女權益保障落實在所有行政團隊施政內容，更不讓整體行政團隊在施政過程中避免對婦女權益之不當限制或侵害。因而，不論是垂直式的政策推動和監督或是水平式的部會間政策執行聯繫工作，在行政機關普遍缺乏婦權意識上，都相當困難。

有鑑於行政院婦權會非常設性機關，在業務規劃及推展上欠缺一致性於持續性，而對於婦女權利之促進與保障有所減損。行政院組織法修正草案中，為追求性別平等的核心價值、順應性別主流化的世界趨勢、增進政府行政效能，欲設立一常設性，且超越傳統認知之性別權益議題之專責委員會。（行政院組織法修正草案第五條）

在討論過程中，有甲、乙兩方案，甲案為行政院規劃提出；乙案為婦女團體所提出[5]。甲案構想內容為，將原本婦權會更名為「行政院性別平等促進會」性質屬行政院之任務編組，由院長擔任召集人。另外在行政院院本部下再設立「性別平等處」作為專責執行性別主流化及性別平等促進會之決議，及保障婦女權益業務，並作為性別平等促進會之幕僚單位。

甲案之優點在於其構想係對現有制度予以改良，降低組織再造複雜性與成本，另外其決策層級為院長，並維持現行婦權會之運作機制，性別主流化理念之推動均可透過對五個工作小組及各部會性平專案小組之督導加以貫徹；各工作小

[5] 參見行政院研究發展考核委員會網站：http://www.rdec.gov.tw/DO/DownloadControllerNDO.asp?CuAttachID=18419。

組係由各部會擔任幕僚機關，有利於政策指揮之水平擴張；業務係由各部會執行，並與地方政府有相對應機關或單位，利於垂直管理。但甲案之缺點為性別平等促進會設立依據為行政命令性質的「行政院處務規程」，其穩定性不如法律高，另外委員為院長聘任之兼任性執委員，權責亦不明確，最重要者為其對性別政策無政策審核主導地位。

乙案構想內容為，設立性別平等委員會，其為行政院中常設性之二級機關，設有主任委員及副主任委員，委員由主委提名機關代表、社會專業人士、婦女團體代表，請院長聘任之，並為非專任委員。性別平等委員會之預算由該委員會自己編列，但委員會下無設工作分組，相關工作由行政院各部會進行，但由本委員會統合推動。

乙案之優點在於設立一明確之性別事務專責機構，具有專責之人員編制及預算編列，有助於彰顯政府重視性別平等之態度，並提昇我國之國際形象。而乙案之缺點主要包括，性別平等委員會為行政院二級機關，其召集人為主委，決策層級較甲案低，此點再加上與其他行政院機關間若堅持本位主義且統合性不佳的話，不易全面性推動性別平等事務。另外，「性別主流化」之理念及業務在政府部門還屬於初期開展階段，尚需維持各部會性別平等專案小組之運作，以培育公務人力之性別意識及將性別觀念滲透到各項政務。但在乙案下，性別平等委員會與各部會之位階為平行，較難要求行政院下各部會性別平等專案小組，雖該委員會可報陳院長同意後請各部會配合辦理，惟在行政流程上涉及跨機關(行政院、性別平等委員會)間行政作業及公文程序，不如行政院性別平等處之效率。

這些討論從扁政府開始，到馬政府，後來決定採取甲案，即伴隨著行政院組織法修正，行政院婦權會將調整為「行政院性別平等促進會」，為行政院之任務編組，並由行政院長擔任召集人，負責政策規劃、督導及整合，以強化女男平等原則。而行政院院本部下新設「性別平等處」作為婦權會的秘書單位[6]，以利於落實政策推動。

## 三、各部會

在各部會部分，扁政府時代主要有教育部在 2001 年 4 月設立人權教育委員會，由部長擔任主任委員，聘請相關部會、學術界及民間團體人士擔任委員，委員會更分別以四個面向成立分組－即研究發展組、課程教學組、校園環境組、宣導推廣組。委員大會每四個月開會一次，而各分組則視需要在開大會前開會。不論是委員大會或分組之會議，各相關之教育部之行政司處都會派代表參加會議。委員會由教育部之部長或次長主持，各分組可就其工作或計畫提到大會形成政策，而由各行政司處來加以執行，並從其行政經費中來支應。

後來因為立法院認為行政部門若要以「委員會」為名，則必須有法源之依據，

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[6] ＜政府再造 4 法通過 2012 實施＞，2010，《自由時報》，2010 年 1 月 13 日，http://www.libertytimes.com.tw/2010/new/jan/13/today-fo1.htm。

因此從 2005 年 9 月起人權教育委員改名為「人權教育諮詢小組」。或許是已進入成熟的階段，隨著名稱的改變，其實在運作的次數和模式上也有所改變。委員會改每半年一次，且已無分組的編制，而運作的主導權改由行政司處來提計畫，而由諮詢委員來提供意見，大部分之計畫係延續之前的內容，而成為行政司處例行性工作。（林佳範，2009：138）

馬政府接續既有之政策維持教育部人權教育諮詢小組。而後來為了實踐「公民與政治權利國際公約」及「經濟社會文化權利國際公約」，2010 年 5 月起內政部、外交部、國防部、教育部、法務部、衛生署、環保署、勞委會、原民會及海巡署等十個部會陸續成立人權工作小組，擔任行政院人權保障推動小組之聯繫窗口，教育部之人權教育諮詢小組也扮演此任務[7]。

而這些人權工作小組面臨一些難題。首先，設立這些人權工作小組之目的為何？以其設立之時間點觀之，實踐兩公約應是各人權工作小組的重點之一，但是事實似乎並非如此。以統籌實踐兩公約之機關法務部為例，其於 2010 年 4 月 19 日發布的「法務部人權工作小組設置要點」第二點之五大任務中，並無一字提及兩公約及其施行法。而「行政院環境保護署人權工作小組設置要點」亦有類似之疑義，並未特別著重於兩公約之實踐，而其第二點則是廣泛地規定，本小組之任務包括擔任行政院人權保障推動小組之聯繫窗口，同時包括與環保署有關人權保障議題之蒐集及擬議、業務之協調及督導、宣導之整合及分工等。因此這些人權工作小組恐怕要陷入職權範疇之掙扎，或是不知職權重點之困境。

其次，其開會頻率亦會影響實質成效，依「法務部人權工作小組設置要點」第四點規定，該小組應每兩月開會一次，然而 2010 年 5 月以後，該小組只於 10 月 14 日開過一次會議。而「行政院環境保護署人權工作小組設置要點」則是規定原則上每六個月召開會議一次，如此開會頻率，恐怕只會形成點綴式的機制，實質上恐怕難以有成效，同時也難以確認政府建構人權機制之決心，最後恐怕是成為花瓶。

第三，各部會人權工作小組之成員為何？基本上各部會人權工作小組之成員包括部會內部成員及外部委員，外部委員人數不得少於三分之一，而且原則上由部長擔任召集人，形式上是相當高之層級，但是各部會之首長政務繁忙，恐怕難以專注於此，結果依然需要事務官負責相關人權事務，因此重點應該是各部會是否可能建構專職及專業之人權機制。

因此各部會人權工作小組可能必須面對一些問題，其中包括專業性、專職性、預算、定位、獨立性等[8]，而其中最有實質影響的應是專業性、專職性，其實各部會人權工作小組的結構與行政院人權保障推動小組類似，部分為單位主

[7] 更完整之論述請參閱，陳俊宏、黃秀端、黃默，2011，《落實兩公約施行法之政策研究》審查版：53-5。

[8] 相關論述亦請參閱，陳俊宏、黃秀端、黃默，2011，《落實兩公約施行法之政策研究》審查版：186-7。

管，部分為外聘委員，並由各部會之某內部單位作為幕僚，例如環保署內部由綜合計畫處擔任幕僚工作。因此各部會人權工作小組亦需要**專職且專業**之核心人物，負責完整掌握其所屬部會之人權事務，這是未來應可增進之處。

## 貳、監察院

憲法第 96 條規定：「監察院得按行政院及其各部會之工作，分設若干委員會，調查一切設施，注意其是否違法或失職。」因此監察院設立了七個常設委員會：內政及少數民族委員會、外交及僑政委員會、國防及情報委員會、財政及經濟委員會、教育及文化委員會、交通及採購委員會、司法及獄政委員會。而依據監察院各委員會組織法第 2 條第 3 項規定：「監察院得應業務需要，於院內設特種委員會。」因而監察院依據其內部決議而設立特種委員會，現有九個特種委員會，包括法規研究委員會、訴願審議委員會、廉政委員會、國際事務小組、預算規劃與執行小組、諮詢委員會、人權保障委員會、監察委員紀律委員會、監察獎章審查委員會。

監察院於 1948 年成立，但是長期以來監察院並未成立有關人權實踐之內部組織，直到 2003 年 3 月才成立「人權保障委員會」，作為監察院特種委員會之一。而監察院聲稱設立人權保障委員會的理由是：「為確保基本人權，有效監督政府機關及公務人員，防止其侵害人權，並遵守國際人權原則，使我國成為真正之國際人權先進國家，因而委員建議設置『人權保障委員會』，以發揮監察功能，落實保障人民基本權利之平等及不受侵害[9]。」

監察院人權保障委員會職掌為：(1)妨害人權案件之發掘及提案調查；(2)人權保障調查報告之研討及建議處理意見事項；(3)人權法案之建議；(4)與國內外人權團體之聯繫並蒐集資料；(5)研議人權教育之推廣工作；及(6)其他有關人權保障事項。監察院對於人權保障業已累積豐富的工作經驗，在實務運作上，監察院每年收受人民書狀多數涉及人權保障議題，且每年調查的案件中，一半以上與人權問題相關。監察院將這些人權案件細分為自由權、平等權、生存權、政治參與、司法正義、醫療照護、工作權、財產權、文化權、教育權、環境資源權、社會保障等 12 類[10]。從 2010 年開始，因為批准兩個聯合國人權公約，監察院人權保障委員會將各相關權利之案件，彙整為兩本工作實錄[11]。不過其彙整之方式是將監察院所處理過之案件，挑選其認為與相關兩組權利之案件作呈現，不是監察院所認為其應實踐人權之方式及內涵。

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[9] 參見監察院人權保障主題網：http://humanrights.cy.gov.tw/mp71.htm (visited on 4 August 2011).
[10] 參見監察院人權保障主題網：http://humanrights.cy.gov.tw/mp71.htm (visited on 4 August 2011).
[11] 參見監察院人權保障委員會，2011，《監察院人權工作實錄第一冊公民與政治權利》，監察院人權保障委員會。監察院人權保障委員會，2011，《監察院人權工作實錄第二冊經濟、社會與文化權利》，監察院人權保障委員會。

監察院人權保障委員會聲稱其有六項職掌，不過實際上真正之工作應該是妨害人權案件之發掘及提案調查，而其本質是將監察院行使職權調查個案彙整，理論上人權保障應該是監察院之職責，而人權保障委員會則是協助實踐此職責之機制，而有時候監察院則必須面臨「合法」及「人權」間之掙扎，例如死刑議題，如果從「合法」之角度觀之，監察院可能認為應該儘速執行死刑，但是從「人權」角度觀之，或許監察院可能認定邁向無死刑才符合人權趨勢。類似地，過去換身份證按指紋之案例，如果從「合法」角度觀之，勢必要求行政院必須盡快要求按指紋及換身份證，但是如果監察院有「人權」觀點，應該是認為不要按指紋。其中可見得監察院所應面對之挑戰。

基於此，監察院不只是作為實踐大法官解釋內涵下之實踐者而已，更可以扮演人權實踐之領導者。而監察院所應實踐之人權應該包括憲法及三個國際人權條約之權利範疇，因此**監察院人權保障委員會應該規劃監察院實踐憲法及三個國際人權條約之權利的內涵及方法，如此監察院才可能扮演人權保護者之角色**。而更重要的是人權保障委員會所建構之理念及方法，不應只是由人權保障委員會本身適用而已，更應由監察院所有常設委員會及特種委員會適用，否則難以真正實踐憲法及三個國際人權條約之權利保障。

## 參、司法院、考試院、立法院

司法院、考試院、立法院均未設立相關人權機制。吾人或許亦應思考是否這些部門亦應設立人權機制。

先就立法院而言，或許可以先看看英國之經驗，英國於 1998 年通過「1998 年人權法」(Human Rights Act 1998)，此人權法是將「歐洲人權公約」之準則於英國國內實現，同時英國國會上議院(House of Lords)及下議院(House of Commons)共同成立「人權聯席委員會」(Joint Committee on Human Rights)，其職責包括審查政府所提之法案是否違反歐洲人權公及其他有關英國人權之事項。

現行立法院所設之委員會包括常設委員會及特種委員會，而常設委員會有內政委員會、外交及國防委員會、經濟委員會、財政委員會、教育及文化委員會、交通委員會、司法及法制委員會、社會福利及衛生環境委員會。特種委員會則有程序委員會、紀律委員會、修憲委員會、經費稽核委員會。如果參照英國之經驗，英國國會當時會設立人權聯席委員會，是因為英國通過「1998 年人權法」，國會必須面對國內法是否符合歐洲人權公約之挑戰，而以聯席方式，是因為英國有兩院制之國會。對於臺灣而言，我們也有類似之情形，2009 年 3 月批准公民與政治權利國際公約、經濟社會文化權利國際公約，同時制訂兩公約施行法，2007 年 1 月加入消除一切婦女歧視公約，2011 年 5 月通過消除一切婦女歧視公約施行法，這兩個施行法都要求必須修法，因此可預期的立法院必須以是否符合三個人權條約之角度審查諸多國內法，因此其情形是與英國相當近似的，而且這些檢

視應該不只是幾年內之工作而已，應該會持續長久，同時立法院本來就有制訂法律應該符合憲法基本權保障之義務，因而基於立法院應該以人權保障之角度立法，立法院應該增設一個常設委員會，稱為**人權委員會**，這將會使立法院有不同之價值與風貌，如此立法院在審查法案時亦可加入人權之概念，而其成果是將人權思考提前，過去只有在法律通過之後，大法官才做違憲審查，然而如果立法在審查法案時即做人權思考，如此或可減少法案違憲及侵犯人權之可能性。

就考試院而言，其實同樣地考試院也應該實踐憲法基本權保障，亦應實踐上述三個國際人權條約之權利。然而考試院至今並未設立任何人權專職機制，依據考試院組織法第 15 條規定：「考試院於必要時得設各種委員會，其組織以法律定之。」例如考試院在 1996 年設立公務人員保障暨培訓委員會。而同法第 10 條第 2 項亦規定：「考試院得應業務需要，於院內設各種委員會；所需工作人員，由院長就所屬人員中指派兼任之。」例如考試院設立法規委員會、研究發展委員會。因而考試院可以應業務需要而設立**人權保障委員會**，作為考試院之內部機制，**負責思考如何實踐憲法基本權保障及三個國際人權條約之權利內涵**。

就司法院而言，大法官做為憲法守護者，自然應該守護憲法所規定之基本權，然而一般法院之法官無法在判決中直接適用基本權規範，但是「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」第 4 條要求「各級政府機關行使其職權，應符合兩公約有關人權保障之規定，避免侵害人權，保護人民不受他人侵害，並應積極促進各項人權之實現。」及「消除對婦女一切形式歧視公約施行法」第 4 條要求「各級政府機關行使職權，應符合公約有關性別人權保障之規定，消除性別歧視，並積極促進性別平等之實現。」其中所稱之「各級政府機關」應該包括司法院，其結果是法官在個案判決中必須適用三個國際人權條約，因此司法院更應努力讓所有法官理解三個國際人權條約之內涵，如此才能進而實踐之。

司法院設有司法人員研習所，作為法官進修之機制，以「提升司法人員的專業知能及人文素養」，但是其應是教育機制，而非決策機制，因此其實有必要於司法院內設立人權相關機制。司法院組織法第 21 條規定：「司法院得因業務需要，於院內設各種委員會；其委員及所需工作人員，由院長就所屬人員中指派兼任之。」如果司法院認為必要時，亦可在院內設立**人權委員會**，以負責思考**在不違背司法獨立之前提下，三個國際人權應該如何於司法院之審判實務中實踐**，同時也可以作為思考司法院所**負責之各種法規是否有可以增進人權保障**之處之機制。

## 肆、國家人權委員會

最後吾人亦應思考臺灣是否應該參考聯合國推動多年之國家人權機構(national human rights institute)理念，並設立國家級獨立之人權專職機制。在臺灣

推動設立國家人權委員會其實是由民間團體推動，後來得到官方之重視，但是不同執政黨政府有不同之態度，迄今設立國家人權委員會之理想尚未實踐。以下先討論推動設立國家人權委員會之歷史過程，再論述在臺灣設立國家人權所面臨的幾個問題。

## 一、推動過程

在臺灣推動設立國家人權委員會之歷史過程是先由民間團體發起，接著面對不同兩個執政政府對設立國家人權委員會之理念。

(一) 民間推動

事實上臺灣公民社會的民間社團從事「推動成立國家人權委員會」的工作已經超過十年，1999 年底 22 個非政府組織共同發起了「國家人權委員會推動聯盟」。「國家人權委員會推動聯盟」分為二個小組，一個是「推動規劃小組」另一為「比較研究與法案起草小組」，前者以臺灣人權促進會當時的會長黃文雄先生為召集人，後者則以東吳大學政治系黃默教授為召集人。

「起草小組」自 2000 年 1 月初開始工作，於 6 月初完成草案，計條文二十一條，並邀請各界提出意見與批評。「推動規劃小組」透過各式各樣的管道向各界廣為推介設立國家人權委員會的急迫性及必要性，而當時適逢臺灣進入總統大選白熱化的階段，「推動規劃小組」也向諸位總統候選人進行遊說的工作。當時幾乎各黨派的候選人都一致地認同這樣的主張，甚至將「設立一個超然獨立的國家人權委員會」作為主要的政見。

在 2000 年的 5 月 20 日的總統就職演說上，當時新當選的陳水扁總統宣示將推動設立國家人權委員會[12]。而因為政府接納此政策，在某個層面也弱化了民間團體之動能，在 2000 年 5 月至 2008 年 5 月民進黨政府期間，設立國家人權委員會成為官方政策，而相對地民間團體推動設立國家人權委員會之動能亦減弱，民間團體或許認為設立國家人權委員會既然已經成為官方之重要政策，而官方有較多之資源，加上民間團體部分成員進入官方各小組成為委員，結果民間團體

政黨輪替之後，國民黨重新執政，並成為立法院的最大黨。臺灣人權促進會並沒有因此而放棄推動國家人權委員會的工作，其依然包括法案及推動兩部分。在法案部分，臺灣人權促進會在 2008 年重新召集過去修法小組的成員，將過去民間版的草案重新審視及修改，並於 2009 年初召開了二次「推動聯盟」各社團的「共識會議」，徵求各社團的修改意見及推動策略，形成民間團體新的國家人權委員會版本。在推動部分，民間團體嘗試說服國民黨政府採納設立國家人權委員會之政策，但是並沒有成功，因此仍須面對未來之挑戰。

[12] See Liao,Fort Fu-Te, 2001, “Establishing a National Human Rights Commission in Taiwan: Role of NGOs and Challenges Ahead,” *Asia-Pacific Journal on Human Rights and the Law* 2, 2: 93-7. Lin, Feng-Jeng, 2001, “The Role of NGOs in setting up a National Human Rights Commission in Taiwan,” paper presented at the *International Conference on National Human Rights Commissions: Promoting and Protecting Human Rights*, 2-4 January 2001, Taipei, Taiwan.

(二) 政府接納

後來此項推動為政黨輪替後之民進黨政府所採納，陳水扁前總統於 2000 年 5 月 20 日其首次就職演說中曾宣示：「我們希望實現聯合國長期所推動的主張，在臺灣設立獨立運作的國家人權委員會。」（陳水扁，2000）而同時設立國家人權委員會是諸多人權立國政策中優先推行的。（陳水扁，2001）陳前總統復於 2001 年元旦祝詞揭櫫政府在新世紀的六大施政課題，再次重申推動人權立法、建立人權指標，設立獨立運作的國家人權委員會，讓我國成為二十一世紀人權的新指標。而陳前總統在出席「國家人權委員會與人權的促進與保障」國際研討會開幕典禮時亦表示，其就職演說中所提及的人權三個政策，即第一是設立一個聯合國已經倡導多年的國家人權委員會；第二，是把《國際人權法典》國內法化為《中華民國人權法典》；第三是加強和國際人權非政府組織的人權交流。在這三個政策裡，我們優先推行的是國家人權委員會的設立。而其原因或可從「人權立國與人權保障的基礎建設 — 2002 年國家人權政策白皮書」中看出，其提到：「政府優先推行國家人權委員會是有特殊考慮的，1971 年中華民國被迫退出聯合國時，同時也被迫退出了國際人權體系。三十年來臺灣因此缺少了來自國際的交流、協助、監督和激勵。在這個人權普世化的時代，這個事實對臺灣有很多負面的影響，尤其是在保護和促進人權的政策、機構、知識、資訊和教育方面。」（行政院，2002：26）

「總統府人權諮詢小組」在 2001 年間召開了十一次的全體委員會逐條討論，完成了「國家人權委員會組織法草案」及「國家人權委員會職權行使法草案」，此即所謂的「總統府版」。惟「總統府人權諮詢小組」的努力並沒有得到行政院的認同。「總統府版」與「行政院版」仍存在諸多差異。當時監察院堅決反對設立「國家人權委員會」，並認為「國家人權委員會」不應行使調查權。2001 年 8 月行政院會將草案以最速件函送立法院審議，後來立法院未能正式審議，此草案因為立法院屆期不連續而失其效力。

後來「總統府人權諮詢小組」持續研擬「國家人權委員會組織法草案」及「國家人權委員會職權行使法草案」，並在 2003 年提出新草案，但是此草案在 2008 年 5 月民進黨卸下執政權之前，都沒有成為確定的官方版本[13]。當然立法院也不可能通過法律以設立國家人權委員會。

(三) 政黨再輪替

2008 年 5 月以後國民黨再次取得執政權，同時亦是立法院擁有絕對多數席次之政黨，此與民進黨執政時有相當不同之處境，理論上如果國民黨政府有意願設立國家人權委員會的話，其成功機率是相當高的。但是馬英九總統在其競選過程中及就任之後均未強調要設立國家人權委員會，馬總統不曾表示有設立國家人

[13] 有關臺灣推動國家人權委員會之經過，請參閱蘇友辰，2002，＜「國家人權委員會」的建構與展望－阿扁總統「人權立國」的落實與實踐＞，《全國律師》，12 月號：24-50。

權委員會之政策。馬總統曾經表示「考量聯合國所提出與人權相關的『巴黎原則』、我國憲政體系與國情、相關機關職權分工及其他國家人權保障機構運作型態等面向，現階段可考慮依中央行政機關組織基準法規定，規劃於總統府下設任務編組之『人權諮詢委員會』，並維持監察院及行政院現有人權保障推動機制。」（總統府，2010）不過總統府下之人權諮詢委員會恐怕與聯合國所推動的國家人權委員會理念是有實質上不同。

經歷過十幾年的推動，設立國家人權委員會的理想，從民間醞釀到政黨輪替之後由民進黨政府接納，但是八年匆匆過去，最終沒有完成。後又歷經再次政黨輪替，國民黨政府卻未正視此議題。不過民間團體依然堅持並持續推動之，只是不知此漫漫長路何時盡，完全無法預估臺灣何時能設立國家人權委員會。

## 二、臺灣借鏡

對於臺灣而言，我們應該思考兩個核心議題：第一，臺灣是否需要一個國家人權機構？第二，如果需要的話，我們應該採取哪一種模式？

### (一) 要不要設立

從理念上而言聯合國各機關不斷地重申國家人權委員會對於促進及保障人權之重要性，而且國家人權委員會對於各種類型之人權保障都是重要的，對於人權的國內及國際實踐都是重要之機制，同時所有的聯合國與人權有關之機關都認為各國應該設立國家人權委員會，並且建構起區域及國際之國家人權委員會組織。

