

場次一：專題演講

PANEL I: SPEECH

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人權事務委員會審查國家報告之程序與目的一 我的廿年經驗

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壹、介紹

公民政治權利國際公約第 40 條第一項明示：「本公約締約國承允依照下列規定，各就其實施本公約所確認權利而採取之措施，及在享受各種權利方面所獲之進展，提具報告書...」；第二項：「所有報告書應交由聯合國秘書長轉送(人權事務)委員會審議。如有任何因素及困難影響本公約之實施，報告書應予說明。」；第四項：「委員會應研究本公約締約國提出之報告書...委員會應向締約國提送其報告書及其認為適當之一般評議。」，以及第五項：「本公約締約國得就委員會可能依據本條第四項規定提出之任何評議向委員會提出意見。」

因此，人權事務委員會 (Human Rights Committee or HRC) 「審議」締約國報告的框架被建立：首先，締約國針對他們國內如何落實公約提出報告；第二步，委員會審議並研究這些報告；第三步，委員會將自己版本的報告附上一般性意見 (general comments) 送回締約國；第四步，締約國也需要提交自己對委員會意見的觀察。本篇短文是以作者擔任人權事務委員會委員的二十年經驗為基礎，以此寫作順序試圖釐清「審議」(consideration) 的目的與程序：(1) 審議的概括目的；(2) 仔細地檢驗審議的步驟與問題；以及(3) 與其他國際監督方式比較之下的審議的效果及評估。

貳、審議 (the Consideration) 的目的

審議的框架，如同上述，指出了審議作為一個整體可能也被視為監督國家實現國際人權標準的系統。毋需多言，由於缺乏世界政府、立法機關以及世界司法系統，當今的人權保障實際是依賴於各個主權國家的內國體制。然而，如果我們僅將人權保障留給國家體制，我們便無法避免由國家權力所做的人權侵害，如納粹迫害猶太人或是南非的種族隔離政策。為了防止這些侵害，我們必須建立一個人權保障的國際體系，其本質是(1)釐清人權的普世標準，(2)且因此標準的落實仰賴國內的系統，(2)本委員會需要監督國家落實此標準。

在二次世界大戰結束後，聯合國(United Nations or UN)的建立並非只是為了維持國際和平與安全，也是為了要提倡國際在經濟及社會事務上的合作，包括人權保障。1948 年聯合國大會(UN General Assembly)通過了世界人權宣言(the Universal Declaration of Human Rights)，提出普世人權標準，接著在 1996 年大會通過了兩個人權國際公約：經濟社會及文化權利國際公約(International Covenant on Economic, Social and Cultural Rights or ICESCR)，以及，公民政治權利國際公約(International Covenant on Civil and Political Rights or ICCPR)。兩個公約詳細的說明了宣言中的規定，以釐清人權的普世適用標準。再者，兩公約也都採用了透過審議國家報告的方式監督公約締約國的落實情況。因此，「審議」的目的很明確：它是為了檢驗或監督國家對於國際人權標準的落實。

參、審議的程序

一、國家報告的準備與提出

如上所述，公民政治權利國際公約（以下簡稱 ICCPR）規定公約締約國需要提出國家報告給聯合國人權事務委員會作為委員會審議。至於經濟社會文化權利國際公約（以下簡稱 ICESCR），則規定了公約締約國的報告要交由聯合國經濟及社會理事會（Economic and Social Council or ECOSOC）審議。然而，當人權事務委員會委員因其「個人」能力而被選舉出來時，經濟及社會理事會的成員卻僅是聯合國成員國代表，而由這樣的代表來審議代表本國或其他國家的報告都是非常不適當的。因此，在 1987 年經濟及社會理事會決定設立經濟社會及文化權利委員會(the Committee on Economic, Social and Cultural Rights or CESCR)，接著其委員也是基於他們的「個人」能力而被選舉出來，與人權事務委員會相同。

任何情況下，ICCPR 的締約國對必須在其加入公約生效的一年內為此提出初次報告書（initial reports），及之後在任何人權事務委員會請求之時。後者的此類報告稱作「定期報告」（periodic reports），通常人權事務委員會要求每五年左右提交一次。還有第三種報告叫做「特別報告」（special reports），HRC 在特殊狀況如政變或是天災發生時要求提交。以上任何一種的國家報告都是由公約締約國自己準備並提交。許多國家透過與多種部門合作以準備報告，如外交、司法、工業、財政、勞工、教育以及治安部門等，雖然經常由外交或是司法部門為主導。有一些國家允許 NGOs 參與報告的準備，但報告的提交仍屬國家的職責。自然地，政府難得會提出一份批評自身人權政策或活動的報告，在這一點上，NGOs 的報告而言就扮演了一個很重要的角色，讓人權事務委員會可以針對該國相關人權狀況做出一個客觀的分析。

至於報告的長度，有些非常短，甚至連十頁都不到，僅列舉了相關國內法律的規定而未說明具體適用到現實的狀況為何。少數報告則是非常長，長至超過五

百頁，內有過多細節資訊及大量的統計資料。平均來說，一份報告的長度大約是五十頁 A4 紙張，以單行間距繕打。

關於報告的內容，人權事務委員會通過了提供給公約締約國準備報告的一般指導原則。簡言之，報告應該分成兩部分：第一部分處理人權保障的一般法律框架，第二部份則釐清特定種類的人權保障，同 ICCPR 第三章中的規定（從第六條生命權至第二十七條少數團體的權利）。

二、人權事務委員會及其年度會期

人權事務委員是由 ICCPR 的公約締約國於大會中選舉出十八位委員所組成。選舉是隔年的九月、於聯合國大會年度會議前舉行，改選所有委員的半數席次。候選人由公約締約國提名，但他們因個人能力被選出，且獨立於任何締約國之外行使職權。他們的任期是四年，但可以連選連任。因為同一批委員一起服務兩年，此局處由主持人、三位副主持人以及報告員組成，分別代表五個聯合國選區：非洲、亞洲、拉丁美洲、東歐及西方。委員會中委員資格並沒有嚴格的地理分配，但在我 1987 年加入人權事務委員會時，非洲、亞洲、拉丁美洲、東歐各有三位，其他的委員則是從西方來的。而關於委員們的背景，大多數是學者、有四分之一是內國法律從業人員、其他的則是退休的公務員或是政治家。

人權事務委員會每年有三次會期，每會期為三週；春季會期是從三月中旬至四月初於紐約的聯合國總部開會；夏季會期則是從七月中旬至八月初，秋季會期是從十月中旬至十一月初，皆在日內瓦的聯合國辦公室開會。通常人權事務委員會每天有兩次會議，從 10:00 到 13:00，以及 15:00 至 18:00。因此，每周有 10 個會議，每會期有 30 次會議，也就是每年 90 次會議。人權事務委員會的工作是由人權事務高級專員辦事處（UN Office of High Commissioner for Human Rights）中人員所組成的秘書處提供協助。

三、對報告的審議 (Consideration of Reports)

公民政治權利國際公約於 1976 生效，而人權事務委員會於 1977 開始運作。ICCPR 首先通過了程序法規，規定將被人權事務委員會審議國家報告的公約締約國代表必須參加會議。此代表要做口頭報告，委員會委員口頭提問，接著代表可口頭回應。此程序可能導致相同或相似的議題，為了避免這樣的重複，人權事務委員會決定通過〈議題清單〉，一份對代表提出的問題書面摘要，這對於審議程序的流程順暢被證明相當有效。關於這一點，每位委員被指定為一個特定公約締約國的報告員（country-rapporteur），他／她的工作是協同秘書處準備起草針對該公約締約國需要提給全體會議批准的議題清單。接下來，委員會會把這些書面問題濃縮到 20 至 30 條，近年來委員會開始在公約締約國提出報告之審議會期的前一個會期寄送書面的議題清單給該國。有些國家會回覆議題清單上的問題寄回作為回應，因此也加速了報告審議的速度。

人權事務委員會早期的每位委員都有些時間做口頭評論，與國家代表做意見交流。這裡同樣地，這些委員們的評論經常是重複或有時矛盾，造成國家代表因而對於人權事務委員會做出的報告評估感到混淆。因此，人權事務委員會通過一個代表委員會整體的〈觀察結論〉(Concluding Observations)的書面文件，基本上符合第 40 條第四項所指出的「一般性意見」(general comments)。當今的〈觀察結論〉包含三個部份：第一部分是客觀地描述審議程序如何進行；第二部份強調報告國人權狀況的優點或是改善；第三部份點出報告國人權狀況的缺失或問題，並給予改善這些狀況的建議。第三部份期待締約國能接受這些建議，並且在下次該國的國家報告中點出狀況的改善。此外，委員會從 20 多個建議中選出幾個，要求締約國在短期之內回應，因為像是解除戒嚴或是釋放政治犯等建議，若要到下次報告才改正這些問題就太遲了。程序的最後階段稱為「觀察報告的追蹤」(Follow-Up to the Concluding Observations)，相關締約國對於此追蹤的回應還不錯，很可能是因為第 40 條第五項的規定。