誠如國際人權政策理事會所言，就現今而言每一個國家都應該要有一國家人權委員會，(International Council on Human Rights Policy, 2000: 1) 反觀臺灣難道臺灣不需要一個國家人權委員會嗎？誠如黃默教授所言，「如果設立國家人權委員會以後，實際上又能有效操作，對人權的保障與享有，必能帶來很大的助力，對弱勢的族群尤其有所幫助。其次，設立了人權委員會並有效操作，也必然帶動臺灣跟國際社會的互動，使臺灣趨近國際社會的人權標準，並與其他國家政府、民間人權組織有進一步的交流與合作。又如臺灣的努力與經驗，對中國大陸今後的發展有某種程度的影響，那又增添了另一項意外的收穫。」（黃默，2000）亦如黃文雄先生所言，「國家人權委員會雖然只是補正常立法、行政、司法及監察之不足的機構，其設立的必要性－尤其是對脫離國家人權體系已久的臺灣－可以從其功能中看出來：(一)調查可能侵犯人權(尤其是歧視不公)案件，進行調解和仲裁，必要時並得協助受害者團體或個人進行訴訟；(二)依據憲法及國際人權標準，審查研究國內既有法規和立法草案，提出修法、立法、修憲的建議；(三)規劃國家人權政策，包括國際人權及人道救援政策，並提出建議；(四)規劃並推廣學校內外人權教育，包括司法官、律師、軍警及其他公務員的人權教育；(五)提出年度及針對特定議題之國家人權報告。這些不都正是我國早該有，而至今仍不

具備的推展人權的基本建設嗎?[14]」

或許我們可以回顧幾十年來國際上設立國家人權機構之發展，從實際的比較法經驗觀之，其實已經有越來越多的國家人權委員會成立，幾十年來已有將近一百個國家人權機構之設立，其不是專屬於新興民主國家，亦非民主成熟國家之專利，而是不分區域及民主程度漸漸形成之國際普遍共識。設立國家人權委員會之國家不是只有落後國家或是先進國家而已，而是任何一種類型之國家都設立了國家人權委員會，這些國家同樣有司法機關及監察組織，但是也需要國家人權委員會擔負人權促進及保護之職責。對於臺灣而言我們歷經戒嚴及動員戡亂時期，人權保障受到壓抑，而民主化亦不到二十年時間，人權在這幾年有稍較受重視，但是人權保障應是攸關全民之生活，而設立國家人權機構對於人權之促進及保障應是有所幫助的，臺灣不應自外於此國際趨勢才是。

(二) 什麼類型

如果我們認為應該設立國家人權機構的話，那麼我們接下來應該思考要設立哪一種類型之國家人權機構。聯合國各機關認為國家人權機構至少可以扮演三種重要的角色：第一，保護者之角色(Protector)；第二，促進者之角色(Promoter)；第三，橋樑之角色(Bridge)。而筆者依據國家人權機構之職權內涵及區域發展為基準，將各國國家人權機構歸類為五種類型：一、諮詢委員會：法國模式；二、人權中心：北歐/德國模式；三、單一職權委員會：不意歸類；四、人權監察使：伊比利半島及東歐模式；五、獨立人權委員會：與監察使分離。各國之經驗產生五種類型之國家人權機構，或許可成為我們思考之基礎。

如果我們只是希望設立一個法國式的人權諮詢委員會，那麼其實可以以行政命令或是法律之方式為之，非常容易可以設立之。但是其實人權諮詢委員會模式只能扮演促進者之角色，無法扮演保護者之角色，至於其可否扮演橋樑之角色都值得懷疑，而人權諮詢委員會模式之職權範圍並無法包括「巴黎原則」所稱之全部，同時此模式大都只要以命令之方式便可成立之，但是一個只依行政命令成立之國家人權機構是否符合法治要求，其實是有相當疑慮的。因此人權諮詢委員會模式應該不是最佳模式。

如果我們要設立的是北歐/德國模式之人權研究中心的話，臺灣大學法律學院已設立人權中心，東吳大學已設立張佛泉人權中心，其實可以很簡單地將其中一個人權中心改為國家人權機構，或是另外通過一個法律而設立國家人權研究中心，作為臺灣之國家人權機構，或許中央研究院亦是可以選擇的。但是各國之人權研究所主要扮演促進者及橋樑之角色，但是其無法扮演保護者之角色，而且過丹麥人權研究所之轉變已使本來單純的人權研究機構，也可能轉換為比較積極的人權監督者及保護者，或許未來人權研究中心之模式也會有相當大之轉變，可能趨向與監察使分離之獨立人權委員會模式。因此我們如果只是設立人權研究中心

[14] 黃文雄，2000，〈臺灣亟待設立國家人權委員會〉，《中國時報》，時論廣場，2000 年 1 月 4 日。

模式之國家人權機構，其職權恐不完備，而且可能忽視此模式之發展趨勢，因此人權研究中心模式不應是臺灣值得借鏡的。

如果我們要以一單一職權委員會(特別是反歧視委員會)作為國家人權機構的話，那麼我們必需由立法院通過法律，成立一反歧視委員會或其他類型之單一職權委員會。雖然單一職權委員會可能有調查權，但是其職權過於狹隘，只著重於單一議題，無法顧及其他人權議題，將導致掛一漏萬之情形。而且從其他國家之經驗可以發現，單一職權委員會有發展為全面性人權委員會之趨勢，而且是與監察使區隔的，因此如果在臺灣設立單一職權委員會也會面對相似之困境，或許這也不應是我們的最佳選項。

而真正的抉擇是在人權監察使及獨立人權委員會兩個模式中擇一，也就是說是要將監察使與國家人權機構合一，還是要將監察使與國家人權機構分離，或許我們可以由幾個面向分析之。

首先，從發展趨勢觀之，會設立人權監察使之國家，多數是新興民主國家，而且過去沒有設立監察使，因此其以設立監察使之方式作為其國家人權機構，而臺灣早已設立監察院，其他國家之經驗顯示，已有監察使之國家，大多另行設立國家人權委員會以專司有關人權之事務，例如英國、愛爾蘭、韓國、泰國等，而其部分原因是聯合國已指出國家人權機構是指職權「特定」為促進及保障人權之機制，因此各國認為應該另行設立獨立之國家人權委員會，或許此發展趨勢可作為臺灣之借鏡。

其次，由兩個機制的本質觀之，監察使與國家人權委員會是有所不同：(1)監察院著重於對行政機關之行為及公務員之監督，而國家人權委員會重視人權保護，其功能不盡然相同。(2)監察院已負責彈劾、糾舉、審計及糾正權，且彈劾權更及於行政院、司法院、考試院及監察院人員，其職權範圍已相當廣泛是否可兼顧及善盡人權保護之專業職責恐有待質疑。(3)國家人權委員會之職權有其特別之處，例如人權之教育、推廣、建議、規劃等事項及準司法權之行使，均有待專業及全心之投入，如由監察院兼顧之，恐無法盡善盡美。(4)調查權範疇不同，憲法明言規定，監察院之職權乃是針對政府官員或機構的行政行為是否公正與合法，進行調查、糾正、糾舉、彈劾等功能。然而人權的範圍極廣，佈及人類集體生活的諸多層面，遠超過政府官員與機構的行政作為。例如涉及侵害集體勞工人權的關廠事件，或原住民族集體的土地經濟與文化權等問題，皆非屬監察院之調查權範圍內，必需透過獨立且專業的國家人權委員會來進行調查與研究[15]。

再者，值得注意的是，雖然監察院自己認為「已完全具備國家人權保障機構之地位毫無疑義」，（監察院人權保障委員會，2005：12）而監察院過去亦希望以此模式成為亞太國家人權機構論壇之成員，但是得到之回覆是監察院並非國家人

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[15] 亦請參閱黃默，2003，＜臺灣「國家人權委員會」的倡導、爭論與展望：一個非政府組織的觀點＞，《全國律師》7，12：4-10。

權機構。其可能原因是在亞太區域並沒有以監察使作為國家人權機構之傳統，而且現行監察院之職權並沒有包括促進及保護人權部分，因此將監察院認定為國家人權機構，恐怕會遭遇國際上無法肯認之負面結果。

已有許多國家分別設立國家人權委員會及監察機關，因而筆者認為國家人權委員會恐怕不適宜於監察院之下設立之，而應是獨立之機構，為維護其獨立性，其應是五院之外的獨立機構如此最能保護其獨立性，並妥善施行其功能。而上述愛爾蘭、泰國及韓國等經驗已告訴我們，其實監察使與國家人權委員會是可以並存的，同時沒有侵犯司法權之疑慮。

## 伍、結語

回顧我國人權機制發展歷史所呈現之特色是行政部門所設立之人權機制有延續性，除了總統府人權諮詢委員會有四年多消失之外，其他機制都是後任政府延續前任政府之人權機制，慢慢形成共識。因而經過幾任政府之努力，在各層級行政部門，不論是各部會、行政院、總統府，均有人權機制之設置，可說是相當完整。

本文認為總統府人權諮詢委員會最缺乏的應是專職、專業的人員，此困境恐怕會持續，總統及副總統可在其任職內聘任他們所信任且具備人權專業之人士，擔任人權諮詢委員會之委員、資政及國策顧問，同時維持其穩定性。

在行政院部分，本文建議由專職之政務委員擔任行政院人權保障推動小組之副召集人，而該政務委員須為人權專家學者，負責整個行政院有關人權議題及法案之思考、決策及若執行。同時在行政院院本部成立「性別平等及人權處」或是「人權處」，作為行政院人權保障推動小組之行政幕僚。未來會設立之行政院性別平等促進會及在行政院院本部下新設性別平等處，應依計畫持續實踐之。

而各部會人權工作小組可能必須面對一些問題，其中包括專業性、專職性、預算、定位、獨立性等，其中最有實質影響的應是專業性、專職性，因此各部會人權工作小組亦需要**專職且專業**之核心人物，負責完整掌握其所屬部會之人權事務，這是未來應可增進之處。

監察院於 1948 年成立，但是長期以來監察院並未成立有關人權實踐之內部組織，直到 2003 年 3 月才成立「人權保障委員會」。本文認為，監察院不只是作為實踐大法官解釋內涵下之實踐者而已，更可以扮演人權實踐之領導者。而監察院所應實踐之人權應該包括憲法及三個國際人權條約之權利範疇，因而本文建議監察院人權保障委員會應該規劃監察院實踐憲法及三個國際人權條約之權利的內涵及方法，如此監察院才可能扮演人權保護者之角色。

司法院、考試院、立法院均未設立相關人權機制。本文建議立法院應該增設一個常設委員會，稱為人權委員會，這將會使立法院有不同之價值與風貌，如此

立法院在審查法案時亦可加入人權之概念，而其成果是將人權思考提前。考試院可以應業務需要而設立人權保障委員會，作為考試院之內部機制，負責思考如何實踐憲法基本權保障及三個國際人權條約之權利內涵。而司法院亦可在院內設立人權委員會，以負責思考在不違背司法獨立之前提下，三個國際人權應該如何於司法院之審判實務中實踐，同時也可以作為思考司法院所負責之各種法規是否有可以增進人權保障之處之機制。

本文亦認為，幾十年來國際上設立國家人權機構之發展，不是專屬於新興民主國家，亦非民主成熟國家之專利，而是不分區域及民主程度漸漸形成之國際普遍共識，因而臺灣應該設立國家人權委員會。同時已有許多國家分別設立國家人權委員會及監察機關，因而本文認為國家人權委員會恐怕不適宜於監察院之下設立之，而應是獨立之機構，為維護其獨立性，其應是五院之外的獨立機構如此最能保護其獨立性，並妥善施行其功能。其實監察使與國家人權委員會是可以並存的，同時沒有侵犯司法權之疑慮。

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# Reflecting upon Taiwan's Human Rights Mechanism

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## Abstract

This article discusses the development and gives suggestions to human rights mechanism of Taiwan. Historical development indicates the continuation of the precedent of human rights structuring set by previous administrations. Except for a brief, 4-year disappearance of the Presidential Office Human Rights Consultative Committee, all institutions have been maintained. As such, the stance on human rights issue shared by previous and new governments remains consistent.

The article thinks that the Presidential Human Rights Consultative Committee lacks specific duty to a professional, and it may last. As the Executive Yuan, this article suggests to find a Minister without Portfolio to serves as the vice convener of Group for Promotion and Protection of Human Rights. The Minister without Portfolio must be a human right expert and responsible for making and carrying out the policy for the human rights related issues and proposed laws. Meanwhile, the government can consider setting up a Gender Equality and Human Rights Office or Human Rights Office in the Executive Yuan, which can be administrative staffs working for the Group for Promotion and Protection of Human Rights. Moreover, the government should go according to the plan to implement the Committee of Gender Equality and the Office of Gender Equality. And for future betterment, the human rights work groups of each administrative agency need experts as key figures to be in charge of human rights issues completely.

This article suggests that the Control Yuan's Human Rights Protection Commission should make a plan about implementing constitution and the three international human rights covenants, so that the Control Yuan can also be the protector for human rights. The Legislative Yuan should set up a standing commission which can be called as human rights commission, so that the Legislative Yuan can add the concept on act review. The Examination Yuan can establish human rights protection commission as the inner mechanism, and consider how to realize the constitutional basic rights and the three international human rights covenants. As for the Judicial Yuan, it can also establish the human rights commission which is in charge of practicing constitutional basic rights protection and the three international

human rights without violating the constitution. Meanwhile, the commission can also be the institute of improving the rules, which e

The article also thinks that the development of national human rights mechanisms around the world neither belongs to new democracies nor mature democracies. Therefore, Taiwan should establish the national human rights commission, and it should be an independent institution that apart from the five Yuans. Lastly, the ombudsman and the national human rights commission can exist simultaneously without violating jurisdiction rights.

## Keywords

Human rights mechanism, the Presidential Human Rights Consultative Committee, the Group for Promotion and Protection of Human Rights, the Committee of Women's Rights Promotion, the Consultative Committee for MOE Human Rights Education, the Human Rights Protection Committee (the Control Yuan)

The core issue of this article is the structuring of human rights. To discuss the related issue in depth, this article discusses the structuring of our human rights and then analyzes both the advantages and disadvantages of this approach. Meanwhile, suggestions will be proposed. First, this article will discuss institutions such as the Office of the President, the Executive Yuan and the individual sectors. Secondly, it discusses the Control Yuan's structuring of human rights. Third, the article analyzes the Legislative Yuan, the Judicial Yuan, and the Examination Yuan and gives suggestions on regarding the structuring of human rights. Fourth, the article will discuss the establishment of the National Human Rights commission. Fifth, the article concludes with summarizing points.

## I. Administration

Before contemplating the development of the human rights structure, allow me to briefly summarize the history. The Committee of Women's Rights Promotion was established during Lee Deng-hui's presidency. Under President Ma Ying-jeou's tenure, the group has planned to change its name to the "Institute for *Gender Equality Promotion*" in 2012.

Former president Chen Shui-bian established the Presidential Human Rights Consultative Committee during his presidency; this group operated from October 2000 to May 2006. The Chen administration maintained the Committee of Women's Rights Promotion; at the same time, they established the Group for Promotion and Protection of Human Rights in July 2001. Concurrently, the Ministry of Education proceeded to establish the Committee for Human Rights Education in April 2001. This was renamed the Consultative Committee for the MOE Human Rights Education in September 2005. Both the Group for Promotion and Protection of Human Rights and the Consultative Committee for MOE Human Rights Education were upheld until the end of Chen's presidency in May 2008.

During Ma's presidency, the Presidential Office Human Rights Consultative Committee was reset in December 2010, though the Group for Promotion and Protection of Human Rights, the Committee of Women's Rights Promotion and the Consultative Committee for MOE Human Rights Education were all maintained. What the Ma's administration did was set up human rights groups in individual sectors.

Historical development indicates the continuation of the precedent of human rights structuring set by previous administrations. Except for a brief, 4-year disappearance of the Presidential Office Human Rights Consultative Committee, all

institutions have been maintained. As such, the stance on human rights issue shared by previous and new governments remains consistent. Consequently, there are many human rights mechanisms in almost every level of administrations after different governments' efforts, such as individual sectors, the Executive Yuan, the Presidential Office. The following article examines the various connotations of human rights structures, and then offers various suggestions.

**1. The Office of the President**

During the rule of the DPP, former president Chen Shui-bian claimed in his inaugural speech in May 2000 that, "We are also willing to give more positive contribution to the assertion of international human rights. The R.O.C won't be excluded from the trend of global human rights. We will comply with the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, re-subsuming R.O.C into the international human rights system. The new government will submit the International Bill of Human Rights, to make it into domestic law[1]. This is the origin of how establish a human rights country.

The Chen administration established the Presidential Human Rights Consultative Group and reorganized it as the Presidential Human Rights Consultative Committee; this was the most significant human rights system established during the ruling of DPP. The committee oversees promoting legalization of human right laws, formulating constitution of human rights, instituting national human rights committee, developing human rights policies, evaluating human rights current condition, advocating human rights education, participating human rights events and other items according to the president's instructions. This committee was also divided into six sectors: constitution of human rights, legalization of human rights, policies on human rights, evaluation of human right, education of human rights and international human rights. The vice president served as the one chairperson of the committee and was served by one to two vice chairpersons; each sector was set to have one chairperson and one vice chairperson.

The Presidential Human Rights Consultative Committee was established to elevate and assure human rights, embody legalization of human rights, and take part in global human rights events. As such, these goals have manifested themselves in the

[1] Chen Shui-bian, the first inauguration of President Chen, May, 20, 2000.

Guidelines for Establishment of the Presidential Office Human Rights Consultative Committee. The establishment of the Presidential Human Rights Consultative Committee was due to the commitment towards human rights that former president Chen had made during the election. Through this committee, the major nucleus of the executive staff, it gradually took shape of the guidelines of the establishment of the committee, and the president entrusted to related sectors to practice.

The Presidential Human Rights Consultative Committee of the DPP government was dismissed in May 2006; the main reason being the majority of the Legislative Yuan, KMT had denied its legality. With the withdrawal of its budget, the Presidential Human Rights Consultative Committee thereby could not operate. Taiwan has encountered the second party rotation in May, 2008. KMT didn't discuss immediately whether to continue the Presidential Human Rights Consultative Committee; the Ma government reorganized the Presidential Human Rights Consultative Committee until December, 2010.

The Ma government's statement was in accordance with Article 28 of Basic Code Governing Central Administrative Agencies Organizations, "agencies may establish task forces in regard to their functions, with required staff members assigned or filled by personnel from relevant agencies", that the Office of the President could still establish the Presidential Human Rights Consultative Committee. But to be more, it was based on Article 31, "the Executive Yuan may establish commissions as affiliated agencies based on policy coordination needs." Consequently, Office of the President shouldn't adopt Article 28 and regard Office of the President as one agency of the Executive Yuan.

Furthermore, the Basic Code Governing Central Administrative Agencies Organizations has already been framed in 2004; therefore, if the Ma government could establish the Presidential Human Rights Consultative Committee based on this code, why couldn't Chen government do the same thing? The logic had contradicted itself beyond comprehension. At that time, KMT thought that there must be sources of authorities to set up task forces; however, KMT government soon established Financial and Economic Advisory Task Force in its ruling in September in 2008, contradicting its previous assertion. In the process of establishing the Presidential Human Rights Consultative Committee, the Ma government wished to modify the R.O.C Office of the President Organization Act originally, but the article draft of establishing advisory committee failed to gain approval. To comply with the former idea, the Ma government should end the Financial and Economic Advisory Task Force and not set up the Presidential Human Rights Consultative Committee. This way, it could truly conform to president Ma's "constitutional" and "rule by law"

repeated-emphasis.

Interestingly enough, there is a paradox regarding the timing of statements made by the Office of the President: if we can have the Presidential Human Rights Consultative Committee in accordance with Basic Code Governing Central Administrative Agencies Organizations, then the Ma government can establish the committee the first day Ma assumed office, but the committee was established two yeas later, which didn't justify itself. In fact, it was mainly because of the unsuccessful modification of the R.O.C Office of the President Organization Act and the Ma government had to find a solution. If human rights was the priority of the Ma government's administration, and establishing the Presidential Human Rights Consultative Committee was the instrument to carry out this goal, the Ma government should have organized the Presidential Human Rights Consultative Committee based on Basic Code Governing Central Administrative Agencies Organizations, or modify the R.O.C Office of the President Organization Act to facilitate the establishment of the Presidential Human Rights Consultative Committee. Instead, the Ma government failed to do either; this indicated that while the Ma government controlled executive power and legislature, it couldn't conceive and execute the content and process of administration, thereby losing traction both politically and legally.

Under the Chen administration, the Presidential Human Rights Consultative Committee attracted its membership from non-governmental sectors. On the other hand, the members in the Presidential Human Rights Consultative Committee in the Ma government included vice premier of the Executive Yuan, vice president of Judicial Yuan, vice president of the Control Yuan. This is rather obscure. For the administrative system of R.O.C, vice premier of the Executive Yuan as one member of a task force, giving consultation to the president and vice president, can have doubt on. The Judicial Yuan and the Control Yuan are supposed to be independent constitutional organs, so when vice premiers become members of a task force of the office of the President, they abANDOn their independent status. Whether the Presidential Human Rights Consultative Committee can bring positive contribution on human rights in Taiwan in the future or not, the key point is the members of the committee and the ideas toward human rights.

As for the members of the committee, the Ma government will continue the Chen government's policy, having vice president as the chairperson, and vice president's expertise and personal traits will lead the future trend of the Presidential Human Rights Consultative Committee. The other members are from non-governmental sector. Because the committee is a force task, all the members are part-time employees. Obviously, it is hard to construct wholesome human rights policies if the

government doesn't ponder proper human rights policies and just want to depend on all the consult from the members.

The key problem of operating the presidential office human rights consultative committee is lack of professional full time staff because vice president is overloaded with being director, and all the members in the committee are served as the part-time employees. Neither the secretariat and vice secretariat nor senior minister and national policy advisor could not be assigned a full-time duty to national human rights commission. Therefore, president must appoint experts in human rights to be as special members, senior ministers and policy advisors in the National Human Rights Commission. The most important duty for national human rights commission is to offer the information about consultation on human rights to the president and the vice president. The way of being an effectual National Human Rights Commission is depending on the president and the vice president's knowledge and capacity.

The Presidential Office Human Rights Consultative Committee should not be mistaken for National Human Rights Commission. One of the most crucial missions of the human rights committee in Chen's presidency is to set up National Human Rights Commission, which can be referred by Paris Principle from the United Nations and the experiences from the world; however, the Ma government has not reach to the consensus in several years. To conclude, over one hundred countries have already set up National Human Rights Commission, in other words, establishing National Human Rights Commission is the vital development in the modern history of international human rights. Therefore, setting up the Presidential Office Human Rights Consultative Committee must not be considered as National Human Rights Commission, and the government should be determined to establish National Human Rights Commission if having the capacity to connect with whole world[2].

**2. The Executive Yuan**

The Executive Yuan has two main teams, Group of Promotion and Protection of Human Rights and the Executive Yuan's Gender Equality Promotion. The discuss will go on as follow.

(1) The Group for Promotion and Protection of Human Rights

The DPP government set up one of an important human rights system at the Executive Yuan is the Group for Promotion and Protection of Human Rights. In order to do researches on different countries human rights systems, the Executive Yuan set up the Group for Promotion and Protection of Human Rights in July 2001 in

[2] The related issues will be discussed in the fourth part.

accordance with the Establishment Directions. The missions including promoting cooperation with other systems and international human rights organizations, realizing international norms, researching human rights policies and related affairs. The group has 21 to 27 committees, containing leaders in related institute and scholars in non-governmental circles. Those members, who are selected by the premier, work without paid and hold a council per six months[3]. The Group for Promotion and Protection of Human Rights has been worked from Chen's presidency.

After 2008 in May, the Ma government, as a ruling party, continues the Group for Promotion and Protection of Human Rights which has set up by the Chen government's Executive Yuan and the group has kept no changed since then.

The advantage of the Group for Promotion and Protection of Human Rights, which set up by the Executive Yuan, is leading by the premier of the Executive Yuan who is the convener of the group. It is meaningful that the administrative department puts highly attention on human rights. This group has the supremacy and flexibility of the decision when promoting and making adjustment of the human rights affair.

There are probably some problems when operating the Group for Promotion and Protection of Human Rights. Firstly, forming this organization is a problem. The Group for Promotion and Protection of Human Rights is a duty assignment, not a standing institution. The meeting is held irregularly and the government representatives, scholars and civilian representatives can hardly reach a common view. As the Group for Promotion and Protection of Human Rights lacks of specific organization, authority and position, it cannot put the ideal decision into practice. The final decision will be carried out through the mechanism of the Executive Yuan. Secondly, Group for Promotion and Protection of Human Rights involves with the problem of budget compilation. The group's budget deals with the other budget item of the Ministry of Justice and the Develop and Evaluation of Commission. The group may have difficulty in promoting related business of human rights protection because of facing funds insufficiency. Thirdly, there are some problems with the function of the group, for there is no sole responsibility for the human rights organization of in our countries. The framework of the duty assignment cannot completely master the policy situation in every department and leave the human rights policy uncompleted[4].

When discussing the revised of the Executive Yuan Organic Law, there is no discussion about whether to reorganize the Group for Promotion and Protection of Human Rights. Therefore, the Executive Yuan does not set up a standing institution

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[3] Article3 and 5, Establishment Directions of Group for Promotion and Protection of Human Rights, Executive Yuan

[4] See http://www.rdec.gov.tw/public/PlanAttach/201105301551032771652.pdf, Republic of China Association for Clean Elections Foundation.

for human rights mechanism. It is a pity that human rights mechanism does not put into consideration in the process of government reorganizing.

There are two ways to improve the Group for Promotion and Protection of Human Rights' operating. No one is responsible for the core decision-making because of the duty grouping mechanism. Secretaries in the Development and Evaluation Commission or Ministry of Justice have difficulty on preliminary decision-making but they can support its administrative affairs. The premier of the Executive Yuan cannot pay close attention on human rights issues because of being occupied with government administration. Therefore, for one thing, we may consider that finding a Minister without Portfolio to serves as the vice convener of the Group for Promotion and Protection of Human Rights. The Minister without Portfolio must be a human right expert and responsible for making and carrying out the policy for the human rights related issues and proposed laws. Setting a position of Minister without Portfolio in the Group for Promotion and Protection of Human Rights may be the simplest way, for there are benefits of having flexibility and without having the law revised.

For another, we may consider that setting up a Gender Equality and Human Rights Office or Human Rights Office in the Executive Yuan, which can be administrative staffs working for the Group for Promotion and Protection of Human Rights. There will be a Gender Equality Department in the Executive Yuan doing secretary affairs for the Committee of Women's Right Promotion in the future. The department can make compensation for not setting up a human rights mechanism when in the process of reforming the Executive Yuan's organization. According to the Article 14 of the Executive Yuan Organic Law, by dealing with special affairs, the Executive Yuan shall set specialized authority in it. Therefore, the Executive Yuan should expand the Gender Equality Department to Human Rights Department. If there is anything regarded as devaluing the women's right in this program, setting up a Human Rights Department is considered a solution. The Human Rights Department can assist Ministers without Portfolio as well as doing secretary affairs for the group.

The structure of organization which makes up of ministers without portfolio and Gender Equality and Human Right Department or Human Right Department can cooperate with the Committee of Women's Right Promotion and all sectors in subcommittee of human right. It is advantageous in making horizontal expansion on human right policy's commanding and enforcement. Also, the human right affairs are carried out by the Executive Yuan, all sectors and cooperating with local government's corresponding institutions. It is advantageous of making vertical management on human right policy's commanding and enforcement.

(2) The Committee of Women's Rights Promotion

The Executive Yuan's Committee of Women's Right Promotion was supposed to be the earliest mechanism of human right. The committee has experienced three presidencies: Lee Deng-hui, Chen Shui-bian and Ma Ying-jeou. The Peng Wan-ru murder case, which happened in 1996, awakened the publics' conscience toward women's right. Therefore, the Executive Yuan held the Taiwan Public Security Conference to make a resolution for setting up an institution to promote the women's right[5], and drew up the functions of the Committee of Women's Right Promotion in May, 1997. The Committee of Women's Right Promotion was officially set up in May, 1997 and there were fifteen members in the institution. Those members were made up of the premiers from all sectors of the Executive Yuan, the professionals and representatives of female organization. The assignments of Committee of Women's Right Promotion were including planning the policy of female right and vital measurements, discussing the related female right law revision, discussing and planning the vital female right, consulting the females' working right, promoting the measurements of female right and other related female right promotion.

After the party transition in 2000, the first party transition, the Chen government maintained the Committee of Women's Right Promotion. From 29, February 2002, by becoming well-implemented and to raise the effectiveness of procedure, the Committee of Women's Rights Promotion divided the operational patters into three levels, in order to promote the policy and measurement effectiveness. The first level is divided into five groups of division conferences: employment and welfare, education, health care, personal safety, and international participation to enhance professional functions. The second level is consultative conference which is responsible for coordinating the agendas and proposals to meet each other's common view. The third level is conference of committee members to make confirmation for the proposals[6].

Though there are meaningful symbols of the setting, the Committee of Women's Right Promotion, the committee exactly exist few difficulties and flaws.[7] Firstly, it is not a standing institution. The Committee of Women's Right Promotion has experienced so many times of reshuffling cabinets and replacing conveners that it leads to an unstable situation of the organization. There are some members feeling willing yet unable as working without official committee members and fixed budget. Under these situations, the professional and experiences cannot be accumulated and passed down. Also, the operation and promotion of the business would be deficient in

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[5] See Executive Yuan 86/11557

[6] See http:// cwrp.moi.gov.tw/WRPCMain/Page_Show.asp?Page_ID=1&CarryStr=1

[7] See http://taiwan.yam.org.tw/nwc/nwc3/papers/forum725.htm

effectiveness and stability.

Secondly, the functions of the committee members are composed of the premiers from all sectors of the Executive Yuan, the professionals and representatives of female organization which is fifteen people in total. For those who actually work for promotion of the women right, they can hardly benefit from those ideas. Because of deficiency of human resource, some suggestions would be proposed in few issues. Moreover, the premiers from all sectors as well as committee members are occupied with official affairs and have no authority to put decisions into practice which leads inefficiency of operation to the committee.

Thirdly, the members of the Committee of Women's Right Promotion, especially experts and private association, though propose actively, the proposal cannot put into evaluation in the Development and Evaluation Commission because of the regulations of the Committee of Women's Right Promotion. And the conference of the Committee of Women's Right Promotion cannot be held regularly for some reasons, thus the proposals are merely a form waited to be carried out. Furthermore, the officials of the Committee of Women's Right Promotion are not invited frequently when drawing up related policies, for it is not a standing institution. The women right is not only hard to be carried out in policies of administrative departments, but also may be improperly restricted or violated through the administration of the administrative departments. To sum up, the committee has difficulties not only when promoting and supervising the policies but also when contacting official affairs between all sectors. Policies are carried out with difficulties as the executives generally lack of awareness of women's rights.

The promotion and planning of official affairs lacks of consistence and sustainability in the Committee of Women's Right Promotion, for the committee is a non-standing institution and there might be some losses in protection of women's right. The amendment to the Executive Yuan Organic Law suggests that it is supposed to set up a standing institution for the committee in order to pursue the core values of gender equality, follow the world trend of gender mainstreaming and improve administrative efficiency[8].

There are two cases in the discussion. The case A was proposed by the Executive Yuan while the case B was by female organizations[9]. The concept of the case A suggests that the Committee of Women's Right Promotion should rename Committee of Gender Equality Promotion. The committee is a duty grouping under the Executive Yuan and the premier serves as a convener. In addition, the Gender Equality

[8]行政院組織法修正草案第 5 條說明

[9] See http://www.rdec.gov.tw/DO/DownloadControllerNDO.asp?CuAttachID=18419

Department is also set up as a staff unit for the Committee of Gender Equality Promotion to protect women's rights.

There are both advantages and disadvantages in case A. The advantages are improving the existing system and designate all sectors serves as staff agencies in each group. The reformation of existing system decreases the complexity of reconstruction and cost. It maintains the operating mechanism of the Committee of Women's Right Promotion and the premier is the decision-making person in the committee. It also improves the consistence of the supervision through five groups and all sectors. All sectors serving as staff agencies bring the advantageous of policy's commanding and making vertical management with local government. However, the Committee of Gender Equality Promotion is set up according to the Regulations of Department Affairs of the Executive Yuan. The administrative decree is less stable than the law. Also, the members in the committee serve concurrently with uncertain duty and have no dominant position when examining the gender policies.

The case B is proposed by female organization. The concept of the case B suggests that it is supposed to set up a Committee of Gender Equality. The committee is a standing and second-level institution of the Executive Yuan. The leaders of the committee are director and vice-director nominated by the representatives of institutions, the professional, and representatives of female organizations. Those are non-specially committee members appointed by the premier. The budget will be planned by the committee members since there are no working groups under the committee. The Committee of Gender Equality will promote the policies and all sectors are responsible for carrying out the related affairs.

The case B has the advantages of setting up a dedicated institution for gender affairs and institution is completed with dedicated staffing and budget planning. It helps to highlight the attitude of the government emphasis on gender equality and enhances the international image of our country.

These discussions started from Chen's presidency then the case A was adopted during Ma's presidency. With the revised of the Executive Yuan Organic Law, the Committee of Women's Right Promotion would be replaced of the Committee of Gender Equality. It is a duty grouping of the Executive Yuan and the premier serves as convener who is responsible for planning the policies, supervising and integrating to strengthen the rule of gender equality. And the newly setting of the Gender Equality Department would serve as secretary unit to carry out the promotion of the policies[10].

[10]See http://www.libertytimes.com.tw/2010/new/jan/13/today-fo1.htm

### 3. Individual Sectors

In individual sectors, the Ministry of Education has set up the Consultative Committee for MOE Human Rights Education in April 2001 during ex-president Chen's reign, assigning minister of MOE to be the chairperson, recruiting people from related sectors, the academia, and private sectors to serve as members of the committee. The committee had four divisions on four aspects: research and development section, teaching section, campus environment section, and popularizing sector. The committee congress was held once in four months, and every section held meetings before the committee congress. In both committee congress and sectional meetings, related sectors of the MOE would assign representatives to attend the meetings. The committee congress was hosted by minster or vice minister of the MOE, and every section could discuss what policies to be made according to their work content or the plan; the policies would be executed by different sections and paid by the administrative budgets.

Later, because the Legislative Yuan considered that there should be a legal basis for the administrative sectors to name the title "committee"; therefore, the Consultative Committee for MOE Human Rights Education had changed into Human Rights Education Advisory and Resources Center. Perhaps we have entered a more developed phase; along with changing the title, the scale and the frequency of the operation also changed. The committee congress has been revamped into once in six months and no arrangement of separate sections. The administrative sectors became the leading role in bringing our proposals, and the consultative members provided consultations. The majority of the plan continued former content and became routine for the administrative sectors[11].

The Ma government continued the existing policy remaining the Human Rights Education Advisory and Resources Center. Later on, to embody ICCPR and ICESCR, the Ministry of the Interior, the Ministry of Foreign Affairs, the Ministry of National Defense, the Ministry of Education, the Ministry of Justice, the Department of Health, the Environmental Protection Administration, the Council of Labor Affairs, the Council of Indigenous People and Coast Guard Administration has continually established human rights work group, as the Group for Promotion and Protection of Human Rights. Human Rights Education Advisory and Resources Center also played the similar role[12].

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[11]參見林佳範，＜臺灣人權教育政策的發展與問題－從校園「解嚴」說起＞，《臺灣國際法季刊》，第六卷第一期，2009 年 3 月，頁 138。

[12] For more information, please see 陳俊宏、黃秀端、黃默，《落實兩公約施行法之政策研究》，審查版，2011 年 8 月，頁 53-55。

However, these human rights work group have faced some difficulties. First of all, what was the purpose of establishing these human rights work group? Supposedly by the timing of the establishment, implementing the contents of International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights should be the focal point for human rights work group; however, the fact was not so. Take the Ministry of Justice for example, of the five missions of article 2 in the guidelines for the establishment of human rights work group of the Ministry of Justice, nothing about the two covenants and the act to the implement were mentioned. The same ambiguity occurred in the guidelines of the establishment of the human rights work group of the Environmental Protection Administration of the Executive Yuan, having no special concern for the implement of the two covenants. Article 2 was stipulated widely that the mission of the group included being the contact window of the Group for Promotion and Protection of Human Rights of the Executive Yuan; at the same time, in charging of collection and proposals of human rights issues, collaboration and supervision of related affairs, and integration and division of labor of guidance. These human rights work groups are likely to fall into struggles of not knowing the scope of authority, or not knowing the focus of work.

Second, the frequency of meetings also affects actual outcomes. According to article 4 in the guidelines of the establishment of human rights work group of the Ministry of Justice, the group should hold meetings once in two months. Nevertheless, since May 2010, the group has had only one meeting on October $14^{th}$. And the guidelines of the establishment of the human rights work group of the Environmental Protection Administration of the Executive Yuan marked out to hold meetings once in six months. For such frequency of meetings, the group might become a mere embellishment, hard to make any substantial contribution. In the meanwhile, it was hard to assent the government's determination to establish human rights system, and would eventually become an empty vase.

Third, who were the members of human rights work groups? Basically, members of each human rights work group included internal and external members of each administrative agency; external members should not be less than one third of the whole members. In principle, ministers served as conveners, but with considerable quantities of government affairs, ministers might find it hard to focus on the groups, and still needed special commissioners to deal with human right matters. Thus, the point here is whether each administrative agency can establish a professional human rights system.

The human rights work group of each group might have to face problems in

some aspects, such as professionalism, division of labor, budget, orientation, independence[13], and the ones that would have actual impact should be professionalism and division of labor. In fact, the structures of the human rights work group of each administrative agency are similar to the structure of the human rights work group of Environmental Protection Administration of the Executive Yuan, one part for administrative mangers, the other part for outside recruit, and designating internal unit as staffs, for example, the Department of Comprehensive Planning of Environmental Protection Administration of the Executive Yuan serving as staff. For future betterment, these human rights work groups of each administrative agency need experts as key figures to be in charge of human rights issues completely.

## II. The Control Yuan

It was written in Article 96 in the Constitution of the Republic of China that the Control Yuan is responsible of setting committees in the Executive Yuan and other administrative agencies to examine all facilities observe and uncover any illegality or violation. For this reason, the Control Yuan established seven standing committees: Internal and Minority Nationality Affairs, Foreign Affairs and Overseas Compatriot Affairs, National Defense and Intelligence Affairs, Financial and Economic Affairs, Education and Cultural Affairs, Communication and Procurement Affairs, and Judicial and Prison Administration Affairs. In accordance with Section 3 Article 2 in Organization Act of the committees of the Control Yuan, the Control Yuan is able to establish special committees for service need. Therefore, the Control Yuan established special committees based on internal resolution. There are nine special committees, including the Statutory Studies, the Consultation, Petitions Review, the Anti-corruption, and the Discipline for the Control Yuan Members, the Budget Planning and Execution, the International Affairs, and the Human Rights Protection.

The Control Yuan was established in 1948, but for such a long time the Control Yuan did not develop any human rights practice system, not until March 2003 did the Control Yuan establish the Human Rights Protection as one of the special committees. The Control Yuan claimed to establish the Human Rights Protection for the reason to “ensures basic human rights, effectively regulates the Government and officials not to violate human rights, abides by global human rights principles, and makes R.O.C a developed human rights country of the world. Thus, the Control Yuan proposed installing the Human Rights Protection to bring surveillance into full play and to

[13]相關論述亦請參閱，陳俊宏、黃秀端、黃默，《落實兩公約施行法之政策研究》，審查版，2011 年 8 月，頁 186-187

embody protection for equal basic human rights and protection from infringement[14].

The function of Human Rights Protection of the Control Yuan: 1) Uncover human rights violation cases and propose investigation; 2) Deliberate Human Rights Protection report and provide consultation; 3) Give suggestions on human rights laws; 4) Contact with domestic and foreign human rights organizations and gather information; 5) Discuss and research into the promotion of human rights education, and 6) discuss other issues of human rights protection. The Control Yuan has accumulated plentiful work experience. In operating practice, most of the letters the Control Yuan received from the people involved with human rights protection, and half of the investigated cases in a year were related to human rights. The Control Yuan particularly divided these cases into 12 categories, civil rights, equal rights, living rights, political participation, judicial justice, medical care, work rights, property rights, cultural rights, education rights, environmental source rights, and social security[15]. Since 2010, Human Rights Protection of the Control Yuan has classified and compiled related cases into two factual records because of the approval of the two human rights covenants of United Nations[16]. But the way the cases were compiled was to choose the cases that were considered to be related and to present them, not what the Control Yuan think to embody the content and the manner of human rights.

The Human Rights Protection of the Control Yuan asserted its six duties, but in reality the Control Yuan's real duty is supposed to be uncovering human rights violation cases and proposing investigation and its essence is to classify cases that have been investigated by the Control Yuan. Theoretically, human right protection is the Control Yuan's duty, and Human Rights Protection is set to achieve this goal. Sometimes the Control Yuan might struggle between legality and human rights, such as the death penalty issue. If we see it in the legality aspect, the Control Yuan should agree with executing death penalty as soon as possible, yet if we see it in the human rights aspect, perhaps the Control Yuan will believe that only abolishing death penalty can correspond with the current human right trend. Likewise, if we see the previous case of fingerprints on ID cards in the legality aspect, the Control Yuan will inevitably request that the Executive Yuan change the current ID cards form and have fingerprints on them. But if the Control Yuan holds the human rights aspect, it will oppose fingerprints on ID cards. From above, we see the challenges the Control Yuan might encounter.

[14] See http://humanrights.cy.gov.tw/mp71.htm (visited on 4 August 2011).

[15] See http://humanrights.cy.gov.tw/mp71.htm (visited on 4 August 2011).

[16]參見監察院人權保障委員會，《監察院人權工作實錄第一冊公民與政治權利》，監察院人權保障委員會，2011 年 9 月。監察院人權保障委員會，《監察院人權工作實錄第二冊經濟、社會與文化權利》，監察院人權保障委員會，2011 年 9 月。

On account of what have been mentioned above, the Control Yuan is not just the practitioner of the interpretation of the Grand Justice, but also the pioneer to live up to human rights. This includes the constitution and the three international human rights covenants, so the Control Yuan ought to draw up the content and measures to embody the constitution and the three international human rights covenants, so that the Control Yuan can truly play the role of human rights protector. More importantly, the content and measures of Human Rights Protection shouldn't just apply to Human Rights Protection itself, but should also apply to all the standing committees and special committees of the Control Yuan; otherwise it's hard to embody the constitution and the three international covenants.

## III. The Judicial Yuan, the Examination Yuan, the Legislative Yuan

The Judicial Yuan, the Examination Yuan and the Legislative Yuan didn't have any mechanism for human rights. As for the Legislative Yuan, British might be a model. British has passed the Human Rights Act in 1998 and put European Convention on Human Rights Standards into practice. At the same time, the House of Lords and House of Commons set up the Joint Committee on Human Rights, which in charge of avoiding the government's bill to violate the European and British human rights contract.

The Legislative Yuan has standing commissions and ad hoc commissions; and the standing commissions include Interior Commission, Foreign Affair and National Defense Commission, Economic Commission, Financial Commission, Education and Culture Commission, Transportation and Communication Commission, Judicial and Rule Commission, Society Welfare Commission and Environmental Protection Commission. And, the ad hoc commissions have procedure commission, discipline commission, constitutional amendment commission and expenditure examination commission. If we learn from British experience, the parliament will face the challenge of European Convention on Human Rights. British Parliament set up Joint Commission, which comes from the Bicameral Parliament, is because they have passed 1998 Human Rights Act. There is a similar situation in Taiwan. In 2009, March, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights have passed. In January 2007, The Convention on the Elimination of All Forms of Discrimination against Women (CEADW) has been added. In May 2011, the CEADW passed. The two Acts need to be revised. Therefore, the Legislative Yuan must use the standard of the three human rights contract to the domestic laws. This position is like British. Besides, this work

should be a long term battle. The Legislative Yuan should enact the law that match the obligation of constitutional basic protection. Enacting the law should follow the rule of human rights protection. The Legislative Yuan should set a standing commission as "human rights commission." This will push the Legislative Yuan to consider the human rights when doing Review Act. In past, only the Justices can do Constitutional Review after passing the law. If the Legislative Yuan consider the human rights when doing Review Act, the violation on human rights will be less.

For the Examination Yuan, practicing constitutional protection of basic rights is necessary and the Examination Yuan should follow the contract of International Human Rights. However, the Examination Yuan have not set up any human-rights-related occupation. According to the 15th law of organic law of the Examination Yuan, "the Examination Yuan should set up any kind of commissions if necessary, following the rule of the organic law." For example, in 1996, the Examination Yuan set up Civil Service Protection and Train Commission. And, the 2ed rule of the $10^{th}$ law also says that "the Examination Yuan should set up any kind of commissions if necessary; all the staff in the commission should be assigned by the chief person," such as Law & Regulation Commission and Reach & Development Commission. As a result, the Examination Yuan can set up Human Rights Protection Commission, which is in charge of practicing constitutional basic rights protection and the three international human rights, to be the inner mechanism.

As for the Judicial Yuan, Justices, the constitutional keeper, is in charge of protection the basic rights of the constitution. However, the judges of the district courts can not judge by fundamental rights norms, but the Article 4 of "International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights" says "Whenever exercise their functions all levels of governmental institutions and agencies should confirm to human rights protection provisions in the two Covenants; avoid violating human rights; protect the people from infringement by others; positively promote realization of human rights." And the Article 4 of "Convention on the Elimination of All Forms of Discrimination Against Women" says, "Whenever exercise their functions all levels of governmental institutions and agencies should confirm to protect gender human rights; eliminate sex discrimination; realize gender equity." The object, "all levels of governmental institutions and agencies," should include the Judicial Yuan. The consequence should be that the judges must use the three international human rights contracts. Therefore, the Judicial Yuan should try hard to educate all the judges to understand the gravity of the three international human rights contracts and put into practice.

The Judicial Yuan has judicial personal study institute, in order to "raise the

profession and humanistic literacy." Moreover, this institute should be the place for education, not for administration. The establishment of human rights mechanism in the Legislative Yuan is necessary. The 21st of the Judicial Yuan Organic Law references that" The Judicial Yuan can set up any kind of commission to deal the related work; all the staff in the commission should be assigned by the chief person." As a result, the Judicial Yuan can set up Human Rights Protection Commission, which is in charge of practicing constitutional basic rights protection and the three international human rights without violating the Constitution, to be the inner mechanism. Meanwhile, the commission can also be the institute of improving the rules, which enacted by the Judicial Yuan, on human rights protection.

## IV. National Human Rights Commission

At last, the idea of national human rights institute, which derived by United Nations for many years, can be the model for Taiwan's situation. The beginning of establishment of the national human rights commission was started from private associations and was noticed by the government later. However, the ideal didn't realize because of the parties' different attitudes. The following will discuss history of the promotion of national human rights commission and then talk about the problems.

### 1. The Process of Promotion

It is the private associations that promote the establishment of the national human rights commission, and face the different idea of setting up national human rights commission from two different ruling parties.