肆、審議程序的效果或評估 (Effect or Evaluation of Consideration Procedure)

如上所述，人權事務委員會一直盡最大努力發展其審議程序。然而，委員會也絕對不能忘記其工作本質上是建議，而「觀察報告的追蹤」甚至並不是個有法律拘束力的程序。基於這個理由，有時人權事務委員會的任何活動都被批評是無涉法律或是無意義的。相反的，歐洲人權公約 (European Convention on Human Rights)，有許多附加條款提供了司法救濟給人權侵害中的受害者，這些條款是有法律拘束力的。美洲人權公約 (American Convention on Human Rights) 以及非洲人權憲章 (African Charter on Human and Peoples' Rights) 也都是如此。

有兩個論點或許可用於回應這些批評。第一個，有一些本質為建議的行動可以實質改善人權侵害的狀況。比如說：在審議日本的初次國家報告時，一些委員指出日本國籍法違反了公民政治國際權利公約第三條的性別平等原則。日本政府相當看重此意見並向法律專家委員會 (the Board of Legal Experts) 諮詢，當該委員會仍在討論此議題時，聯合國大會通過了「消除對婦女一切形式歧視公約」(Convention on the Elimination of All Form of Discrimination against Women)，日本國內的婦女 NGOs 也向日本政府施加壓力。最後，國籍法對於日本國籍的繼承採用了性別平等的原則。另一個例子是從公民政治權利國際公約的任擇議定書 (Optional Protocol) 中的個人申訴 (individual communication) 而來---荷蘭的失業給付法相對於未婚女性及男性，歧視已婚女性。根據此法，已婚女性必須證明她不是家中負擔家計者才能得到全額失業給付，但未婚女性及男性卻不須提出這樣的證明就可獲得全額給付。人權事務委員會主張此法構成對 ICCPR 的侵犯，即便委員會的觀點只是建議性質，荷蘭政府仍修正了這個法律。事實上，如果相關的

人們與政府已準備好要接受，建議仍能產生同樣的結果。

第二個反駁批評的論點，是司法救濟不能永遠提供有效的救濟對抗任何人權侵害。在這樣的世界，人權標準普世適用的概念有時會面臨困境，特別是當這些標準與經濟社會權利保障有關時。舉例來說，在第二次世界大戰之後，日本面臨了嚴重的糧食短缺，有位檢察官僅吃國家分配的糧食而餓死。家屬控告政府未遵守憲法中保障所有日本人民最低生活水準的規定。政府反駁說，在這樣嚴峻的狀況之下，國家不可能提供更多米給所有的日本人，也沒有足夠的外匯從國外進口稻米。日本最高法院判決政府勝訴。事實上，非訟爭議解決機制(alternative dispute resolution or ADR)可能比司法救濟更能發揮功能，再考量到世界上所存在的價值判斷的多元性，具彈性的法律觀念解釋與適用有時更符合需要。人權事務委員會不斷地提倡與人權紀錄不佳的政府對話的重要性，並希望未來狀況能夠改善。在此意義上，審議程序可稱為「建設性的對話」(constructive dialogue)，目標在於國家法律體系可逐步且自願地落實國際人權法標準。

伍、一些補充說明 (Some Additional Remarks)

數年前當我還是人權事務委員會委員時，我在日內瓦開委員會會議，我的一位臺灣朋友來找我。我介紹他給委員會中的其他同事，他向每位同事詢問「臺灣能不能加入公民政治權利國際公約？」他們的意見很一致：「這不是個法律上的問題，而是政治上的！」公民政治權利國際公約第48條第一段：「本公約聽由聯合國會員國或其專門機關會員國、國際法院規約當事國及經聯合國大會邀請為本公約締約國之任何其他國家簽署。」既然臺灣並非聯合國會員國或任何其專門機關或國際法院規約當事國，則唯一的可能性就是由聯合國大會邀請參加公民政治權利國際公約了。然而，考慮到中華人民共和國現在的立場，聯合國大會很可能會發出擴大這樣的邀請。因此，我的同事們對他所說的，是沒錯的。

儘管如此，香港與澳門兩者皆屬於公民政治權利公約的適用範圍，因為英國及葡萄牙各自在歸還這兩地主權給中國時，成功地說服中國讓繼續以香港特別行政區及澳門特別行政區之名繼續適用 ICCPR。這也意味了中華人民共和國已經允許過其部份領土上 ICCPR 的繼續適用。雖然香港與澳門的狀況與臺灣完全不同，臺灣仍可從中看到成為 ICCPR 成員的不同方式的可能性。當然，以我的觀點，臺灣人似乎已經享有公約中大多數的人權保障，民主在臺灣也運作地很好。臺灣人民應該要為這樣的事實感到驕傲，也應該向中國大陸展現這美麗寶島上人權狀況的現實。

The Purpose and Procedure of Consideration of States Parties' Reports by the Human Rights Committee under the International Covenant on Civil and Political Rights; through My Twenty-Year Experience as a Committee Member

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I. Introduction

Article 40, paragraph 1, of the International Covenant on Civil and Political Rights provides that: "The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights..."; Paragraph 2 that: "All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the [Human Rights] Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant"; Paragraph 4 that: The Committee shall study the reports submitted by States Parties.... It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties"; and Paragraph 5 that "The States Parties...may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this Article."