(1) Promote by Civil Organization

In fact, the promotion from private associations has worked for more than 10 years. In the end of 1999, 22 NGOs set up the National Human Rights Advocacy Alliance. National Human Rights Advocacy Alliance has two groups, Program Promote Group and Comparative Study and Bill drafting group. The chairman Mr. Huang, Wen-xiong from Taiwan Association for Human Rights is the convener of Program Promote Group; professor Mab Huang from the department of Political Science at Soochow University is the convener of Comparative Study and Bill drafting group.

Drafting group worked from January, 2000, and finished the first draft in June. The draft has 21 articles and the group invited the professional from other fields to offer suggestions and criticisms. Program Promote Group pushes forward to public the emergency and necessity of establishing national human rights commission. At

that time, the Program Promote Group asked the president candidate to focus on this issue. At the time, almost every candidate from different parties agreed this claim and even set "establish a super independent national human rights commission" as their main politics.

On the Inaugural speech on May, 20, 2000, the president Chen Shui-bian claimed to drive setting up national human rights commission[17]. Hence, the government took the action. During DPP's presidency from May, 20, 2000 to May 20, 2008, they set the promotion as their governmental politics and somehow weakened the energy from civil organizations. The civil organizations considered that the action was taken by government and the government has more resources and supports…

(2) Government Acceptance

The promotion of the National Human Rights Commission had been accepted by DPP becoming the ruling party in Taiwan. Former president Chen made an inauguration address on May 20th, 2000, he said "We would like to fulfill the long-term idea of establishing the independent operation of National Human Rights Commission in Taiwan which has been promoted by the United Nations.[18]" And setting up a National Human Rights Commission is the first priority for human-right-based countries to promote[19]. Former president Chen made a public announcement for six policy issues in the new century, and restated the promotion of human rights law, establish the target of human right, setting up the independent operation of National Human Rights Commission, which can lead Taiwan to be a new model country for human rights in the twenty first century[20].

Furthermore, former president Chen made an opening ceremony speech for the international conference on "National Human Rights Commission: Promotion and Protection Human Rights". According to the inauguration address on the three policies for human rights; first, establishing National Human Rights Commission which has been promoted by the United Nations for a long time; second, transforming International Bill of Human Rights into R.O.C Bill of Human Rights; third, reinforcing the interaction with non-governmental organizations for human rights.

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[17] See Fort Fu-Te Liao, "Establishing a National Human Rights Commission in Taiwan: Role of NGOs and Challenges Ahead", *Asia-Pacific Journal on Human Rights and the Law*, Vol. 2, No. 2, 2001, pp. 93-97. Feng-Jeng Lin, "The Role of NGOs in setting up a National Human Rights Commission in Taiwan", paper presented at the *International Conference on National Human Rights Commissions: Promoting and Protecting Human Rights*, Taipei, Taiwan, 2-4 January 2001.

[18] Chen Shui Bian, 2000, The first inauguration of President Chen, May, 20, 2000.

[19] Chen Shui Bian's speech, "National Human Rights Commission: Promotion and Protection Human Rights" January, 02, 2001.

Above all, setting up National Human Rights Commission would be the first step, which can be inferred from Human Rights Infrastructure-building for a Human Rights State —2002 Human Rights Policy White Paper of the Republic of China (Taiwan). Official government is under special consideration of promoting National Human Rights Commission; Taiwan was expelled from the United Nations and international human rights system in 1971. Therefore, Taiwan has been absent from international interaction, assistance, investigation and encouragement for thirty years. Human rights have been popularized in twenty first century, being expelled from the Untied Nations made a negative impact on Taiwan, especially in the perspectives of protecting and promoting human rights on policy, foundation, knowledge, information and education.[21]"

The Presidential Office Human Rights Consultative Committee had held conventions for 11 times in 2001 in order to the presidential office version of the Drafting of the Taiwanese Organic Law of National Commission on Human Rights and the Drafting of the Function Act of National Human Rights Commission which had not been validated by the Executive Yuan, though. Actually, there were some differences between the version of the Presidential Office and the Executive Yuan on the issue of National Human Rights Commission; moreover, the Control Yuan rejected firmly to establish National Human Rights Commission and did not allow National Human Rights Commission to use the right of investigation. The drafting had been sent with the urgent letter by the Executive Yuan to the Legislation Yuan for deliberation. Unfortunately, the Legislation Yuan could not have an official deliberation on the drafting of the National Human Rights Commission; and the drafting had been invalid since the turn over of legislators in Taiwan.

The Presidential Office Human Rights Consultative Committee had continued to make the Drafting of the Taiwanese Organic Law of National Commission on Human Rights and the Drafting of the Function Act of National Human Rights Commission, and presented the new draft of Nation Human Rights Commission in 2003. Nevertheless, the draft had not been validated until DDP withdrew ruling authority, or there was no opportunity for the Legislation Yuan to pass the law of establishing National Human Rights Commission.

(3) After Alternation in Power

After party transition in KMT has become a ruling party in May 2008, and had also obtained absolute majority in the Legislative Yuan which is the quite different situation from DPP in power. Theoretically, the rate of success can be much higher if

[21] Human Rights Policy White Paper of the Republic of China, the Executive Yuan, 2002.

KMT government wanted to organize National Human Rights Commission. Unfortunately, President Ma had neither made public emphasis on setting up nor presented the policy for National Human Rights Commission in the period of president election and presidency. President Ma used to indicate that considering Paris Principles related to human rights proposed by the United Nations, the constitutional system and condition in Taiwan, the authority division connected with relating organs and the operation of human rights protection in other countries, National Human Rights Commission could follow the regulation of Basic Code Governing Central Administrative Agencies Organizations at the present stage, be organized into 'The Presidential Office Human Rights Consultative Committee' and maintain institutions for the promoting and protection of human rights in the Control Yuan and the Executive Yuan." Even though President Ma would like to organize 'The Presidential Office Human Rights Consultative Committee', there is still the substantial difference from the ideal of promoting National Human Rights Commission in the United Nations.

National Human Rights Commission has been given an impetus for several decades during the time of citizens' effort and DPP's acceptance. But, the idea of establishing National Human Rights Commission has yet to be fulfilled in Chen's presidency for eight years; and the issue has still yet to be emphasized in the Ma government. National Human Rights Commission is still to be performed by civil organizations without knowing the time to be finalized.

## 2. How to Improve Taiwan Mechanism

As for the case happening in Taiwan, there are two core issues we should think over. First, is it necessary to have a national human institution in Taiwan? Second, which way is supposed to take if needed?

(1) Whether Set Up Human Rights Institute

Ideally, every sector from the United Nations continues to reaffirm the important of promoting and protecting human right from National Human Rights Commission; furthermore, National Human Rights Commission is significant for variety of human rights protection; and National Human Rights Commission is also a crucial mechanism to implement human rights. Meanwhile, all organizations connected to human rights from the United Nations consider that it is necessary to establish and to build up the institution to combine local with international National Human Rights Commission.

According to International Council on Human Rights Policy, there is

indispensible to have National Human Rights Commission for each country[22], which should not be reflected in Taiwan? Furthermore, "having the right and protection of human right can be influenced; and the minority can be well-supported after establishing National Human Rights Commission. Furthermore, Taiwan can have more constant interaction with international society for reaching the standard on human rights; and corporation with another official governments and civil organizations for human rights further if commission can work efficiently. Moreover, if experiences and endeavours in Taiwan can make an influence on China's development in the future, it could be an unexpected benefit in Taiwan.[23]" quoted by Professor Mab Huang "in spite of the fact that the function of setting up National Commission on Human Rights is to complement for the Legislation Yuan, the Executive Yuan, the Judiciary Yuan and the Control Yuan. The crucial thing of establishing National Commission on Human Rights for Taiwan with deviating the system of National Human Rights can be revealed as following functions.

First, National Human Rights Commission can investigate the issues for possible violation of human rights (unfair discrimination especially) with conciliation and arbitration. And assist in the lawsuit of victim for group or individual. Second, according to the standard of constitution and international human rights, National Human Rights Commission can examine and research the existed regulation and the legislative draft plan in order to make suggestion on the amendment to law, constitution, and the legislation to law. Third, National Human Rights Commission can plan and offer advice on International Human Rights Policy including the policy for international human rights and humanitarian aid. Fourth, National Human Rights Commission can organize and educate judiciary, lawyer, military guard and functionary on human rights. Fifth, National Human Rights Commission can submit the annual proposal or the plan for particular issue on national human rights. Above all, these functions should be the basic elements for promoting national human rights that must be established before." Quoted by Pr. Huang, Wen-xiong[24].

We can turn back to evaluate the progress of the development for the International Human Rights Organization in the world in the past several decades. We can compare with the issue from the experience, there are getting more and more National Human Rights Commission, and there are nearly one hundred National Human Rights Organization been established in decades, which can indicate that National Human Rights Organization does not reserve for new democracies and

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[22] International Council on Human Rights Policy, *Performance and Legitimacy: National Human Rights Institutions* (International Council on Human Rights Policy, 2000), p. 1.

[23] Mab Huang, "National Human Rights, Asia, and Asian Value" 19, 02, 2000.

[24] See http://www.tahr.org.tw/site/committee/2000.01.04.peter.htm

mature democracies only; on the other hand, National Human Rights Organization is a common consensus around the world during the procedure of democracy. It is not just for undeveloped countries or advanced countries to organize National Human Rights Commission, National Human Rights Commission should be built up in every different type of countries instead. Each country has already had judicial organization and control system; nevertheless, setting up National Human Rights Commission to have duty to improve and protect human rights is the most essential step to go forward. Concerning the situation in Taiwan, human rights had been suppressed by government in the period of Martial law and mobilization for the suppression of Communist rebellion. Nowadays, Taiwan has been demoralized less than twenty years, and human rights has revealed in recent years. In conclusion, Taiwan has no exception for people's life can be greatly influenced by human rights which definitely should be supported by setting up National Human Rights organization.

(2) The Types of National Human Rights Institute

If the National Human Rights Institute should be established, then we should think about what kind of institute it is. The organizations of United Nations think that the human rights institute can at least plays three important roles, Protector, Promoter and Bridge. According to the authority and the area development, I divided national human rights institute into five types; advisory committee (French model), human rights center (Northern European and German model), single-administrative committee (hard to classify), human rights ombudsman (Iberian model and Eastern European model), independent human rights commission (separate from ombudsman). The experiences that generated from countries' national human rights institutes can be our foundation of thinking.

If we just want to set a French style advisory committee, then it will be easy to set up by an administrative order or make a law. However, advisory committee can only be a Promoter rather than be a Protector; and even doubt if it can be a Bridge. Besides, the functional authority of advisory committee can not include all "Paris Principles." Moreover, setting up by an administrative order is quite doubt. Therefore, the advisory committee is not the best model.

The next is the discussion of setting up a human rights center like Northern European or German mode. There are two human rights center founded at universities, Human Rights Center of National Taiwan University, and Chang Fo-Chuan Center for the Studies of Human Rights, Soochow University. The government can just change one of it to be a national human rights institute. Another way is to establish a national human rights center by passing a law; Academia Sinica is one of the choices. However, the human rights research centers in countries can become the character of

promotion or bridge, but can not become protectors, and the transition of human rights research centers in Denmark let the simple research center becomes a positive human rights supervisor and a protector. Maybe in the future, the model of research center may have a big transition; its authority may depart from the supervision authority and become an independent human rights committee. Therefore, if we just set up a national human rights institute as human rights research center, the authority will not complete.

If we want to set up a single-administrative committee (especially anti-discrimination committee) as national human rights institution, then we should pass the law to set up an anti-discrimination committee or a single-administrative committee in other types. Even though the single-administrative committee might have the investigation right, but the authority will be too narrow, that is to say, it will only focus on a single issue rather than consider other human rights issues. Besides, based on the experiences from other countries, a single-administrative committee might develop to a comprehensive human rights committee which is separated from human rights ombudsman; therefore, Taiwan will face the same dilemma if set up a single-administrative committee .

The actual choice is to choose between the model of human rights ombudsman and independent human rights commission. That is to say, should we manage or separate? The following is the analysis in different dimensions.

First of all, from the trend of development, the countries which set up ombudsman are mostly new democracies; they had no ombudsman before. But Taiwan has the Control Yuan already. Based on the experiences from other countries, if one country has ombudsman then it will set up a national human rights commission which in charge of human rights affairs, such as the United Kingdom, Ireland, South Korea, and Thailand, and so on. One of the reasons is that the United Nations point out that national human rights commission is a mechanism which focuses on the promotion and protection of human rights, therefore, the countries should establish an independent national human rights commission.

Second of all, ombudsman is different from national human rights commission, and we can tell from the essence of two mechanisms;

A. The Control Yuan focuses on the behaviors of the administrative and monitors public servants, while the national human rights commission pays attention to the protection of human rights. The functions are different.

B. The Control Yuan has already in charge of the impeachment, corrective measures and audit. In addition, the right of impeachment extends to the Executive Yuan,

the Examination Yuan and the Control Yuan. In other words, the authority is quite comprehensive so that it may be hard to protect human rights.

C. The authority of the national human rights commission is special, such as the education, promotion, suggestion and plan of human rights, and the implementation of jurisdiction rights. It is not only the Control Yuan's business.

D. The investigation rights are different. According to constitution, the authority of the Control Yuan aims to the behaviors of administrators and institutions, that is to say, to implement the functions of investigation, corrective measures and audit, and so on. However, the range of human rights is comprehensive and far beyond from the behaviors of administrators and institutions, such as violating collective labor rights, or aboriginal's economy of land and culture rights, and so on. Therefore, it is essential to establish an independent and professional national human rights commission to investigate and research on related affairs.

Moreover, though the Control Yuan position itself as national human rights institution, but it was not admitted by the Asian Pacific Forum when applied for membership. The reason might be there is no such tradition in regarding ombudsman as national human rights institution. Therefore, the Control Yuan might face the negative consequences if they regard itself as national human rights institution.

Many countries have set up national human rights commission and procuratorial organs respectively. Therefore, I think that the national human rights commission should not be established under the Control Yuan, it should be an independent institute instead. To maintain its independence and implement its functions, it should be independent from the five Yuans. And also, the experiences from Ireland, Thailand and Korea show that the ombudsman can coexist with national human rights, and without the qualm of violating jurisdiction rights.

## V. Conclusion

Historical development indicates the continuation of the precedent of human rights structuring set by previous administrations. Except for a brief, 4-year disappearance of the Presidential Office Human Rights Consultative Committee, all institutions have been maintained. As such, the stance on human rights issue shared by previous and new governments remains consistent.

The article thinks that the Presidential Human Rights Consultative Committee lacks specific duty to a professional, and it may last. President and vice president can hire some professionals whom they can trust to hold a position of committee of

human rights committee or senior advisor to the president or national policy advisor to the president, and to maintain the stability.

As for the Executive Yuan, the article suggests that the position of Deputy Convenor of Group for Promotion and Protection of Human Rights should be taken by a full-time Minister without Portfolio; he or she should be a human rights expert and will be in charge of the whole issues related to human rights of the Executive Yuan, and the thinking, decision making and implementing of the bills. At the same time, the Executive Yuan can set up an Office of Sex Equality and Human Rights or Human Rights Office as staff members for Group for Promotion and Protection of Human Rights.

The groups of human rights from all levels of administrative may face some problems, such as profession, sole duty, budget, orientation, independence and so on. The matters of substance could be profession and sole duty; therefore, the groups also need professional and full-time key figures to completely in charge of all the human right affairs. That is what the government has to do in the future.

The Control Yuan was founded in 1948, and had never established any internal organizations related to human rights till March in 2003, the setting of the Protection of Human Right. This paper thinks that the Control Yuan is not only the practitioner of implicating the explanation of chief justices, and furthermore, to be a leader of implicating human rights.

What the Control Yuan should implement including constitution and three international human rights treaties. In addition, this article suggests the Control Yuan should plan the ways for implementing the constitution and the three international human rights treaties, so that the Control Yuan can play the role of Protector of human rights.

The Judicial Yuan, the Examination of Ministry and the Legislative Yuan have not set up any related mechanism. This article suggests that the Legislative Yuan should set a “permanent committee,” called “human rights committee” and that will give new value to the Legislative Yuan. Therefore, the Legislative Yuan can add new concepts when examine laws. The Examination Yuan could establish an internal mechanism (human rights protection committee) to think about how to protect people’s fundamental rights by the constitution and three international human rights covenants in practice. Besides, the Judicial Yuan could also set up human rights committee to think about how to achieve the three covenants in judgment cases in practice, and also, to find out more about what can be improved of laws and regulations.

The article also thinks that the development of national human rights mechanisms around the world neither belongs to new democracies nor mature democracies. Instead, it is an international common consensus; area or the level of democracy is irrelevant to it. In addition, Taiwan should establish the national human rights commission. However, a lot of countries have set up the national human rights commission and the procuratorial organs separately. While Taiwan has the Judicial Yuan already, so the national human rights commission should be established independently, that is to say, an independent institution that apart from the five Yuans. If so, the ombudsman and the national human rights commission can exist simultaneously without violating jurisdiction rights.

# 為什麼需要國家人權委員會

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## 摘要

2009 年兩公約施行法開始實施，然因為未同時設置專業與專責而獨立的國家人權機關負責執行，致兩年來成效有限。從本文作者的執業經驗、兩公約監督聯盟的檢討報告及法務部主管官員的檢討中，可知設置國家人權委員會刻不容緩。論者謂我國憲法並未規定設置國家人權委員會，且中央政府已設置監察院，毋庸再成立國家人權委員會，但從《巴黎原則》與亞太國家的實例觀察，祇要依法律設置，縱使已設置監察使，亦可設置國家人權委員會。國家人權委員會對一國人權文化的長期發展扮演重要的角色，它能夠經由主動地調查案件、進行人權教育與提出人權報告等方式，提升人們對人權的認知，此對於兩公約的實施尤其重要。

關鍵字

兩公約實施 巴黎原則 獨立性 人權文化 國家人權委員會 國家人權報告 人權教育 必要機制

在我國長期實施戒嚴時期，人權不張，然自 1987 年 7 月 15 日解除戒嚴後，在臺灣的中華民國人權逐漸改善。90 年代當東南亞諸國政治領袖(如新加坡前總理李光耀、馬來西亞總理馬哈迪)排拒西方國家民主政治與人權潮流，提出亞洲價值(Asian Values)時，我國在 1996 年 5 月進行首次總統直接民選，2000 年 5 月我國第一次政黨和平輪替，又李登輝前總統及陳水扁前總統均採取保障人權的政策，我國被譽為與日本並列為亞洲地區最自由的國家。(李司潭，2003：194-198)

1971 年我國退出聯合國，不再是聯合國的會員國，致使公民治權利國際公約與經濟社會文化權利國際公約簽約後，無法完成批准、存放等程序。2000 年 5 月陳水扁總統就任後，一度努力將上述兩人權公約國內法化，但因朝野對立，無法成功。2008 年 5 月我國中央政府二度政黨輪替，馬英九總統再度希望兩人權公約國內法化，2009 年 3 月 31 日立法院通過「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」(簡稱兩公約施行法)，同年 12 月 10 日實施，使兩公約規定具有國內法律之效力，此為我國人權保障邁向新的里程碑。然而，在兩公約施行法實施兩年後，卻發生良法美制無法落實之缺失，它應該具備那種配套制度，實為關心我國人權進程的人士首應探究者。本文綜合個人執業經驗、國內 NGO 的觀點及法務部主管官員之檢討，主張為落實兩公約施行法人權規定保障，我國亟需設置國家人權委員會，才能彌補目前制度上的不週全。

為支持此論點，本文分為以下五個章節。第一節為兩公約施行法實施之情形，略述主管機關法務部的規劃。第二節為兩公約施行法實踐之檢討，此包括個人執業之經驗、兩公約施行監督聯盟之檢討及法務部主管官員之檢討。第三節為兩公約施行法應有之配套制度，分從專責機關、專業機關、提升人權文化與設置獨立的國家人權機關分析。第四節為國家人權委員會是必要機制，再從國際潮流、國家人權委員會的職責及必要機制但非充分機制等處申論。第五節為結論，再申述一個國家完整的人權機制，除將重要的國際人權公約國內法化外，尚需設置國家人權委員會。

## 壹、兩公約施行法實施之情形

觀察兩公約施法法實施之情形，可由該法內容及法務部執行計劃兩方面著手。

首先，兩公約施行法共計九條，其要點如下：

一、揭櫫本法立法目的及明定兩公約揭示保障人權之規定，具有國內法律之效力。(第 1 條及第 2 條)

二、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。(第 3 條)

三、各級政府機關行使職權，應符合兩公約有關人權保障之規定，並應籌劃、推

動及執行兩公約規定事項；政府應與國際間共同合作，以保護與促進兩公約所保障各項人權之實現。(第 4 條及第 5 條)

四、政府應依照兩公約之報告機制，建立人權報告制度。(第 6 條)

五、執行兩公約所需經費，應依財政狀況，優先編列。(第 7 條)

六、法令與行政措施有不符兩公約規定者，各級政府機關應於本法施行後二年內完成法令之制(訂)定、修正或廢止，以及行政措施之改進。(第 8 條)

七、明定本法施行日期，由行政院定之。(第 9 條)

其次，政府在 2009 年兩公約施行法立法完成而實施前，即已指示法務部訂定執行計劃，此即「人權大步走計劃」，其內容為法務部編印講義、培訓種子人員及印製宣傳品，並協調司法院、考試院及行政院下各部會將「兩公約」列入訓練課程，各級政府機關並應在兩公約施行之日起 2 年內，將不符「兩公約」規定之法令及行政措施完成修正、廢止(停止適用)及制定。2010 年 12 月 10 日總統府設置「人權諮詢委員會」，其功能及任務包含人權政策諮詢、整合協調各機關及團體人權事務、研究國際人權制度與規範、研提國家人權報告等事項。另外，行政院在 2001 年 7 月已設立「人權保障推動小組」，由相關機關首長及民間學者、專家共 21 人至 27 人組成，院長擔任召集人，原則上每 6 個月開會一次。2010 年 5 月起，行政院下之內政部、外交部、國防部、教育部、法務部、衛生署、環保署、勞委會、原民會及海巡署等 10 部會陸續成立人權工作小組，成員由各部會邀請社會公正人士及專家學者參與，負責該部會人權保障議題之蒐集及擬義、人權保障業務之協調及督導、人權保障宣傳之整合及分工，及其他人權保障相關事項。（彭坤業，2010：124-132）

法務部執行「人權大步走」計劃不遺餘力，然而臺灣社會人權文化之提升有限，且包括司法機關等政府機關之人權認知並無實質進步(詳下節)，此不能不令人感到遺憾。

## 貳、兩公約施法行實踐之檢討

### 一、個人之執業經驗

本文作者為執業律師，自 2009 年 12 月 10 日兩公約施行法實施後，即嚐試在我國法院與行政機關援用兩公約相關規定作為刑事辯護、民事請求及行政訴願等之法律依據，惟除法院在少數案例中就兩公約定作出准駁之裁判外，大多不重視兩公約相關規定，未予以回應。

在 2006 年 10 月 10 日及同年 11 月 3 日紅衫軍違反集會遊行法案件，本案曾由台北地方法院判決被告施明德等 16 人無罪，其中 10 人經檢察官提起上訴，由於二審臺灣高等法院審理期間兩公約施行法業已實施，本文作者除以集遊法第

26 條比例原則規定辯護外，亦援用公民與政治權利國際公約第 21 條和平集會權利規定辯護。臺灣高等法院 98 年度矚上易字第 1 號刑事判決駁回檢察官上訴，其判決理由係以集遊法第 26 條比例原則規定為主要依據，然其亦「斟酌」公民與政治權利國際公約第 21 條和平集會權利規定，認為「和平理性之表現自由，應為成熟民主國家加以完全保障之重要基本人權之一」[1]。

上述司法機關適用兩公權為被告有利之判決係屬少數，大多數法院判決在本文作者援用兩公約規定時，不附理由加以駁回，甚至未在判決理由中就該案件是否適用兩公約規定表示意見。2008 年 2 月 18 日甲房屋仲介公司以其分店店長 A 隱瞞兄長 B 在乙房屋仲介公司擔任總經理，違反甲公司單方制定之工作規則情節重大為理由，將其懲戒解僱。本件台北地方法院判決 A 敗訴，A 向臺灣高等法院提起上訴，本文作者除援用勞工法相關法理及判例為上訴理由外，亦在二審法院提出該工作規則違反公民政治權利國際公約、經濟社會文化權利國際公約揭櫫之反歧視及平等原則為上訴理由。臺灣高等法院 99 年度重勞上字第 9 號民事判決駁回 A 之上訴，其判決未附理由，即認定 A 主張上述公約規定，「自不足取」[2]。值得注意者，在高等法院審理中，當本文作者提出兩公約規定時 ，資深的高院庭長與著名的被上訴人訴訟代理人均表示未聽過兩公約規定。

最高行政法院 100 年判字第 1329 號有關寺廟事務事件，最高行政法院亦不附理由，駁回上訴人援用公民政治權利國際公約第 18 條：「人人有宗教之自由」之主張[3]。

至於行政機關亦常在申訴程序中，當事人援用兩公約相關規定時，直接予以駁回，且不在理由中就系爭案件是否適用兩公約規定加以論述。以台北市 X 國中 Y 教師國外學歷改敍薪級為例，Y 在英國倫敦大學國王學院修習碩士課程，以優異成績獲得碩士。Y 在返國後以國外碩士學歷申請改敘，原本經台北市政府教育局在 2006 年 6 月同意備查在案。2010 年 7 月 X 國中接獲匿名檢舉，以 Y 在英國居住期間未達 240 日為理由撤銷改敘處分。經 Y 向台北市教師申訴評議委員會申訴，評議申訴有理由。嗣後 X 國中向教育部中央教師評議委員會再申訴，中央申評會評議再申訴有理由，台北市教師申評會之決定不予維持。中央教師申評會評議之理由為嚴格限縮「修業」期間為「居住」期間，為維護「公益」，不問 Y 是否經學校同意而離開英國。本件雖經本文作者援用經濟社會文化權利國際公約第 6 第 1 項及第 7 條第 3 款規定，但中央教師申評會評議未論述上開公約規定，即逕以駁回[4]。本件現在台北高等行法院訴訟中。

行政機關人權文化不足，對人民基本權利之保障消極被動，此並不因兩公約實施前後有所改變。以學生權利為例，本文作者在 90 年代從事教育改革運動，

[1] 臺灣高等法院 98 年度瞻上易字第 1 號刑事判決，17-18。
[2] 臺灣高等法院 99 年度重勞一字第 9 號民事判決，9-10。
[3] 最高行政法院 100 年度判字第 1329 號判決，14。
[4] 教育部中央教師申訴評議委員會 100 年 6 月 27 日第 9280 號再申訴評議書。

曾參與起草教育基本法，1997 年 6 月 23 日我國實施教育基本法，確立學生為教育權主權，然中小學仍不時發生體罰學生的現象。2003 年 12 月作者與國內其他學者向教育部請願，2006 年 12 月 27 日教育基本法方在其第 8 條增訂禁止體罰。（魏千峯，2008a：86）但中小學學生的受教權在實踐上仍不時遭受侵害，例如學生無法適應教師時，為教師的尊嚴，學生衹得轉校，不得轉班; 又如學生遭受他同學霸凌，學校當局往往掩蓋事實，避免傳出醜聞，此種情形並不因實施教育基本法或兩公約施行法實施而改善。2010 年初，中小學校園霸凌事件不斷爆發，教育部方邀集學者專家、民間團體、家長團體及教師會代表召開霸凌定義與防制作為相關會議，並加強宣導霸凌行為的法律責任，課加校長與教師通報義務與責任。在 1 年半後，2011 年 10 月 25 日立法院三讀通過教育基本法第 8 條修正，增訂學生不受霸凌行為之侵害，並授權中央主管教育行政機關訂定霸凌行為防制機制等相關事項之準則[5]。足見學生為教育權主體，但經過教育基本法實施 14 年之久，仍未落實。

**二、兩公約施行監督聯盟之檢討**

在兩公約施行法實施前 1 日，包括臺灣人權促進會、臺灣法學會、臺灣勞工陣線、民間司法改革基金會等 45 個公民社會團體立成兩公約施行監督聯盟(下稱兩督盟)。兩督盟迄今發表兩公約施行檢討報告係在 2010 年 12 月 10 日提出，名為「一年又七個月來政府落實兩公約及其施行法之檢討」(下稱「兩督盟檢討報告」)。

兩督盟檢討報告肯定政府兩公約施行法的實施是我國人權民主史上的重要里程碑，但也提出以下四點檢討：

(一)事先缺乏整套的計劃：NGO 倡導的計劃有三個部分，第一部分是綱領性的兩公約批准及其國內法化，第二部是設立一個符合聯合國「巴黎原則」(Paris Principle)，兼具促進與保護人權的國家人權委員會(national human rights commission, 簡稱 NHRC)，以做為將國際人權標準國內法化的機構配套，第三部分是以兩公約為綱領起點，有重點、有步驟的批准加入並國內法化其他人權公約。馬政府採納第一與第三部分，但沒有採納設立國家人權委員會的建議。

(二)兩公約施行法生效前 7 個月又 18 天的準備期過於短暫：英國在 1998 年通過《人權法》(Human Rights Act)，將施行數十年的歐洲人權法國內法化，英國是人權先進國家，但亦須兩年準備期，於 2000 年 10 月 2 日人權法才生效。1971 年我國失去聯合國席次同時，也退出聯合國人權體系，多年來有關國際人權之知識、經驗與人才皆嚴重缺乏，在 7 個月 18 天短暫準備期不易成功。

(三)準備期過短的後果： (1)培訓、講習、宣導之品質不佳。為兩公約施行法之實施，召集各級政府人員共 1880 人，進行「種子教師」受訓，使用一份 85

[5] https://csrc.edu.tw/bully/2011.11.1 上網查詢。

頁論文形式的概論，非國際上進行人權訓練時所用之「教案」訓練教材，上 12 小時課。再由「種子教師」、人權學者及專家在全國進行 4 千餘場各 3 小時的「講習會」，品質堪憂。而由電子媒體、報紙文宣等 7 項宣導，大多淪為紙上作業。(2)法令與行政之檢討品質不良。2009 年 12 月 1 日統籌機關法務部彙整各級政府「檢討清冊」，所謂「各級機關」，除總統府、國安會、司法院、考試院外，行政院僅有 12 單位參與，地方政府僅台北縣，總共 17 機關。檢討標準分為不符兩公約規定者與是否不符尚有疑義者兩類。在公民與政治權利國際公約部分有 177 頁，經濟社會文化權利國際公約部分有 42 項，總計 219 頁，其中在兩公約於法庭運用上扮演關鍵角色的司法院僅提出 6 項。在 219 項檢討中，均未引用兩公約人權事務委員會所累積的解釋。

(四)施行期第一年，步調混亂與進度落後：2010 年 12 月 10 日總統府成立「人權諮詢委員會」，其為無給職的任務編組，其任務包括人權政策諮詢及研提國家人權報告等，但總統府發言人稱此人權報告係結合民間團體之「官民合一」的人權報告，此與各國之國家人權報告係官方報告，民間 NGO 另提出影子報告(shadow reports)相混淆。2010 年 5 月起，行政院下 10 部會陸續成立人權工作小組，但例如法務部人權工作小組的五大任務中，並無一字提及兩公約及其施行法。在法務部所列 219 項檢討中，有多少邁進「立/修/廢法」或改進階段？又依兩公約施行法第 7 條規定，各級政府機關執行兩公約所需經費應依財政狀況優先編列，但事實上法務部在兩公約施行法實施第 1 年預算為新台幣壹佰壹拾壹萬參仟元，第 2 年預算為參佰柒拾萬元，顯然只是法務部預算的零頭。

在兩督盟檢討報告之附錄 2，亦由台北律師公會司法改革委員會主任委員高涌誠律師撰寫「兩公約施行一年之司法判決觀察」乙文，該文透過司法院之裁判書查詢系統以「公民與政治權利國際公約」及「經濟社會文化權利國際公約」作關鍵字搜尋自民國 98 年 12 月 11 日至 99 年 11 月 30 日期間內各級法院判決，共搜得各級法院(包括普通法院及行政法院)裁判 25 件，在 1 年數十萬件裁判中為極少數，足見臺灣法官對兩公約之內容並不熟悉。在上述 25 件裁判中，律師引用兩公約規定作為論述理由，但法院無任何回應者有 5 件。關於兩公約之法律定性與效力，部分法官認為兩公約規定與國內法不符者，非當然可直接適用; 部分法官認為兩公約規定屬宣示性條款;部分裁判引用兩公約條款直接作為適用法律，甚至認為應優先於國內法律而適用。但縱為直接適用兩公約之裁判中，大部分法官祇是將公約文字重述一遍，並未論證其實質精神與內涵。（兩公約施行監督聯盟，2010：1-13、52-53）

**三、法務部主管官員之檢討**

2009 年 12 月 10 日兩公約施行法實施前，行政院即指示法務部統籌辦理一約施行法實施之準備，該法實施後法務部亦負責統籌兩公約施行法實施之相關事宜。由於本文撰寫時，法務部或其主管官員尚未發表新的報告或論文，本文以 2010 年 12 月 10 日法務部首席參事彭坤業參加中華人權協會與文化大學社科院

暨政治學系主辦之「百年人權之省思與展望」國際研討會中，發表「人權大步走，政府推動兩公約之實踐」乙文，作為法務部主管官員對兩公約施行法實施檢討之材料。

彭文就兩公約之實施，認為須就以下四點加以檢討：

(一)欠缺「國家人權行動計劃」：依《維也納宣言和行動綱領》第 71 條及兩公約施行法第 8 條，我國有必要比照辦理，訂定「國家人權行動計劃」，將相關檢討有計劃、有步驟納入，據以執行，以確保其成效，並向國際社會表明我國落實人權保障之決心。

(二)任務編組之專業性及獨立性不足：

《巴黎原則》要求國家人權機構掌理之工作，均屬人權專業工作，其中如「審查政府的法規及行政措施是否符合人權及建議修法」等，需立場超然之獨立性機關方能客觀據以執行。法務部奉指示擔任總統府「人權諮詢委員會」之議事組幕僚及行政院設「人權保障推動小組」之幕僚事務，因小組性質上係任務編組，非法定常設機關，無法定編制、經費及人員，僅能由專業性不足之法規委員會人員兼辦。而甚多涉及相關部會職掌之人權問題，部會通常並無人權專業人才，對研議之人權內涵亦欠熟悉，無法因應及解決急迫性之人權事務。

(三)會議召開不易，無法隨時有效監督、追蹤及掌握進度：

「人權諮詢委員會」及「人權保障推動小組」均非常設之專責機關，小組委員均係兼任，會議召開不易。對於會議決議事項無法隨時有效監督、追蹤及掌握進度; 對專業性之人權問題，亦無法立即指派專人解決。而小組所為之決議，仍須透過各級政府機關之執行機制方能執行，若各機關基於本位主義而因循推託，亦難及時糾正。

(四)設置人權專責機關仍有爭議：

《巴黎原則》係聯合國要求會員國設置國家人權機構，此即要求會員國應設置權責獨立運作、成員具多元代表性、可受理申訴且有調查權及審議權之國家人權機構。鑒於以任務編組之「人權諮詢委員會」取代人權專責機關，不免有專業性及獨立性不足、會議召開不易、無法隨時有效監督、追蹤及掌握進度及未能擬具「國家人權行動計劃」等缺失，故惟有設立專業性及獨立性之「國家人權委員會」方能有效統籌推展我國人權保障工作。但因我國對設置專責機關「國家人權委員會」議題尚有爭議，現階段僅能強化「人權諮詢委員會」之整合協調功能。（彭坤業，2010：134-136）

## 參、兩公約施行法應有之配套制度

由上節對兩公約施行法實施的檢討，可知兩公約施行法的實踐並不成功，其

主要缺失並非是負責統籌執行的法務部不夠認真，而是制度上的不完整，使兩公約施行法的實踐大打折扣。那麼，若希望兩公約的實施達到較為理想的目標，應有何配套制度呢？

## 一、應有專責的法定常設機關

首先，為使兩公約施行法實施真正收到效果，應該設置專責的法定常設機關，具有足夠經費。誠如前節引用法務部彭主任參事的檢討，不論總統府「人權諮詢委員會」或「人權保障小組」都是任務編組，無法定編制、經費及人員，小組委員均係兼任，會議召開不易。且依本文作者曾任行政院人權保障小組委員之經驗，會議往往數月才召開一次，雖事先提供資料，因委員本身另有其他工作，無法深入探掘問題、研究及尋求解決方法，致會議流於形式，成效不大。

就經費乙事，兩督盟檢討報告也指出，雖然依兩公約施行法第 7 條就各級機關編列執行本法經費有所規定，但因非法定與專責預算，致法務部執行兩公約施行法的預算每年僅數百萬元，如何落實兩公約施行法的實踐？而依今年 10 月 24 日總統府人權諮詢委員會提出之國家人權報告草稿，總統府人權諮詢委員會 2011 年年度預算共 265 萬元，（總統府人權諮詢委員會，2011：44）試問如此低的經費，如何落實兩公約施行法？在其他國家的國家人權機構為推動其正常運作，必須具備足夠的經費(adequate funding)，此經費必須使其擁有自己的職員與預算，若無足夠的經費，國家人權機構不可能良好運作[6]。（Burdekin, 2007： 47-48）

至於促進及保障人權的其他國家人權機關，其委員多係專任(full-time)，或大部分委員係專任，僅少部分是兼任，且委員雖非終身，但有任期保障(tenure)，通常是 5 年至 7 年。例如澳大利亞為 7 年，有專任及兼任委員; 印度為 5 年，全係專任委員; 馬來西亞為 2 年，採兼任委員; 菲律賓為 7 年，全係專任委員; 韓國為 3 年，3 位專任，8 位兼任委員委員。專任而定期的委員才能有效推動國家的人權保障機制[7]。（Burdekin, 2007： 49-50, 56）此絕非我國總統府人權諮詢小組及行政院人權保障小組委員的任務編組，兼任而非常設，所可比較。

## 二、應有專業的人權機關

兩公約施行法實施推動的執行機關應係人權專業的機關。在法務部主管官員的檢討論文中，指出法務部奉指示擔任總統府人權諮詢委員會及行政院人權保障推動小組的幕僚，其業務係由專業性不足的法規會人員兼辦，而涉及相關部會執掌的人權問題，部會亦無人權專業人才，對研議之人權內涵亦欠熟悉，無法因應及解決急迫性之人權事務。此在兩督盟檢討報告亦指出法務部及各級政府機關之

[6]比較亞太地區各國國家人權委員會年度經費，韓國 2005 年為 204 億韓圜(約 7 億 1000 萬新台幣)，同年馬來西亞為 682 萬馬幣(約 6820 萬新台幣)。參閱廖福特，《國家人權委員會》，(台北:五南圖書公司，2011 年 1 月)，67、158。

[7] 馬來西亞國家人權委員會任期為短短的兩年，且採取兼任制，又經費不足，功能尚有疑問。參閱廖福特，同上，176。

人權專業欠缺，按法務部統籌的「人權大步走」教材並非國際上人權訓練所用之「教案」訓練教材，而是論文形式的概論，又各級政府機關就法令是否符合兩公約之檢討清冊僅列 219 項，除本位主義外，相當程度係專業不足。在各級政府機關人權專業不足下，如何期待他們能夠落實兩公約保障人權之旨？

依照外國的成例，一個國家的人權機制必須有能力促進與保障人權，此包括其完全明瞭該國在人權面對的最嚴肅挑戰，它可能是跨國性的人權議題(例如環保、勞工權利)，也可能是該國獨有的人權議題(例如印度的賤民人權)，它被要求關注公民社會團體長期耕耘、活躍和承擔任務的領域，它也被要求跨越公民社會團體最薄弱、無力和未耕耘的部分(例如臺灣數百來歷經不同政府及不同土地制度所留下的土地所有權問題)，以集體參與的方式有效形成人權政策、計劃與實踐。（Rao, 2006： 178）因此，國家人權機關必須由多元背景的成員組成，他們各自在人權領域中具有特殊的利益、專長或經驗。包括對抗種族歧視、工會、律師、醫師、記者、反映不同哲學或宗教思想的公民社會、大學教授和其他專家，如此方能表現其具有批判性的功能，（Burdkin, 1999： 66-67）以此角度審視我國負責統籌兩公約施行法實踐的法務部法規會及各部會非人權專業的公務員顯然不符合此種要求。

**三、國家人權機制應具有提昇人權文化的功能**

從國內外的制度與經驗觀察，國家人權機制應具有提昇人權文化的功能。由兩督盟檢討報告與本文作者執業經驗可知，我國司法機關與行政機關在兩公約施行法實施後，在人權保障的實踐上並未有較明顯的進步，對人權文化的提昇相當有限，此從大多數法院裁判與行政機關決定甚少回應兩公約相關規定可資說明。

如前所述，我國解嚴後雖多次制定相關法律，卻未能培養尊重自己與他人的人權文化。以保障學生教育權為例，我國雖在 1997 年 6 月實施教育基本法，但中小學學生遭受體罰或霸凌的情形卻很難改善，此原因在於僅有法律提醒人民並不完足，尚須國家設置專責且專業的國家人權機關方能夠真正促進與保障人權。試想若臺灣具有如此的國家人權機關，則對學生教育權的保障是否已提早落實，不必施延 10 年或 15 年再尋找補救的途徑？

若從我國傳統文化無基本人權概念及行政機關、司法機關普遍對弱勢族權利不能積極保障著眼，我國尤需設置國家人權專責機關，提昇人權文化，方能落實保障人權。以今年總統府人權諮詢委員會提出之國家人權報告草稿本為例，其〈公民與政治權利國際公約〉執行情形書面第 127 頁，表示監督寺廟條例與民法相關規定，主要規範宗教團體組織運作與財產、財務管理，對宗教內在思想、言論、信念及精神信仰層次，並無限制;「但對宗教團體之宗教領袖產生方式，依現行規定，無法按各宗教教制規定承認」。（總統府詢委員會，2011：127）上述報告使人感佩總統府人權諮詢委員會的用心，但也因該委員會祇具諮詢功能，無法接受人民申訴，致不能改變我國行政與司法實務未能完全保障宗教自由之現況。按

儘管大法官釋字第 490 號解釋局部保障宗教自由，但民主國家保障宗教自由包括保障宗教自治，必須尊重各宗教依其自身的宗教教制產生宗教領袖，（Jayamickrama, 2002： 649）此在伊斯蘭教各教派領袖多與創教始祖穆罕默德家族有關，（金宜久，2004：14-24）尤其明顯。我國宗教或寺廟不乏由某特定人士創建，宗族親友成為信眾，百年來亦由其子孫擔任管理人，然不論嗣後是否成立財團法人，因民法等相關規定，行政主管機關又缺乏尊重創建者之作法，往往強行介入或便宜地方政治人物接管，衍生不少社會問題與司法訴訟。

今年的國家人權報告亦指出其他司法問題，此呈現若設置專責的國家人權委員會儘早接受人民申訴，若干遺憾或可避免，至少亦提醒法院慎重處理。例如 2010 年 2 月某 6 歲女童遭性侵案件，檢方依最輕本刑 7 年以上之加重強制性交罪起訴，一審法院卻以未違反女童意願為由，改判處 3 年 2 月徒刑，引發輿論不滿。同年 8 月，最高法院審理另件 3 歲女童性侵案件，以實際上未違反意願，祇能成立對未滿 14 歲男女性交罪為由發回更審，導致白玫瑰運動發生。（總統府諮詢委員會，2011：26）全國律師雜誌為此事件，並出版司法改革專題，其中，徐偉群教授論文指出以「被害人未為反抗」來推論「未違背被害人意願」，其詮釋方法悖離真實生活，但當社會不滿意司法時，有無集體偏執？是否將司法壓迫往另一個方向迷航？（徐偉群，2011：15-29）又如 1996 年原空軍作戰司令部營區發生謝姓女童命案，國防部軍事法院於 1997 年將上兵江國慶判處死刑並執行槍決。經監察院調查認為本案偵辦過程違法刑求、非法取證，於 2010 年提案糾正。台北地檢署檢察官於 2011 年重啟司法調查，認定江國慶非本案之行為人。國防部公開向江國慶家屬致歉。（總統府諮詢委員會：2011：30）若我國設置國家人權委員會，接受人民就其遭受非法侵害人權之申訴，司法機關偵審刑案將更為慎重，也可能減少冤案發生。

國家人權委員會不能單獨地確保該國人權之保障，但國家人權委員會就人權文化的長期發展扮演重要的角色。因為它比消極被動的法院能長期運用較為廣泛的策略解決更多的人權問題。國家人權委員會經由教育、政府遊說、調查特定案件和長期實踐，增進對人權的瞭解。（Evans, 2004： 729-729）此皆非法院所可能的作為。通常，公務員與人權文化的養成密切相關，按其所為決定影響人民的權利至鉅，公務員最需要對人權的要求具有敏感性，以解決相關爭議。國家人權委員會透過檢視法律或立法草案、國家是否符合人權公約的報告、起草人權政策及對法令提供諮詢，有系統地影響政府運作，縱使國家人權委員會的建議未為公務員完全接受，其對現行法律和政策的實際運用仍有深遠的影響。（Dickson, 2003： 278-279）

以印度的國家人權委員會為例，其向來被認為在提昇人權文化上扮演重要角色。在 1993-94 年度報告中，警局拘留所死亡、強暴、邊境軍隊施暴人民及童工等問題係當年大事，該報告也對人權文學、大學人權課程與人權研究、警察與軍人的人權教育加以關心。（Yadav, 2004： 101-120）在 2001-2 年度報告中，印度

國家人權委員會對當時古吉拉邦(Gujurat)宗教暴動迫害少數宗教族群事件，提出制衡政客與輿論的報告，該報告認為古吉拉邦的宗教暴力事件主要歸因該邦未採取合理的措施，及時保護人民免受傷亡。(Evans, 2004： 726-727) 它超越敏感的政爭與宗教問題，客觀指出政治上的印度教中心主義(Hindutva)迫害不同宗教的不當。在 2008-9 年度報告中，印度國家人權委員會再度指出警局拘留所死亡、非法拘禁、對婦女與兒童的性侵害與剝削童工等人權問題，並追蹤自 2004-5 年起人權報告案例處理進度情形[8]。(National Human Rights Commission (India), 2009) 印度國家人權委員會對政府機關侵害人權案件嚴格監督，除喚醒印度的人權意識外，亦提升該國的行政與司法機關保障人權的水準，對提升人權文化具有重大的貢獻。

## 四、國家人權機制應具備獨立性的國家人權機關

我國目前的人權機制主要是由兩公約施行法、總統府人權諮詢委員會及行政院人權促進小組所形成。此種人權機制無法真正實踐國際人權國內法化的意旨。因為兩公約施行法並沒有獨立的國家人權機關確保我國的法令與國際人權公約協調，及有效執行。而無論總統府人權詢小組或行政院人權促進小組的成員均以政府機關代表為主，僅部分成員為無法完全掌握資訊及無監督權限的學者、專家或民間團體代表，自難有效落實兩公約之實施。

為落實國際人權公約的國內法化必須設置獨立的國家人權機關，俾對該國是否違反國際人權公約或不符合國際人權公約之情形加以批判，此時若僅有對行政機關建議(advisory)的功能，沒有對抗(adversarial)的功能，是無法奏效的。因為行政機關往往不願尊重別人對它的批評，在亞太地區有些國家(如泰國)縱使設置國家人權委員會，行政機關對國家人權委員會提出其不喜歡的報告時，往往加以責罵，而且設法減少國家人權委員會的預算和職員，何況類如我國未設置國家人權委員會的國家？因此，為排除或減少行政機關的本位主義，使其願意落實國際人權公約國內法化，設置獨立的國家人權機關便成為該國落實國際人權公約的必要途徑。(Burdekin, 2007： 63-64)

建立獨立的國家人權機關必須在憲法或法律上保障其獨立性，祇有依行政機關的命令設置並不能保證國家人權機關繼續存在，因為其獨立性可能隨時被取消或弱化。(Evans, 2004： 716) 我國反對設立國家人權委員會的理由之一為「憲法上並無於總統府設立人權專責機關之依據」,(黃默，2003；蘇友辰，2003) 本文作者認為此種說法，似有誤會，按從比較法觀察，亞太地區國家的國家人權委

[8]在亞太地區國家的國家人權委員會亦在司法優先的前提下，協助法院處理人權侵害案件，且以參加人身份參與訴訟，提出建議予法院。在這些案例中，國家人權委員會具現出重要的教育價值(educative value)，不僅對於司法，也及於一般大眾。著名的例子為 1994 年澳大利亞人權與機會平等委員會在 Teoh 案例中對無家庭兒童的保護，促使法院在該國未簽署兒童權利國際公約下，採用該公約保護兒童的最佳利益為主要之考量。2005 年 3 月印度國家人權委員會在 Charanjit Singh 案例中，就精神病患的犯人提出釋放建議，此亦使新德里高等法院據此作出釋放之裁判。參閱 Burdekin , 2007: 69-72.