Thus, the framework of "consideration" of States Parties' reports by the Human Rights Committee (HRC) is established: First, States Parties submit reports about their domestic implementation of the Covenant; Second, HRC considers and studies the reports; Third, the Committee transmits its own reports with general comments back to the States Parties; and forth, the States Parties, on their part, submit to the Committee their observations on the Committee's comments. This short article attempts to clarify the purpose and procedure of the "consideration" on the basis of the author's twenty-year experience as a member of the Committee in the following order: (1) the purpose of the consideration in general; (2) detailed examination of the process as well as problems of the consideration; and (3) the effect and evaluation of the consideration as compared with other means of international monitoring.

II. Purpose of the Consideration

The framework of the consideration, as described above, indicates that the consideration as a whole may be regarded as a system of monitoring domestic implementation of international human rights standards. Needless to say, due to the lack of world government and legislature as well as world judiciary, the current protection of human rights depends on domestic systems of each sovereign state. However, if we leave the protection only in the hand of domestic system, then we cannot avoid cases of human rights abuse by domestic authority such as Nazi persecution of Jewish people or the apartheid policy in South Africa. In order to avoid those abuses, we need to establish an international system of human rights protection, whose essence is (1) clarification of universal standards of human rights, and because the implementation of the standards depends on a domestic system, (2) international monitoring of domestic implementation of the standards.

After the end of World War II, the United Nations (UN) was established not only to maintain international peace and security but also to promote international cooperation in economic and social matters, including the protection of human rights. In 1948 the UN General Assembly adopted the Universal Declaration of Human Rights, which set forth universal standards of human rights, and in 1966 the Assembly adopted two international covenants for the protection of human rights; the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Both the Covenants elaborated the provisions of the Declaration to further clarify in detail universally applicable standards of human rights. In addition, both the Covenants adopted an international system of monitoring the implementation by each State Party of their provisions through consideration of its report. Thus, the purpose of “consideration” is clear: It is to examine or monitor domestic implementation of international human rights standards.

III. Procedure of Consideration

1. Preparation and Submission of a State Report

As described above, the ICCPR provides that a State Party submits its report to HRC for its consideration by the Committee. As to ICESCR, it provides that a State Party's report is to be considered by the Economic and Social Council (ECOSOC) of the United Nations. However, while members of the HRC are elected in their “personal” capacity, members of ECOSOC are representatives of U. N. members

states and it is not necessarily proper for representatives of members states to examine a report of his or her own state or other states. Therefore, in 1987, ECOSOC decided to set up the Committee on Economic, Social and Cultural Rights (CESCR) whose members are thereafter to be elected in their “personal” capacity, as in the case of the HRC.

In any event, a state party to ICCPR must submit its initial report within one year of the entry into force of the Covenant for it and, thereafter whenever HRC requests. The latter category of reports are called “periodic reports” and ordinarily HRC requests their submission every five years or so. There is a third category of reports called “special reports” which HRC requests on specific occasions such as political coup or natural disaster. Any category of a state report is prepared and submitted by the state party itself. Many states prepare the report with the cooperation of various departments concerned such as departments of foreign affairs, law, industry, finance, labour, education and police, though often department of foreign affairs or law takes the initiative. Some states allow NGOs to participate in preparing the report but the submission of the report falls within the responsibility of the government. Naturally, governments rarely submit a report critical of its human rights policy or activities, and in this connection, reports of NGOs can play an important role for HRC to make an objective analysis of actual human rights situation in the state concerned.

As for the length of a report, some are very short in less than 10 pages, enumerating merely provisions of relevant domestic laws without explaining their concrete application to reality on the ground. A few are very long over 500 pages with too detailed information and voluminous statistics. In average, the length of a report is approximately fifty page A4 sheets in single space typing.

As to the content of a report, HRC has adopted general guidelines for a state party in preparing its report. Briefly speaking, the report should be divided into two parts; the first dealing with the general legal framework for the protection of human rights, the second clarifying the protection of specific categories of human rights as stipulated in Part III of ICCPR (from Article 6 on the right to life to Article 27 on the minority rights).