員會僅有斐濟、菲律賓與泰國等 3 國係依憲法規定設置，但印度與韓國等 9 國係依法律設置(印尼國家人權委員會在 1993 年依總統的命令成立，但在 1999 年改以立法設置)，並非必須以憲法設置國家人權委員會。（Burdekin, 2007： 18、28、43）以印度為例，其係依 1993 年人權法(Human Rights Act)設置國家人權委員會，由政府與反對黨代表組成的委員會推薦 5 位國家人權委員會員，而由總統確認任命。為避免任命程序過於政治化，它嚴格限制國家人權委員會的主持人是最高法院院長，且 5 位國家人權委員會委員的其他 2 位必須是最高法院或高等法院的現任或前任法官。此種任命方式係藉由 5 位國家人權委員會中的 2 位現任或曾任資深法官的方式，確保委員會的獨立與威信。韓國亦係依 2001 年國家人權委員會法(National Human Rights Commission Act)設置國家人權委員會，就 11 位委員中，3 位由最高法院院長提名，4 位由總統提名，3 位由國民大會(National Assembly)提名(包括 2 位專任委員)，所有委員須經總統任命程序，而主持人係由總統在 11 位委員中選任，11 位委員中須有 4 位婦女。印韓兩國以法律明文規定國家人權委員會任命程序超越黨派政治，且兩國皆以任命法官為國家人權委員會來確保其獨立性，然兩國的司法獨立頗受肯定，但其他亞太國家則未必有相同的客觀條件[9]。（廖福特，2011：56、62；Evans, 2004： 716-717；Cho, 2002： 230-231）

另個反對我國設置國家人權委員會的理由係侵害監察院的調查權。（黃默，2003：8；蘇友辰，2003：32）本文作者並不同意。在亞太地區國家中，同時設立監察使(ombudsman)與國家人權委員會並不少見，包括韓國、菲律賓、澳大利亞與紐西蘭等國皆是如此。（廖福特，2011：87、189-190，蘇友辰，2003：33；Burdekin, 2007： 86）足見以我國已有監察院，不應設置國家人權委員會的論述，無堅強的立論依據。監察使固被歸類在廣義的國家人權機關(National Human Rights Institutions )範圍，（Pegram, 2010： 733-734）有時亦得藉由監督公務員及政府機關執行職務是否違法或不當，具現人權保障，但其與國家人權委員會(National Human Rights Commission)仍有不同。因為監察使關心者係公部門的行為，並非私部門，通常它限制在依國內法(domestic law)來判斷行政行為是否合法與公正，而進行調查、糾正、糾舉或彈劾。但國家人權委員會通常關切者係廣泛範圍的人權促進和保障，且不僅對象涉及公部門與私部門，也與國內法與國際人權法有關。且縱使在實際運作中，祇要兩機關達到適當的理解，重疊的管轄(overlapping jurisdiction)並不會造成困難，在後者情形祇要協調特定案例何者較適當管轄，則不會造成混淆。（黃默，2003：8-9；Burdekin, 2007： 86-87）

獨立的國家人權機關應在法律保障下管理人事、提出財政預算。調查公私部

[9]在陳水扁總統任內，行政院院會曾在 2002 年 8 月 21 日通過「國家人權委員會組織法草案」及「國家人權委員會職權行使法草案」，送請立法院審議。依上開國家人權委員會組織法草案第 3 條，我國國家人權委員會置人權委員 11 人，任期 4 年(均屬專任); 同草案第 4 條第 2 項，本會人權委員審薦辦法，由總統府定之。參閱蘇友辰，前引註 29，40。比較印度與韓國兩國制度，皆以法律明定由政府與反對黨代表或司法首長、立法機關共同提名國家人權委員會委員，似較我國上開組織法草案更能確保國家人權委員會的獨立性。

門是否侵害人權及接受申訴外，其亦應有權對不符合國家人權委員會指示或決定者加以懲罰(sanction)，包括罰鍰或拘禁，例如印度、泰國、澳大利亞、紐西蘭與韓國等國的國家人權委員會皆具有此種權限。若該國家家人權委員會無上述權限，亦至少應有權將違反國家人權委員會決定者移送司法機關偵辦或處罰，例如印尼、蒙古與斯里蘭卡。（Burdekin, 2007： 43-44, 74）我國 2002 年 8 月行政院院會通過之國家人權委員會職權行使草案，在監察院壓力下，調查權須非屬監察院職掌調查之重大人權案件(6 條 1 項 2 款)，且明定偵審中案件，不予受理，屬監察院職掌者，應即移送監察院(6 條 2 項)，（蘇友辰，2003：43-44）使得國家人權委員會的調查權殘缺不全，又對於偵審中案件，不能像亞太地區大部分國家(如印度、斯里蘭卡、印尼、韓國、尼泊爾、蒙古、澳大利亞、紐西蘭與斐濟)在司法案件扮演積極協助角色，（Burdekin, 2007： 69-70, 76）似無法跟隨時代潮流邁進。

## 肆、國家人權委員會是必要機制

由前節分析可知，我國兩公約國內法化必須設置專責、專業的獨立人權機關，此方能使兩公約真正落實，行政機關與司法機關亦才能反應兩公約的實施。若從當今世界各國趨勢也得到設置國家人權機制的相同結論。2008 年自由之家(Freedom House)評述全世界 193 個國家的人權狀況，其中 90 個國家被評比為自由(free)國家，60 個國家被評比為部分自由(partly free)國家，43 個國家為不自由(not free)國家。而 90 個自由國家中，63 個國家設置國家人權機關(national human rights institution, 簡稱 NHRI); 60 個部分自由國家中，39 個國家亦設置國家人權機關; 甚至 43 個不自由國家中，也有 17 個國家設置國家人權機關，可見全球大部分國家已設置國家人權機關。在未設置國家人權機關的自由國家包括美國與巴西，雖在國家層次未設置人權機關，但在州(state)層次卻設置人權機關。至於未設置國家人權機關的部分自由國家包括新加坡和葉門; 未設國家人權機關的不自由國家係屬多數，包括中國與古巴。（Pegram, 2010： 755-759）我國自 1996 年進行首次總統直接民選，成功地實踐民主鞏固，即被自由之家列為「自由國家」，斷無拒絕大多數自由國家設置國家人權機關的趨勢。那麼，我國為什麼必須設國家人權委員會？它是必要機制或充分機制？

### 一、我國必須設置國家人權委員會

在國家人權機關中固然區分為古典監察使(classical ombudsman)、人權委員會(human rights commission)與人權監察使(human rights ombudsman)三種，但監察使係以監督政府行政為主，人權委員會係以保障及促進人權為重心，仍有所不同。區域擴散(regional diffusion)亦對國家人權機關的形態影響重大，按監察使源自北歐國家，以瑞典為例，傳統上其設置監察使接受人民的申訴，對抗政府機關違法和不當的行政; 丹麥監察使則重在監督政府行政是否公正。北歐監察使制度

嗣後擴散到西歐國家及紐西蘭。亞太國家並無區域的人權機制，因此多採用符合聯合國巴黎原則而設置國家人權委員會。（Pegram, 2010： 733-737, 741-742）

聯合國巴黎原則就國家人權機關並未作精確定義，祇要它是依據憲法或法律，具有促進和保障人權功能的獨立機關，皆是此為處之國家人權機關。但是亞太國家為何多採取國家人權委員會為主要的國家人權機關？

按依巴黎原則，國家人權機關除必須依憲法或法律設置的獨立機關，享有足夠的經費外，其職責包括擁有廣泛權限實踐人權的促進與保障，此不限於國內法，亦包括國際人權公約的國內法化; 其接受申訴，不限於事後救濟，亦可於事前檢視或防範; 向政府、國會和其他主管機關出意見和建議; 其必須依國際人權公約提出國家人權報告; 其從事人權教育，不僅教育民眾知曉人權事務，亦特別針對執法的公務員進行人權教育; 其不祇與國內公民社會團體就促進與保障人權進行合作，也與聯合國、區域或其他國家的人權機構合作。（Burdekin ,1999：66-73）上述國家人權機關之職責已非監察使或法院之職掌，而國家人權委員會最適合擔負此項職責。茲再申論國家人權委員會之職責，說明它是最適合我國的國家人權機關。

按符合巴黎原則的國家人權機關職責中最重要者乃擁有廣泛的權限實踐人權的促進和保障。此處僅可能廣泛的權限(as broad a mandate as possible)，包括第一、二、三代人權，不論是國內法或國際人權公約，也擴及公民政治權利或經濟社會文化權利。我國傳統文化與歐美國家不同，並無權利概念，雖說解嚴後人民基本權利保障有相當程度的進步，但畢竟係繼受外來文化，憲法保障之權利並未能完全落實，誠如今年國家人權報告草稿所言，依現行法律，宗教團體之宗教領袖產生方式尚無法按各宗教教制規定承認，實有改善之必要。另如臺灣土地所有權制度自清朝、日治時期與民國時期皆有重大不同，但現行司法實務祇依民法第758 條規定採取登記生效要件，致有些人民的祖先在清朝乾隆時期開墾占有土地，歷代居住三百多年，今日仍卻面臨遭受他人拆屋還地訴訟之苦，此與中東歐國家在實施民主憲政後，立法處理因政權更替不同土地制度所衍生的人權財產權問題，大異其趣。此皆有賴國家人權機關挖掘問題，並建議政府採取解決方案。

黃默教授主張若我國國家人權委員會成立，應先把工作重心放在轉型正義與弱族群生存權利兩方面，（黃默，2003：10）本文作者同意此種見解。我國政府對於戒嚴時期遭受冤獄的政治犯訂立專法補償，但 1991 年 1 月 18 日大法官釋字第 272 號解釋，認為國家安全法第 9 條第 2 款規定，基於裁判安定與維護社會秩序之必要，剝奪非現役軍人刑事裁判確定者之重新訴訟之權利，與憲法並無牴觸。此種犧牲正義與漠視真相之作法，迄今仍有遭受冤獄的政治犯不時向立法院請願，（魏千峯，2008b：33-35）應儘早加以解決。弱勢族群的生存權利以原住民權利最為嚴重，雖政府在 2005 年 2 月 5 日公布施行原住民族基本法，但司法實務在司馬庫斯泰雅族撿拾櫸木事件與阿里山鄒族頭目蜂蜜事件，皆不易保障原住民權利。（魏千峯，2008a：61-62）我國國家人權委員會成立後，初期著重在

轉型正義與經濟社會權利保障，不失為一種高瞻遠矚的規劃。

國家人權委員會的職責亦特別檢視國內法是否違反國際人權公約。我國兩公約施行法第 8 條亦明定，各級政府機關應依兩公約規定之內容，檢討所主管之法令與行政措施，然因我國未訂定國家人權行動計劃，致成效不彰。（彭坤業，2010：134）在 1993 年世界人權會議時，不祇強調設置國家人權機關，亦強調訂定國家人權行動計劃(national plans of action)。菲律賓、南非與澳大利亞皆建議由國家人權委員會主導國家人權行動計劃。國家人權行動計劃係根據國際人權公約制定，其範圍廣泛，包括建立基準點檢視國內法規。國家人權行動計劃使國家人權委員會具有向外的角色(proactive role)，此與法院不同。法院不能因處理案件而走向社群，確認人權遭受侵害並提供有效適時和適當的救濟。（Burdekin, 1999：72-73）以印度為例，其國家人權委員會在 2006-2007 年度中，推動國家人權計劃，聚焦在 5 個爭點：食物安全的權利、受教育的權利、居住的權利、健康的權利和監所正義的權利，（National Human Rights Commission (India)，2007： 9）表現印度重視經濟社會權利及解決監所人權之迫切性，此種積極的教育功能非法院所能發揮。

其次，國家人權委員會接受申訴，不限於事後救濟，也可於事前檢視或防範，主動避免侵害人權之情事發生。但監察使祇能事後接受申訴，被動地對侵害人權的情形加以救濟。廖福特教授舉換身分證要求按指紋案例說明，若我國設置身分證立法過程，即可向國家人權委員會申訴，避免此項侵害人權的立法實施，但因我國未設置國家人權委員會，致戶籍法第 8 條在 1997 年修正，但是大法官在 2005 年才解釋其侵犯個人資訊隱私權，事實上人權已受侵害。因此，國家人權委員會可將人權保障提前。同時，國家人權委員會亦可事後協助被害人，甚至自行調查個案，或參與司法程序，同時兼顧人權之事前與事後救濟。（廖福特，2008a：44-45；Burdekin, 2007： 20）

三者，國家人權機關向政府、國會和其他主管機關就人權促進和保障事項提出意見和建議，國家人權機關為此得以檢視現行法律、法律草案、行政措施，若有必要，國家人權機關得建議採取新立法、法律修正或修正的行政措施。國家人權機關此種建議(advisory)的功能，國家人權委員會最適合實施，而非監察使的職掌。兩公約施行法第 8 條規定：「法令與行政措施有不符兩公約規定者，各級政府機關應本法施行後二年內完成法令之制(訂)定、修正或廢止，以及行政措施之改進。」但各級政府機關在本位主義及人權專業不足下，難在「二年內」完成法令之增修、廢止或行政措施之改進，致使本條條文形同虛設。反觀，韓國國家人權委員會因具有此項建議檢視法規、行政措施之權限，其在 2008 年向政府建議擴大外籍勞工更換工作的原因與廢止禁止集會事由之立法，（National Human Rights Commission of the Republic of Korea, 2008： 40）較能符合促進與保障人權之旨。

四者，國家人權機關依國際人權公約提出國家人權報告，在設置國家人權委

員會的國家(如印度或韓國)人權報告，其報告內容主要以處理人民申訴的案例、立法或行政建議構成，與我國今年的國家人權報告單純反應現行法令結構及司法判決之情形不同。前者表現主動積極的風格，較能指出現行法令、行政或司法的缺失，俾提升我國的人權文化，後者祇是資料與統計數字的呈現，無法積極主動地改善現行法令、行政或司法的缺失。國家人權委員會的報告除年度報告外，尚有特別報告，得針對特定的重大人權侵害事件提出報告。若我國設置國家人權委員會，即得就轉型正義或原住民生存權利提出特別報告，此對促進與保障我國的人權將有長遠的貢獻。

五者，國家人權機關須就一般民眾及特定團體人員進行人權教育，此在印度與韓國均有良好的表現。以韓國為例，2008 年國家人權委員會持續在學校、一般民眾與特定團體人員進行人權教育。就學校教育言，在中小學教導學生知曉其自身的人權; 就公眾教育言，出版人權專門書籍、提倡人權文學與拍攝人權電影，並運用新聞媒體宣揚人權理念; 就特定團體人員教育言，針對軍人、警察、公務員與記者施以專業人權教育。韓國人權教育係全面性的(comprehensive)，除在公部門特別針對照顧殘障者(disability)與兒童者施以人權教育外，在私部門也針對企業家施以社會責任的教育。韓國成立人權教育中心，也實施人權敏感性訓練與人權專家訓練，並指定 10 所大學進行人權教育之研究，藉此建立地區人權教育網路，（National Human Rights Commission of the Republic of Korea, 2008：20-22, 97-102）近年來，我國人權教育逐漸發展中，但尚未形成全面性的人權教育系統，實有賴成立國家人權委員會統籌其事。

## 二、國家人權委員會是必要機制

為落實我國兩公約國內法化，國家人權委員會是一個促進和保障人權的必要(necessary)機制，但非充分(sufficient)機制，仍需要仰賴其他制度、該國政府及全體人民共同努力，才能建立完整而週延的人權體系。

以印度國家人權委員會為例，其係依 1993 年人權法(Human Rights Act)成立，在 2006 年修正為人權保護法(Protection of Human Rights Act)。依該法第 12 條規定，人權委員會具有(1)調查人權侵害申訴; (2)在法院准許下介入人權侵害案件; (3)訪視監獄或其他政府管控機關下的被拘禁人或被處遇之人居住狀況，並向政府提出建議; (4)審查憲法或任何有關人權保障法律及提出其有效實踐之建議措施; (5)審查包括妨礙享有人權之恐怖主義之事實及提出適當救濟措施之建議; (6)探究人權條約與其他人權國際公約及提出有效實踐之建議; (7)從事與促進人權領域之研究; (8)經由出版、新聞媒體、研討會及其他適合的途徑，在社會各階層傳播人權讀寫能力及促進保障人權的意識; (9)鼓勵非政府組織與部門在人權領域工作; (10)其他保障人權必要的功能。國家人權委員會雖係印度保障人權的必要獨立機關，但是否良好運作仍須視政府各級機關及公民社會等共同合作，方足以奏功。舉 2008 年印度教基本教義派份子攻擊 Karnataka 少數基督徒及其會館為例，當弱勢的基督徒向國家人權委員會申訴時，委員會調查部門發現警察吃

案或故意拖延不處理，政府亦刻意壓低事件的嚴重性。因此，國家人權委員會調查部門提出數個建議報告，促使社會大眾知曉弱勢族群的安全顧慮。印度國家人權委員會將此調查部門的建議報告副本提交 Karnataka 政府，促其採取適當的行動。（National Human Rights Commission (India), 2009： 42）

在牽涉人命的案例，印度國家人權委員會處理更為慎重。在 2007 年 1 月 14 日 Punjab 省 Amristsar 地區某私立學校 1 年級女童 Simran 之父宣稱其女兒被教毆打致死，國家人權委員會接受女童父親控訴而加以調查。經過長年調查後，發現此種控訴係屬虛偽且沒有根據，該名女童在其死亡前已生病多日住進醫院。國家人權委員會指示 Punjab 警局局長必須提出女童最後死因的報告。（National Human Rights Commission (India), 2009： 59）比較我國江國慶案例，江國慶牽涉女童命案，被軍事法院草率認定為兇嫌，判處死刑並執行槍決，經過 10 多年後才發覺是冤案，印度國家人權委員會詳細調查事實的作法，令人印象深刻。

比較印度國家人權委員會，印尼國家人權委員會更能說明祇靠單一制度並不能充分發揮人權機制的功能。印度的最高法院被譽為世界最有力量的司法機關，（Mehta, 2007： 70）印尼的司法機關的判決卻因司法不獨立與無效率而不受信任。（Butt, 2008： 346, 359）且印尼的國家人權委員會自 1993 年設置時雖即享有相當高的評價，但因民主起步較晚，國家人權委員會復由於 1998 年轉型民主後，歷任總統對人權支持的立場不同，國家人權委員會在不同總統任內的運作不同，此顯示出國家人權委員會是一個人權保障的必要機制，並非充分機制。在印尼民主化後第 1 任總統 Habibie 任內(1998 年至 1999 年)，因 Habibie 將人權置於其施政的優先順序，印尼政府批准一些國際人權公約，並批准 3 個國際勞工組織(ILO)的公約，包括第 105 號廢除強迫勞動公約、第 111 號禁止僱用與職業歧視公約與第 138 號禁止僱用童工公約。在 1999 年至 2001 年 Wahid 總統任內，因 Wahid 未掌權前是人權運動者，印尼政府容忍少數族群印尼華人的平等權利，包括允許恢復華人姓氏、宗教信仰與慶祝華人農曆新年，對亞齊(Aceh)獨立爭議採取對話而和平解決方式，且為處理重大侵害人權事件，立法建立人權法院。然而，在 2001 年至 2004 年 Megawati 總統任內，因她將領土完整與國家安全順位置於人權之前，印尼政府對亞齊省實施戒嚴長達 1 年，制定反恐法，限制言論與出版自由。（Juwana，2004： 49-58）至於 2004 年起擔任總統的 Yudhoyono 亦較不重視人權議題，致印尼國家人權委員會遂成為弱勢機關，而 1998 年慘遭殺害與強暴的印尼華人仍在等待該次暴動所受損害的賠償。（Lindsey and Santosa, 2008：20）

## 伍、結論

從 2000 年我國第二次總統直接民選前，國內人權團體與部分學者開始倡議國際人權法國內法化及設置國家人權委員會，本文作者記得當時國民黨總統候選

人連戰與民進黨總統候選人陳水扁就將設置國家人權委員會納為競選政見之一。2000 年我國第 1 次政黨輪替後，陳水扁總統將「人權立國」政策列為主要施政重點，政府與民間團體也為制定人權法與設置國家人權委員會努力，可惜在陳總統任內不能完成。直到 2008 年 5 月我國第二次政黨輪替後，馬英九總統接受民間社會的建議，2009 年 3 月立法院通過兩公約施行法，同年 12 月 10 日實施，連香港報紙也評論是華人社會的一大盛事。然由於未同時設置國家人權委員會推動兩公約的實踐，致使兩年來我國的人權文化並未提升，行政機關、司法機關與多數國人迄今對兩公約仍處於陌生的階段。我國因為政治因素，不能參加聯合國人權體系，但是我國在政治與經濟方面既是國際社會的前段班國家，自然必須想辦法突破。它的方式簡單，就是跟隨世界潮流與亞太國家設置國家人權委員會。

本文從作者執業律師經驗、兩公約監督聯盟檢討報告與法務部主管官員自身檢討探究，發現建立專責、專業並具有獨立性的國家人權機關，幾乎是改善目前兩公約施行法無法落實的唯一答案。所謂憲法未規定或侵害監察院職權的說法，在對照比較法的文獻與亞太國家制度後，根本站不住腳。那麼，為什麼政府還要採取拖延又保守的作法呢？我國傳統文化並沒有基本人權的因素，所以能夠走民主法治與保障人權的道路，係因為解嚴後邁向平時憲政之故，可是在平時憲政中，臺灣應該有信心建立更多的良法美制。從亞太國家中印度與韓國等國實例中探究，可知設置國家人權委員會功能甚多，可以全面性地建立完整而週延的國家人權體系，不僅使國際人權法國內法化，解決與他國類似的人權問題，也可以解決我國社會特殊的人權問題，對保障與促進人權才是真正的實踐之道。

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# Why We Need National Human Rights Commission?

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## Abstract

It has been two years, after the passage of the Implementation Act of the Two Covenants, however, without an independent National Human Rights Commission, accomplishment will be limited.

The author examines the reason why the two Covenants cannot be implemented completely from the point of views as a practicing lawyer, the report from the NGO, 'Covenant Watch,' and the review from the officer of Ministry of Justice. The results all indicate that the only solution is to establish an accountable, professional and independent National Human Rights Commission (NHRC). The counter arguments that there is no constitutional authority to set up a NHRC or that the establishment interfere in the authority of the Control Yuan cannot sustain, as long as we refer to comparative literature of International Law, or to the systems in Asia-Pacific countries. Taiwan has no DNA of fundamental human rights in its traditional culture, but the author argues Taiwan should be more confident to establish more regimes to promote human rights. The conclusion recognizes that there are lots of advantages to have a NHRC in Taiwan.

## Keywords

Implementation Act of the Two Covenants, Paris Principle, independence, human rights culture, National Human Rights Commission, National Human Rights Report, Human Rights Education, necessary mechanism

Until the end of the long period of martial law on July 15 1987, human rights were ignored in Taiwan. While Southeast Asian political leaders, such as LEE Kuan Yew, the former Prime Minister of Singapore and Mahathir bin Mohamead, the fourth Prime Minister of Malaysia, have proposed the concept of 'Asian Values' to oppose the international trend of democracy and human rights that originate in Western countries, since 1996, Taiwan's presidential elections have been fully democratic. Both the first directly-elected president, LEE Teng-hui, and the second, CHEN Shui-bian adopted policies to protect human rights. In the light of these developments, and following its first peaceful transfer of power between parties, Taiwan has been recognized as one of the most liberal countries in Asia, alongside Japan.

Since Taiwan has been expelled from United Nations and is therefore no longer a UN member state, the procedure of ratification and deposit of the International Covenant on Civil and Political Rights (ICCPR) and of International Covenant on Economic, Social and Cultural Rights (ICESCR) cannot proceed formally, even though Taiwan has signed the Covenants. When President CHEN Shui-bian first come into power in May 2000, he attempted to convert the Covenants into domestic law, but the attempt failed due to conflict between the two major parties. After the second transfer of power in May 2008, the new president, MA Ying-jeou, proposed to integrate the two Covenants again, and the Legislative Yuan passed 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)' on March 31 2009. The Act entered into force on December 10 2009. The Implementation Act provides that 'Human rights protection provisions in the two Covenants have domestic legal status,' and this represents a milestone for the protection of human rights in Taiwan. However, after two years, there are still significant problems with the application of the Implementation Act. Those concerned with the progress of human rights in Taiwan should first investigate what kinds of supplementary measures ought to be taken alongside the Implement Act. In the light of my own personal experience as a lawyer, from the perspectives of NGOs in Taiwan, and given the opinions of officers of Ministry of Justice (MOJ), I argue that it is necessary to establish a National Committee on Human Rights to implement the protection of human rights in Taiwan.

This paper is divided into five sections. In the first part, I will describe briefly how the MOJ, which is in charge of the executive affairs of the Implementation Act, designs the instruments of the Act. The second section reviews the practice of the Implementation Act—including my own experience as a practicing lawyer, that of the Covenants Watch NGO, and that of officers from the MOJ. In the third section, I discuss necessary supplementary measures: an organ that should be accountable,

professional, independent, and able to improve human rights culture. In the fourth section, I argue that a National Commission on Human Rights is a necessary mechanism, and defend the argument with reference to international trends and the function of the Commission.

I also respond to the debate regarding whether it is a necessary mechanism instead of a sufficient one. In section five, the conclusion, I will emphasize that a complete human rights mechanism must not only convert significant international conventions into domestic laws but also establish a National Commission on Human Rights.

## I. The Practice of the Implementation Act

We can observe the practice of the Implementation Act from two perspectives: the content of the Act and the executive plans from the MOJ.

The Implementation Act consists of nine articles, which can be summarized as follows:

1. The legislative purposes of the Act are to implement the ICCPR and ICSCER and to protect human rights, and the provisions in the two Covenants have domestic legal status. (Article 1 and 2)
2. Applications of the two Covenants should make reference to their legislative purposes and interpretations by the Human Rights Committee. (Article 3)
3. Whenever exercising their functions, all levels of governmental institutions and agencies should conform to the human rights protection provisions in the two Covenants, and take responsibility for preparing, promoting and implementing the human rights protection provisions in the two Covenants. The government should cooperate with the international community to promote and protect the human rights provisions in the two Covenants. (Article 4 and 5)
4. The government should set up a human rights reports system in accordance with the two Covenants. (Article 6)
5. The government should preferentially allocate funds to implement human rights protection provisions in the two Covenants according to their financial status, and take steps to enforce. (Article 7)
6. All laws, regulations, directions and administrative measures incompatible with the two Covenants should be amended within two years after the Act enters into force. This includes new laws, amendments to or abolition of existing laws and

improved administrative measures. (Article 8)

7. The Executive Yuan shall decide the date on which the Act comes into force. (Article 9)

Second, before the Implementation Act came into force, the MOJ was requested to propose an executive plan in 2009, named 'Great Strides toward Human Rights.' The content of the project includes publishing hANDOuts, lecture slides for the purpose of training, printing literature, and coordinating the Judicial and the Examination Yuan to put the two Covenants into training program. 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 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. The Human Rights Advisory Committee was established under the Presidential Office on 10 December 2010. Its functions include advising on human rights policies, coordinating human rights affairs of different organizations and groups, researching international human rights institutions and norms, and submitting national human rights reports. In addition, the Executive Yuan has established 'The Promotion of Human Rights Protection' team, which is composed of 21 to 27 scholars, experts and officials. The Premier of the Executive Yuan is the chairman of the team and, in principle, holds a meeting every six months. Since May 2010, ten departments—Ministry of the Interior, Ministry of the Foreign Affairs, Ministry of National Defense, Ministry of Education, Ministry of Justice, Department of Health, Environmental Protection Administration, Council of Labor Affairs, Council of Indigenous Peoples, and Coast Guard Administration—under the Executive Yuan have set up working groups, and have invited experts to help to collect and draft the related human rights issues, to coordinate and supervise the protection of human rights, and to promote human rights in public.

Unfortunately, the progress of human rights culture in Taiwan has been limited, despite the MOJ's 'Great Strides toward Human Rights' project. There has been no substantial progress in awareness of human rights in all levels of governmental institutions and agencies, including Judicial ones (which will be illustrated in the next section).

## II. The Reviews of the Practice of the Implementation Act

### 1. Experience as a Practicing Lawyer

As a practicing lawyer, I have attempted to cite articles from the two Covenants to defend criminal clients, to request civil rights in the court and to appeal cases to administrative organs. Most governmental organs disregard the two Covenants and do not respond, except for a few cases in the court.

On 10 October and 3 November 2006, 16 people were prosecuted for violating the regulation of the Act of Assembly and Parade. While the Taipei District Court held the defendants not guilty, the prosecutor made appeals against 10 of them to the High Court. Since the Implementation Act has come into force, I asserted the right of peaceful assembly in Article 21 of ICCPR in addition to the principle of proportion in Article 26 of the Act of Assembly and Parade. In the case numbered '98year-zhu-shang-yi-no.1,' the High Court overruled the appeal from the prosecutor. The arguments were based on the principle of proportion in Article 26 of the Act of Assembly and Parade. Article 21 of ICCPR was also referred to in the verdict, which asserted that 'the freedom of peaceful and reasonable assembly is one of the significant fundamental human rights which should be completely protected in a matured democratic state.'

The aforementioned verdict in which the judicial organ applied the two Covenants, and ruled in favour of the defendants is rare. Most verdicts in which I cited the two Covenants as arguments were overruled without arguments. For example, in one case, A filed a case against their employer, arguing that A was fired illegally on 18 December 2008. While the Taipei District Court overruled A's case, I appealed for A to the Taiwan High Court, applying the principles and precedents in the Labor Law. In addition, I also asserted that the employer's own rules went against the principle of anti-discrimination and equality in the ICCPR and ICESCR. The High Court overruled the appeal as the case numbered '99year-chong-lao-shang -no.9' and indicates that it is 'plainly' no reason for A to cite the Covenants without any arguments. It is worth mentioning that neither the experienced Chief judge nor the famous lawyer representing the opponent party had heard of the articles from the Covenants, which I asserted.

In a case related to a temple numbered '100year-pan-no.1329,' the Supreme Administrative Court overruled the appeal, which asserts the Article 18 'Everyone shall have the right to freedom of […] religion' without any arguments.

Administrative organs often overrule claims related to the two Covenants without any substantive justifications. For example, Y is a teacher of a junior high

school and applied for wage adjustment since Y has graduated from King's College London and obtained a master's degree. The application was approved by the school in June 2006 and later dismissed in July 2010 because it was reported to the school that Y did not reside in the UK for at least 240 days. Y complained to the Teacher Grievances Committee of Taipei City, which favors Y, and the school appealed to the higher Committee of the Ministry of Education, which overruled the decision and did not favour Y. In order to protect 'public interests,' the Committee of the Ministry of Education interpreted the concept of 'the period in study' strictly as 'the period of residence' and disregarded the fact that Y left the UK with the approval of the university authorities. Despite my assertion of Article 6 (1) and Article 7 (3) of the ICESCR, the Committee of the Ministry of Education overruled the case without arguments related to the articles. This case is now pending in the Taipei High Administrative Court.

There has been no change: the administrative organs still lack a culture of human rights and fail to protect individuals' fundamental human rights, even after the two Covenants have been put into force. The human rights of students, for example, have been violated: there are still physical punishments, despite the recognition of students as the subjects of education in Educational Fundamental Act, which was effective on 23 June 1997 (I was personally involved in the drafting of the Act during the educational-reform movement of the 1990s). In December 2003, alongside other scholars, I petitioned the Ministry of Education for students and procured the amendment of Article 8 of the Educational Fundamental Act, forbidding corporal punishment, on 27 December 2006. In practice, however, students' rights to learning and education are violated constantly. For example, students can be transferred to other schools, instead of other classes, if they do not get along with a certain teacher, in order to save that teacher's face. Or, if students are bullied by their peers, schools often conceal the truth to avoid scandals. These situations have not improved as a result of the enforcement of the Educational Fundamental Act or of the two Covenants. In the beginning of 2010, a spate of bullying scandals in several primary and junior high schools forced the Ministry of Education to invite scholars, experts, civil organizations, groups of parents, and representatives of Teachers' Society to hold meetings in order to examine the implications of bullying and to protect students from bullying. The Ministry of Education emphasized legal responsibility for bullying and stated that principals and teachers have a duty and responsibility to report bullying. After a year and a half, the Legislative Yuan passed the amendment of Article 8 in the Educational Fundamental Act on 25 October 2011. The Article adds that students should be protected from being bullying and authorizes the educational organ in the central government to make regulations preventing bullying. From the facts indicated

here, it is obvious that the idea that students are the subjects of the right of education is far from fulfilled, despite that the Educational Fundamental Act has been in force for fourteen years.

**2. Reviews from Covenants Watch**

One day before the Implementation Act became effective, 45 NGOs, including the Taiwan Association for Human Rights, the Taiwan Law Society, the Taiwan Labor Front, and the Judicial Reform Foundation, established an alliance named 'Covenants Watch.' Covenants Watch issued a report titled 'The Review of the Implementation of the Two Covenants in the Government for One Year and Seven Months (the Review)' on 10 December 2010.

The Review affirms that the practice of the Implementation Act is a milestone in the history of human rights and democracy in our country, but there are four points of criticism:

(1) The lack of the whole-set plan:

There are three sections of the plan promoted by NGOs: the first is to ratify and codify the two Covenants domestically; the second is to establish a NHRC in accordance with the 'Paris Principle' of the UN to promote and protect human rights, (the whole-set-plan institution for the codification of international human rights norms); the third part is to ratify and codify other significant conventions, step by step, like the two Covenants. MA Ying-jeou's administration has adopted the first and third parts, but has ignored the second one.

(2) The seven months and eighteen days' preparation for the Implementation Act to become effective is too short:

The UK passed the Human Rights Act in 1998 and then codified the European Convention on Human Rights domestically after decades of practice. As a developed country in terms of human rights, the UK needed two years of preparation before the Human Rights Act came into force on 2 October 2000. When we were expelled from the UN, we were also distanced from the human rights system of the UN. We lack knowledge, experience, and talent when it comes to international human rights. The preparation time of 7 months and 18 days is simply too short.

(3) The results of such a short preparation:

First, the quality of lectures, training, and workshops will necessarily be compromised. The government has selected 1880 people from all levels of governmental organizations and agencies to be trained as 'seeded teachers.' The material for this training is merely an introduction of 85 pages and 12 hours, and does

not compare with the human rights training commonly adopted by the international community. The 'seeded teachers' and other experts or scholars on human rights then conduct 3-hour lectures around Taiwan, around 4000 sessions in total. The 7 items of propaganda that will appear in digital media or in newspapers are merely paper work. Secondly, the quality of the review of the laws and administrative regulations is not good. The MOJ collected the lists of reviews from all levels of government on 1 December 2009. The so-called 'all levels' merely refer to 12 organs, excepting the Office of the President, the National Security Bureau, the Judicial Yuan, and the Examination Yuan, and include 12 agencies in the Executive Yuan and Taipei County, which is the only local government. The reviews are divided into two categories: those that are incompatible with the two Covenants and those in which the incompatibilities are in question. There are 219 items identified: 177 are reviewed from the ICCPR and 42 are from the ICESCR. It is worth noting that the Judicial Yuan, which will play a significant role while practicing the two Covenants in court, has submitted only 6 items. Also, among all 219 views, none of them cite the general comments from the Human Rights Committee of the UN.

(4) The practice is disharmonious and falling behind schedule in the first year:

The Office of the President established the Human Rights Advisory Committee on 10 December 2010, as an unpaid, part-time committee. Its mission is to give advice on human rights policy and to draft the national human rights report. The spokesperson of the Office of the President refers to the report as a combined effort 'both from the government and civil society.' This confuses the custom that the national report is governmental and that NGOs should submit shadow reports. Despite the establishment of many working teams in the 10 Ministries under the Executive Yuan since May 2010, the team of MOJ, for example, has targeted 5 missions but none of them related to the two Covenants or the Implement Act. How many of the aforementioned 219 reviews concern the enactment of, amendment of, or abolishment of the law? Furthermore, Article 7 of the Implementation Act provides 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.' In fact, the MOJ has only provided a budget of 1113000 NTD for the first year and 3700000 NTD for the second year to execute the Implementation Act. This is an extremely small percentage of the MOJ's overall budget.

In appendix 2 of the Review, YC KAO, the Chief Commissioner of Judicial Reform Commission of the Taipei Bar Association, has written an article entitled 'Observations on the Verdicts, After One Year's Practice of the Implementation of the

Two Covenants.' The article searches all verdicts from the search engine of the Judicial Yuan under the keywords of 'ICCPR' and 'ICESCR' between 11 December 2009 and 30 November 2010. There are only 25 verdicts, including those of regular courts and administrative courts—a very small number compared with the hundreds of thousands of verdicts in any given year. This indicates that judges in Taiwan are not familiar with the content of the two Covenants. In the 25 verdicts, there are 5 cases that the courts have no responses despite lawyers asserting the two Covenants as arguments. Regarding the nature and the legality of the two Covenants, some judges rule that if there is conflict between the two Covenants and domestic laws, the two Covenants cannot be applied directly. Some judges consider the two Covenants to be merely declarative, while others not only apply the two Covenants directly as part of domestic law, but also recognize their superior legal status. Given that asserting the two Covenants explicitly into the verdicts, most of the judges simply reiterate the articles and do not explain their spirit or implications.

**3. Reviews from the Officer of MOJ**

Before the Implementation Act became effective on 10 December 2009, the Administrative Yuan indicated that the MOJ would be in charge of preparation for the two Covenants, meaning that the MOJ is in charge of coordinating the practice of the two Covenants after the Implementation Act has come into force. Since, at the time of writing, the MOJ has not yet issued its report, I would use the article 'Great Strides toward Human Rights—The Practice of The Promotion of The Two Covenants by The Government,' issued by KY PENG, the Chief Counselor of MOJ at an international conference held by the Chinese Association for Human Rights and Social Science and Politics Department of Chinese Culture University, entitled 'The Reflection and Prospect on The Human Rights in 100 Year,' as the material MOJ reviews the practice of the two Covenants.

PENG summaries four reviews in his article:

(1) The government lacks a 'National Program of Action on Human Rights:'

Referring to Article 71 of 'Vienna Declaration and Program of Action' and Article 8 of the Implementation Act, a 'National Program of Action on Human Rights' should be planned in order to incorporate all reviews, to execute them, to ensure the outcome, and to show our determination to protect human rights.

(2) The team in charge of promotion is not professional and independent:

As set out in 'The Paris Principles,' the work of a national institution on human rights should be highly professional. It 'shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such

recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures.' This clearly requires a neutral and independent organ to implement it. MOJ is the staff advisor of the Human Rights Advisory Committee established under the Presidential Office and of the Promotion Team of Human Rights Protection under the Executive Yuan, but the team of advisors is organized because of the mission instead of a regular organ. It is not a legal organization and therefore has no budget, and its staff, from the Legal Affairs Committee of MOJ, are not experts on human rights issues. Other ministries have the same problem and they thus have difficulties in responding and solving urgent human rights issues.

(3) It is difficult to arrange meetings and thus hard to supervise, to trail, and to control progress effectively:

The aforementioned Human Rights Advisory Committee and the Promotion Team of Human Rights Protection are not regular organizations, and the committee members are all part-time. It is therefore difficult to call a meeting. It is hard to supervise, to trail, and to control the progress effectively; it is also problematic to assign experts to solve serious human rights questions. Any solutions passed by the committees need to be executed by all levels of governmental organizations, and thus it is hard to correct organizations in time if they failed to accomplish them out of their departmental egoism, for example.

(4) It is still controversial whether an organ on human rights should be established:

The 'Paris Principles' require party states to establish a national institution on human rights. That institution should be independent, multi-cultural, able to accept complains, and should enjoy the power of investigation and judgment. In Taiwan, however, such an institution has not yet been established—there is only 'Human Rights Advisory Committee.' The establishment of a professional and independent institution of 'National Committee's on Human Rights' can coordinate and promote the protection of human rights in our country. This issue is, however, still in dispute in Taiwan, and so we should try to enhance the function of what we *do* have, the 'Human Rights Advisory Committee.'

## III. The Supplementary Measures of the Implement Act

So far, I have indicated that the practice of the two Covenants has not been

successful in Taiwan. This is not because the MOJ is not working hard, but because the system itself is flawed. Therefore, what supplementary measures can be taken to achieve better practice of the Two Covenants?

**1. There should be an accountable and permanent organ**

First, we should establish a productive, accountable and permanent institution, with a sufficient budget. As PENG indicates, both the 'Human Rights Advisory Committee' and the 'Promotion Team of Human Rights Protection' are organized according to their mission. They are not regular organizations, and lack legal status, a budget and personnel. The committee members are all part-time and it is difficult to call a meeting. In my personal experience as a member of the 'Promotion Team of Human Rights Protection' under the Executive Yuan, it is common not to call a meeting for several months. Despite the preparation of material in advance, time constraints and pressure from their regular jobs prevent members from solving the problems. The meetings, therefore, become meaningless and formalistic.

Secondly, regarding the budget, the report of Covenants Watch points out that despite the fact that Article 7 of the Implementation Act states that all levels of governmental institutions and agencies should preferentially allocate funds to implement human rights, the nature of the funds is not legally exclusive ones for human rights. MOJ, for example, has only several million NT dollars to execute the Implementation Act. How could it be possible to fulfill the requirements of the two Covenants? Referring to the draft of national human rights report issued by the Human Rights Advisory Committee under Presidential Office on 24 October this year, the budget of the Committee is 265 million NT dollars in 2011. It is questionable that we can accomplish the goals of the Implement Act with such a small amount of funding. Most human rights institutions within other states have adequate funding to execute their mission, with their own staff and an exclusive budget. A national institution cannot operate properly without sufficient funding. (Burdekin, 2007:47-48)

Thirdly, most Commissioners within national human rights institutions in other countries are full-time. They hold office for life but have a certain period of tenure, such as 5 to 7 years. For example, it is 7 years in Australia and there are both full-time and part-time commissioners; it is 5 years in India and commissioners are all full-time; it is 2 years in Malaysia for both; it is 7 years in Philippines and commissioners are all full-time; it is 3 years in South Korea and there are 3 full-time commissioners and 8 part-time ones. Commissioners should be full-time and with a period of tenure in order to promote human rights protection effectively, and this mission is unlikely to be accomplished by provisional teams, which are not a permanent organ, such Taiwan's 'Human Rights Advisory Committee' under the Office of President and the

'Promotion Team of Human Rights Protection' under the Executive Yuan. . (Burdekin, 2007:49-50, 56)

**2. There should be a professional human rights organ**

The organ in charge of the promotion of the Implementation Act should be human rights professionals. In PENG's article, he admits that MOJ is assigned to be the staff advisor of the 'Human Rights Advisory Committee' and of the 'Promotion Team of Human Rights Protection.' The staff advisors are originally from the Legal Affairs Committee of MOJ. They are not experts on human rights issues and to be staff advisors is merely a side job. Thus, they are not familiar with the implications of human rights and have difficulties responding to urgent human rights issues. The report from Covenants Watch also gives the same conclusions. In addition, the materials within the 'Great Strides toward Human Rights' project are not teaching plans as commonly seen in international human rights training, but academic papers. Furthermore, since all levels of governmental institutions and agencies should review laws, regulations, directions and administrative measures within their functions according to the two Covenants, the whole reviews from them are merely 219 points. This shows not only departmental egoism but also a lack of professionalism. If all levels of governmental institutions and agencies are so unprofessional, how can we expect them to implement the two Covenants to protect human rights?

Learning from the international community, a national institution on human rights must have the capacity for the promotion and protection of human rights. This implies that the institution completely understands the most serious challenges of the state: the challenges could be international human rights issues (i.e. environmental protection, rights of labors or exclusively domestic ones (i.e. the human rights of the outcaste in India). It should be concerned not only with the fields in which NGOs are active, but also the ones in which NGOs are not (i.e. the disputes on the property of lands framed by the different governments and land systems for hundreds of years in Taiwan). The institution should collectively respond to these issues by forming policy, plan and practice of human rights. (Rao, 2006:178) Therefore, the institution must consist of, for example, representatives of unions, lawyers, doctors, journalists, professors, and experts from various backgrounds. They can thus represent and reflect respective interests, specialties, experiences, and civil society, with different cultural and religious backgrounds. From this point of view, the officers of the Legal Affairs Committee of MOJ and of all levels of governmental institutions and agencies are not qualified to execute the Implement Act. (Burdkin, 1999:66-67)

**3. The mechanism of the institution should be able to improve human rights culture**

Observing international mechanisms and experiences, a national institution of human rights should function to improve the culture of human rights. The review of the Covenants Watch and my own experience show that our judicial and administrative systems have not improved much on the protection of human rights after the Implementation Act became effective. The verdicts of courts and the decisions of administrative organs make almost no reference to the two Covenants.

As indicated, given that Taiwan has enacted many related bills after the abolishment of martial law, the culture of human rights has barely developed. Despite the passing of the Educational Fundamental Act in June 1997, students' human rights, for example, have not improved with regard to physical punishment and bullying. It is because it is far from enough to have an Act to remind people, and the establishment of an accountable and professional human rights institution is necessary. If Taiwan had had such an institution, the protection of students' human rights would have been accomplished and remedy would not be needed after 10 or 15 years' delay.

Given the lack of concepts of human rights in traditional Chinese and Taiwanese culture and that administrative and judicial organs are generally reluctant to protect disadvantaged minorities, we need the establishment of a national institution of human rights to promote the culture of human rights and to accomplish the protection of human rights. In page 127 of the draft of the report, regarding the national conditions of human rights and issued by the Human Rights Advisory Committee under the Office of President, it is identified that regulations within the Act of Supervision of Temple and Civil Code are principally for the operation, poverty and financial management of religious organizations, but not for inner thoughts, speech, conviction, or belief. Given that, 'these regulations do not acknowledge the way to generate a leader of a religious group by its own religious rules.' I appreciate the consideration of the Committee, but since it is advisory and cannot accept complaint, it has no power to improve the situations that our administrative and judicial organs ignore the protection of freedom of religious. The Interpretation No. 490 of Grand Justice indicates the protection of religious freedom is not absolute, but it should imply the autonomy of a religion, in particular in a democratic state. This is obvious if we recognize the many leaders of branches of Muslin are the related to the family of Mohammed, the creator. Many religions or temples in Taiwan are created and believed by the family and managed by their descendant. Whether do they become judicial persons or not, administrative organs always intervene forcefully by regulations such as Civil Code and result in social problems and many lawsuits.

The national report of human rights this year points out other judicial problems. It can be said that if we have a permanent committee to accept complaints, we may avoid some tragedies. For example, the case about a sexual offense to a six-year-old girl in February 2010 is trialed. The offender was prosecuted by the charge of ‘serious rape,’ which will be sentenced for at least 7 years if guilty. The District Court sentenced the defendant for only 3 years and 3 months because the Court rules that the sexual offence is not ‘against the girl’s will.’ The public was very angry about the ruling and the Court. Furthermore, in August of the same year, the Supreme Court overruled another case about sexual offence to a three-year-old girl for the same reason. This leads to a social movement asking for judicial reform named as ‘White Rose.’ The Taiwan Bar Journal thus publishes a special topic of articles about judicial reform. Among the articles, professor XU Wei-qun argues that the court interprets ‘victims do not fight back’ as ‘the offence is not against the will of the victims’ is far from the reality. He, however, worries that a collective paranoid of society may be generated if the whole society dissatisfies the judicial system. And this may put the judiciary out of its track. Another example is a murder case, happened in the former camp of the Headquarter of the Air Force of Operation, concerning a little girl, XIE, in 1996. The Military Court of the Ministry of Defense sentenced the soldier, CHIANG Kuo-ching to death and executed him immediately in 1997. The Control Yuan investigated the case and found the Ministry of Defense tortured and forced CHIANG to confess. The Control Yuan correct this case in 2010 and the Prosecutor of the Taipei District reopened the case in 2011. It is now recognized that CHIANG did not commit the crime and the Ministry of Defense has apologized to his family publicly. It can thus be said that if we have a National Human Rights Committee to accept people’s complaint of human rights violation, the judicial organs should be more carefully while investigation and the case of injustice would be reduced.

A national committee may not be able to secure the protection of human rights of the country, but it would play a significant role as a promoter of the culture of human rights. It can better solve more human rights problems by policies with a widespread point of view in the long term than judicial power which is passive and negative. The committee may improve the understanding of human rights by education, lobby, investigation of some cases, and long-term practice. (Evans, 2004:729) These cannot be done by courts. It is not uncommon that public officers shape the culture of human rights. Since the decisions made by them influence people enormously, they should be very sensitive about the standard of human rights while solving issues. A national committee on human rights can advises and affects the operation of government systematically by examining acts or drafts, human rights reports, polices and advisory of regulations. Even though suggestions of a national committee of human rights may

not been accepted by public servants immediately, they can have widespread influences on law and police in practice. (Dickson, 2003:278-79)

The National Committee on Human Rights in India, for example, has played an important role in the promotion of the culture of human rights. In the national reports of 1993-94, the issues of the death and rape in the detention jail of the police station, of the violation by armies around the borders, and of the child labor are examined. (Yadav, 2004:101-120) The report also pays attentions on the literature of human rights, the human rights programs in the universities, human rights studies, and human rights education on the police and soldiers. In the reports of 2001-01, the Committee submitted opinions, which is about the religious violence suppressing the minorities in Gujurat, against politicians and the public voice. It indicates that the violence can be attributed to the County which failed to adopt reasonable measurements to protect people from harm. It also illustrates objectively beyond the sensitive opposition in politics and religious that the suppression from Hindutva to other religions is inadequate. In the report of 2008-9, the Committee again points out the problems of the death and rape in the detention jail of the police station, of the sexual violation toward women and children, and of the exploitation of the child labor, and tracks back the improvements since the report of 2004-5 has been issued. The strict supervision from the Committee toward administration not only wakes up the conscious of human rights of India, but also promotes the standard of human rights protection of administration and judiciary of the state. It contributes enormously toward the culture of human rights.

### 4. The mechanism of the human rights should be independent and national level

Taiwan's regime of the human rights consists of the Implement Act, the Human Rights Advisory Committee under the Presidential Office and the Promotion Team of Human Rights Protection under the Executive Yuan. A regime like this cannot implement international human rights domestically. Precisely because there is no independent institution of human rights, according to the Implement Act, to make sure the consistency between the domestic laws and international norms and to execute the laws effectively. Most of the members from the Committee and the Team are staffs from governmental organs and the few left are scholars, experts, and representatives of NGOs who have difficulties to receive information completely and supervise with authority. It is not easy to implement the two Covenants.

We need an independent institution to implement international human rights and to criticize the violations. This cannot be effective if the institution is advisory instead of adversarial. It is not rare that administration disregards the critiques and in some Asia-Pacific states, Thailand, for example, the administration may blame the human

rights committee if they dislike its report, and then try to reduce the budget and staffs, let alone Taiwan where there is no committee of human rights. Therefore, in order to decrease the departmental egoism of administration and to increase the motivation to implement human rights, it is necessary to set up an independent institution of human rights. (Burdekin, 2007:63-64)

The independence of the institution must be on the level of Constitution or Law, because it may withdraw or weaken if it is set up via administrative order. (Evans, 2004:716) One of the opponent arguments to establish the institution is that 'there is no constitutional resource to support an institution of human rights under the Office of President.' I would argue this is a misunderstanding. From a comparative study, there are only 3 countries—Fiji, Philippines, and Thailand—where the establishments of institutions of human rights are based on the Constitution. 9 states, including South Korea and India, set up institutions by law (the National Committee of Human Rights in Indonesia is built by the order of the President in 1993, but enacted its legal status by legislation in 1999). India, for example, set up a National Committee of Human Rights in accordance with the Human Rights Act in 1993. It consists of 5 members who are recommended by the ruling and opponent party and who are appointed by the President. In order to avoid politicization, the Chair of the Committee must be the Chairman of the Supreme Court and 2 of the 5 members must be present or former judges of the Supreme Court or High Court. This is the mechanism designed to ensure the independence and the public reliance of the Committee. South Korea set up a Commission of Human Rights by National Human Rights Commission Act in 2001. Among 11 commissioners, 3 are nominated by the Chairman of the Supreme Court, 4 are by the President and 3 are by the National Assembly (including 2 full-time ones). All commissioners and the Chairperson are appointed by the President and there must be at least 4 females. The laws of the two countries regulate that the nomination of the commissioners must be beyond the political parties. Both also nominate judges to guarantee the independence. This is because the independence of judiciary with the two countries is recognized but other Asia-Pacific countries may not have the same objective conditions. (Evans, 2004:716-17; Cho, 2002:230-31)

The other argument to oppose a national commission of human rights is that it may infringe the power of investigation enjoyed by the Control Yuan. I disagree on the argument for there are many Asia-Pacific states—such as South Korea, Philippines, Australia, and New Zealand—have ombudsmen and commission of human rights at the same time. The fact here can retort the argument. It is correct that institution of ombudsmen is one part of the National Human Rights Institutions for it can supervise, control and correct public servants and governmental organizations to protect human rights. It still differs from Notional Human Rights Commission

because ombudsmen pay attention on the public department rather than civil sphere. They often limit themselves within the domestic law evaluating the legality and adequacy of the administration and exercise their power of investigation, correction, censure, or impeachment. But a Commission of Human Rights cares about the improvement and protection of human rights generally. This includes public and private sphere and relates to domestic and international human rights law. As long as the two institutions reach an adequate agreement, the overlapping jurisdiction would not be a problem for they can coordinate the jurisdiction accordingly. (Burdekin, 2007:86-87)

An independent institution of human rights should be protected by law to handle its own personnel affaires and to organize its financial budge without interference. It should have the power to investigate complaints of human rights violation from public or private sphere and to impose sanction, fine or detention, for example, against those who ignore the indications or decisions from the commission. The National Commission of Human Rights in India, Thailand, Australia, New Zealand, and South Korea has the power. Even if any Commission which has no such authority, it should have the power to deliver the violators to judicial system, such as in India, Mongolia, and Sri Lanka. The draft of the authority of the national commission of human rights, which was passed in the Administrative Yuan in August 2002 under the pressure of the Control Yuan, provides that the power of investigation is limited in the scope of significant human rights cases which the Control Yuan are not in charge of (Article 6, Item 1, Point 2). And it also provides that the commission cannot accept cases which are still pending in the prosecution or the court, and that if the cases should be charged by the Control Yuan the commission must deliver them (Article 6, Item 2). These regulations handicap the function of the commission and also weaken the active role it may play in the cases pending in the prosecution or the court unlike most Asia-Pacific countries (i.e. India, Sri Lanka, Indonesia, South Korea, Nepal, Mongolia, Australia, New Zealand, and Fiji). (Burdekin, 2007:69-70,76)

## IV. A National Commission on Human Rights is A Necessary Mechanism

As indicated in the former section, we need an accountable, professional and independent institution of human rights to implement the two Covenants. The international trend leads us to the same conclusion and this can improve the practice of the two Covenants among administrative and judicial organizations. The Freedom House evaluates the human rights conditions of 193 countries around the world in

2008. There are 90 'free' countries, 60 'partly free' ones, and 43 not free ones. Among the 90 free countries, 63 countries have national human rights institutions (NHRI); among the 60 partly free countries, 39 countries have NHRIs; among the 43 not free countries, even 17 countries have NHRIs. This shows that most countries in the world have NHRIs. Free countries which have no NHRIs include Brazil and USA which have human rights institutions at the level of state despite the lack at the national level. The partly free countries which have no NHRIs include Singapore and Yemen; the not free countries without NHRIs are majority including China and Cuba. (Pegram, 2010:755-759) Taiwan has been named as a free country since the first directly presidential election in 1996. Through the election we concrete the democracy in Taiwan successfully and have no reasons to go against the trend that most free countries establish NHRIs. So, why do we need a national human rights institution? Is it a necessary or sufficient mechanism?

## 1. We must establish a National Human Rights Commission

It is true that a national human rights institution can include classical ombudsman, human rights commission, and human rights ombudsman, but the former mainly supervise the governmental administration, while the latter ones protect and improve human rights. In addition, regional diffusion influences the shape NHRI dramatically. Ombudsman originates from North Europe, and Sweden, for example, sets ombudsmen to accept complaints from people and to correct illegal and inadequate governmental administration. The ombudsmen of Demark focus on the fair administration of the government. The system later diffuses from North Europe to Western Europe and New Zealand. Since there is no regional human rights institution in the Asia-Pacific area, states adopt the Paris Principles of UN to establish NHRIs. (Pegram, 2010:733-737;741-742)

There are no clear definitions regarding the NHRI in Paris Principles of UN. As long as NHRIs are established by Constitution or Law, and are independent to promote and protect human rights. But why most Asia-Pacific states establish National Human Rights Commissions as NHRIs?

According to Paris Principles, an NHRI must be an independent institution established by Constitution or Law and must have sufficient budge; its responsibility includes the promotion and protection of human rights with a general authority, which is provided not only by domestic laws but also by international covenants and their codification as domestic norms. It should accept complaints before or after the harm, and may advise or suggest government, congress, or other administration. It must submit national report of human rights, and should proceed with human rights education to the pubic and public servants as well. It should not only cooperate with

NGOs to promote and protect human rights nationally, but also with human rights institutions of the UN, the regions, and other countries. The mission aforementioned is not suitable for the ombudsmen or courts but for a national human rights commission.

According to the Paris Principles, the most significant mission of a NHRI is to enjoy general authority in order to promote and protect human rights. The term 'as broad a mandate as possible' should include the first, second, and third generation of human rights, and domestic laws and international norms would also be included, such as civil, political, economic, social, and culture rights. We have no concepts of rights like European or American countries. Given that there is great progress of the protection of fundamental rights after the abolishment of martial law, the idea is succeeded from abroad culture at any rate and the protection of constitutional rights has not accomplished yet. As indicated, the selection of religious leaders still cannot be recognized by the rules of the religion. The system of the property right of land has been different in the dynasty of Ching, the Japan, and the Republic of China. But the court interprets the right of land narrowly via the Article 758 of the Civil Code, which admits registrant of the land as the owner only. This results in the fact that even though some people have occupied the land from more than three hundred years since the King Qian-Long Era, Ching Dynasty, they may suffer from the verdict orders them to pull down their house and return the land. This could be compared with the Central or Eastern Europe. After democratization, many bills were enacted to deal with the problems of human rights and of the rights of property derived from the change of the political power. It would be very helpful if a NHRI can dig problems and suggest solutions.

I agree what professor Huang Mo has argued that once we establish a National Human Rights Commission, we should focus on the transitional justice and the right to live of disadvantaged minority. For example, in order to compensate political prisoners under the martial law, Taiwan has passed the Act of Compensation. On 18 January 1991, the Interpretation No. 272 of Grand Justice, however, rules that Article 9 Item 2 of National Security Act is not unconstitutional because it is necessary for the stability of the verdict and the maintenance of social order. The Article 9 Item 2 of National Security Act deprives those people who has been sentenced confirmed were not soldiers at the moment of the right of retrial. The regulation sacrifices justice and ignores the truth, and leads that many political prisoners appeal to the Legislative Yuan until now. This injustice should be resolved as soon as possible. The violation of human rights of the disadvantaged minority is most serious regarding the rights of indigenous peoples. Despite Taiwan has passed The Indigenous Peoples Basic Law on 5 February 2005, the court rarely protects their fundamental rights in practice—which

can be seen in case of the Atayal Tribe at Smangus who has been prosecuted and sentenced for the steal of the wood of Taiwan Zelkova, and in another case of the Tsou Tribe at Ali Mountain who has been prosecuted and punished for the steal of honey. It is indeed the foresight to focus on the transitional justice and the protection of economic and social rights in the begging of the establishment of the National Human Rights Commission.

The duty of the NHRC is to examine whether the domestic law violates the international human rights covenants. The Article 8 of the Implement Act provides that all levels of governmental organizations and agencies should review all laws and regulations, directions and administrative measures. But the review is not productive for the lack of national plans of action on human rights. In the world conference on human rights in 1993, it has been emphasized that the set up of a NHRC is significant as well as of national plans of action. Philippine, South Africa, and Australia all suggest that the NHRC should lead to plan the action of human rights. The plans should be extensive, and made in accordance with the international human rights covenants. Standard should be made to check the domestic laws in the plans. The plans enable the NHRC to play a proactive role which is different from the court. The court cannot walk actively toward the community to identify the violation of human rights and to provide effective, timely, and suitable help. Take India for example, the NHRC promoted national plans of human rights in the year of 2006-07. It concentrated on five issues: the right to safe food, the right of education, the right of living, the right of healthy, and the right of justice in prisons. The plans show that India has paid much attention to the economic, social and prisoners' rights, and the court is incompetent to play this active function role of education. (Burdekin , 200 7:20)

Secondly, the NHRC can accept complaints before and after the violation of human rights, but the ombudsmen can only accept them after the violation, which is very passive. Professor LIAO Fort has illustrated this by the case of which the Article 8 of Household Registration Law requires people to press fingerprints whenever renew the ID Card. If we had had an NHRC then, we can appeal to it immediately for that the amendment of the Law in 1997 has violated human rights. Even though the Grand Justice interprets the amendment of the Law is unconstitutional and violates the privacy of personal information in 2005, human rights, in fact, have been damaged. This is why a NHRC can protect human rights in advance. Meanwhile, the NHRC can also help victims afterward, and even investigate cases or participate in the judicial procedure. This explains the NHRC can protect human rights both in advance and afterward. (National Human Rights Commission of the Republic of Korea, 2008:40)

Thirdly, a national institution of human rights can offer advice and suggestion of protection and promotion of human rights to government, parliament, and other organizations. It can also examine law, legal draft, and administrative regulations and suggest amendments if necessary. The advisory function of the national institution of human rights would be better exercised by NHRC instead of the ombudsmen. The Article 8 of the Implement Act provides 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.' But the all levels of government cannot finish the amendments of all laws, regulations, directions and administrative measures incompatible to the two Covenants within 'two years' due to the departmental egoism and the lack of human rights profession. The Article becomes nominal because of this. By contrast, the NHRC of South Korea has the authority to examine laws and regulations, and has suggested, for example, the government to expand the clauses allowing migrant workers to change jobs and to abolish the regulation against assembly in 2008. The authority designed for NHRC of South Korea is better for human rights protection.

Fourthly, a national institution of human rights should submit national report according to the international covenants. In the states with NHRCs (such as India or South Korea), the national human rights reports consist of people's complaints, suggestions toward legislation or administration. They are very different from the national report of Taiwan this year, which merely reflects on the structure of the related laws and the verdicts from the court. The former is more active, which can show the flaws in the legislation, administration or judiciary and can promote the culture of human rights. The latter is merely the display of data and statistics which cannot improve the faults just mentioned. In addition to the national report every year, the NHRC should submit special reports if there are certain significant violations of human rights. If Taiwan has had a NHRC, it can issue special reports about transitional justice or the right to live for indigenous peoples. This will have great contribution of the promotion and protection of our human rights.

Fifthly, a national institution of human rights should provide human rights education toward general people or certain groups of people, and the NHRCs perform well in India and South Korea. South Korea, for example, proceeds with human rights education for the schools, the public and the people of groups. As far as the education in the school is concerned, it teaches students of primary and secondary school to realize their human rights. On public education, it publishes books, promotes literature or movies of human rights, and advocates ideas of human rights through

media. On the education of certain groups of people, it provides education toward soldiers, police officers, public servants and journalists. The human rights education in South Korea is comprehensive for it not only teaches how to take care of disabilities and children in the public apartments, but also educates businessmen to take the social responsibility in the private sphere. An institution of human rights education has been founded in the South Korea to practice training of human rights on sensitive issues and experts. Ten universities have also been indicated to study education of human rights and to build a regional network of human rights education. (National Human Rights Commission of the Republic of Korea, 2008:40) In Taiwan, the human rights education has been developing in recent years, but a comprehensive system has not been formed yet. The establishment of the NHRC can organize it.

**2. NHRC is a necessary mechanism**

In order to complement the two Covenants domestically, the NHRC is a necessary mechanism but not merely a sufficient one. It is of course depending on the cooperation between other systems, governmental organizations and whole people to build a comprehensive and complete system of human rights.

The NHRC of India is set up in accordance with the Human Rights Act in 1993, which has been amended as the Protection of Human Rights Act in 2006. The Article 12 of the Act provides that the functions of the Commission include to: (1) inquire the complaint of the violation of human rights; (2) intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court; (3) visit, under intimation to the State Government, any jail or any other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection to study the living conditions of the inmates and make recommendations thereon; (4) review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation; (5) review the factors, including acts of terrorism that inhibit the enjoyment of human rights and recommend appropriate remedial measures; (6) study treaties and other international instruments on human rights and make recommendations for their effective implementation; (7) undertake and promote research in the field of human rights; (8) spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means; (9) encourage the efforts of non-governmental organizations and institutions working in the field of human rights; (10) such other functions as it may consider necessary for the protection of human rights.

NHRC is a necessary and independent institution to protect human rights in India, but it needs the cooperation between all levels of governmental organizations and civil society. For example, the people from the fundamentalism of Hinduism attacked Christian Karnataka in 2008. When the disadvantaged minority of the Christian filed the case to the NHRC, the investigation found that the police ignored or delayed the case, and the government attempted to suppress the truth. Therefore, the Committee released reports to urge the public to realize the safety issues of the minority, and to request the Karnataka administration to adopt adequate movements. (National Human Rights Commission of (India), 2009:42)

If the case involves murder, the NHRC of India will be more careful. On 14 January 2007, a father accused that his daughter, Simran, who was the first grade in a private school, was beaten to death by her teacher. The Commission accepted the complaint of her father and investigated for many years and found that the accusation was groundless for the girl had been sick for many days and lived in the hospital before her death. (National Human Rights Commission of (India), 2009:59) The Commissioner asked the Chief Police Officer to submit the report about the cause of death of the girl. This case can be compared with the CHIANG's case in Taiwan. CHIANG was accused to murder a little girl and had been sentenced to death and executed carelessly. Though he has been found innocent after more than ten years, what's done cannot be undone. So, it is very impressive that the NHRC of India investigated the truth so carefully.

The Supreme Court of the India has been regarded as the most powerful judicial organ in the world, while the judicial system in Indonesia is not trusted due to its lack of independence and efficiency. Even though the NHRC has a high reputation when it was fist established in 1993, the Commission functioned differently in the different office time of various presidents. In comparison with the NHRC of India, the situation in Indonesia can explain why we cannot rely on only one system to protect human rights.

After the democratization in Indonesia, the first president Habibie prioritized human rights in the term of office (1998-1999). The government then ratified several international human rights treaties and 3 conventions of International Labor Organization (ILO): C105 Abolition of Forced Labor Convention, C111 Discrimination (Employment and Occupation) Convention, and C138 Minimum Age Convention. In the term of office of President Wahid (1999-2001), since he was a human rights activist before coming to power, the Indian government respected the right of equality. It tolerated the minor ethnic group of Indonesian Chinese, and allowed them to restore their Chinese name, to believe in their religion, and to

celebrate the Chinese New Year. It also adopted the strategy of peaceful conversation to deal with the issue of independence of Aceh, and established human rights court to accept significant violations of human rights. The next president, Megawati (2001-2004), however, prioritized the integrity of territory and the security of state than human rights, and thus practiced martial law for one year in the Aceh Province. She also enacted the Anti-Terrorist Act, and restricted the freedom of speech and of the press. (Juwana, 2004:49-58) The next president Yudhoyono, who came into power in 2004, pays less attention on human rights issues, and the NHRC in Indonesia has become weak since after. The Indonesia n Chinese who were murdered or raped in 1998 are still waiting for the compensation now. (Lindsey and Santosa, 2008:20)

## V. Conclusion

Far from the second direct election of President of Taiwan in 2000, human rights organizations and some scholars began to advocate for the codification of international human rights law and the establishment of a NHRC. I recall that the candidate of Chinese Nationalist Party, LIAN Zhan, and the one of Democratic Progressive Party, CHEN Shui-bian, both adopted the establishment of NHRC as their policy. After the change of power for the first time in Taiwan, the President CHEN Shui-bian proposed the policy titled ‘Human Rights Infrastructure-building for a Human Rights State,’ and the government and NGOs all devote to the enactment of a Human Rights Bill and the establishment of NHRC. It is a shame that they have not been accomplished in his term of office. It is not until the second time of the change of power of Taiwan in May 2008, the President, MA Ying-jeou, accepted the advice from civil society to enact the Implement Act in March 2009. The Implement Act came into force on 10 December 2009, and even the newspaper in Hong Kong commented that this is a remarkable milestone in the Chinese society. The establishment of the NHRC, nevertheless, has not reached to promote the two Covenants. This causes that the culture of human rights has not improved in the two years, and that the administrative or judicial organs are still unfamiliar with the two Covenants. Due to the political factors, Taiwan cannot be a part of the human rights system of the UN. But since we behave so well in both politics and economy, we must figure out the way to implement human rights. To set up a NHRC, like the world trend and countries around the Asia-Pacific area, is the simplest way to achieve the goal.

I have examined the reason why the two Covenants cannot be implemented from the point of views as a practicing lawyer, the report from the Covenant Watch, and the review from the officer of MOJ. They all indicate the only solution is to establish an

accountable, professional and independent NHRC. The arguments that there is no constitutional authority to set up NHRC or that the establishment interfere the authority of the Control Yuan cannot sustain, as long as we refer to comparative literature of International Law, and of systems in Asia-Pacific countries. We have no DNA of fundamental human rights in our traditional culture, but the reasons why Taiwan can move toward democracy, rule of law, protection of human rights are because we abolish martial law and practice constitution in peacetime. Since it is in peaceful time now, we should be more confident to establish more regimes to promote human rights. As investigated from the countries in Asia-Pacific area such as India and South Korea, we recognize that there are lots of advantages to have a NHRC. The NHRC can construct a complete and widespread national system of human rights, codify international law domestically, solve similar problems as other countries, and deal with special issues of human rights in our own country. The establishment of a NHRC is the true way to promote and protect human rights.

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