2: HRC and its annual Sessions

HRC is composed of 18 members elected by the plenary meeting of states parties to ICCPR. The election takes place every two years in September before the annual meeting of the General Assembly, in which half of the total members are elected. The candidates are nominated by states parties, but they are elected in their personal capacity and act independently from any state party. Their terms of office is 4 years

but they can be reelected. Because the same members serve for two years together, the Bureau consists of Chair, 3 Vice Chairs and Rapporteur, each representing 5 electoral regions in the United Nations: Africa, Asia, Latin America, Eastern Europe and the West. There is no strict geographical distribution of membership of the Committee, but in 1987 when I joined HRC, 3 each are from Africa, Asia, Latin America and Eastern Europe and the rest are from the West. As far as their background is concerned, majority are academics, one fourth domestic law practitioners, and the rest retired civil servants and politicians.

HRC meets three sessions a year and each session lasts for three weeks; spring session from mid-March to early April at the UN Headquarter in New York, summer session from mid-July to early August and autumnal session from mid-October to early November both in the UN Office in Geneva. Usually HRC has two meetings a day from 10:00 to 13:00 and from 15:00 to 18:00. Thus, it has ten meetings each week, thirty meetings a session, which makes ninety meetings a year. Work of HRC is supported by a Secretariat composed of a team of officials of the UN Office of High Commissioner for Human Rights.

3: Consideration of Reports

(A): List of Issues and Concluding Observations

ICCPR came into force in 1976 and HRC started working in 1977. It first adopted Rules of Procedure by which the delegation of the state party whose report is considered by the Committee is required to attend the meeting. The delegation is to make oral presentation of the report, the Committee members are to ask oral questions, and the delegation may reply orally. This procedure was likely to cause the same or similar questioning, and in order to avoid such repetitions HRC decided to adopt List of Issues, a written summary of questions to be asked to the delegation, and this proved to be very efficient for smooth functioning of the consideration procedure. In this connection, a member of the Committee is assigned as a country-rapporteur for a particular state party, and his or her function is to prepare with the help of the Secretariat a draft list of issues concerning that state party which is to be approved by the plenary. Later, HRC came to limit the number of written questions to 20 to 30, and in recent years the Committee has started sending written list of issues to the state party concerned one session ahead of the session in which its report is to be taken up. In response, some of the states parties concerned send written replies to the list of issues, thus accelerating the consideration of reports further.

In the early days of HRC it was customary that each member was granted time to make oral comments about the exchange of views with the delegation. Here again,

the comments of members were often repetitious or sometimes contradictory, thus causing confusion to the delegation as to HRC's appraisal of the state party's report. Consequently, HRC has come to adopt written Concluding Observations of the Committee as a whole which correspond in substance to "general comments" as stipulated in Article 40, paragraph 4. Nowadays, the Concluding Observations consist of three sections: The first section is an objective description of how the consideration procedure has proceeded; the second section emphasizes merits or improvement of human rights situation of the reporting state party; and the third section specifies demerits or problems concerning human rights situation of the state party and make recommendations to correct the situation. The third section expects the state party to accept the recommendation and indicate improvement of the situation in the next report of the state party. Furthermore, of the 20 or so recommendations, HRC chooses a few that require the state party's response within a short period of time because the next report would be too late to correct the problem such as the lifting of curfew or release of political prisoners. This last procedure is named "Follow-Up to the Concluding Observations", and the response of the relevant states parties, probably in line with the provision of Article 40, paragraph 5, has been pretty encouraging.

IV. Effect or Evaluation of Consideration Procedure

As explained above, HRC has been endeavouring to develop its consideration procedure to the maximum extent possible. However, it must not be forgotten that the work of the Committee is essentially of recommendatory nature and that even Follow-Up to the Concluding Observations is not a legally binding procedure. For that reason, sometimes any activity of HRC is criticized as legally irrelevant or meaningless. In contrast, the European Convention on Human Rights, with many additional Protocols, provides for judicial remedy to the victims of a human rights violation which is legally binding. So does the American Convention on Human Rights as well as the African Charter on Human and Peoples' Rights.

Perhaps, against such criticism, there are two arguments to be made. The first is that some of the acts of recommendatory nature may lead to actual improvement of the situation. For example, during the consideration of the initial Japanese report some Committee members pointed that the Nationality Law of Japan then in force was in violation of the principle of sexual equality enshrined in Article 3 of ICCPR. The Japanese government took it seriously and consulted the Board of Legal Experts, but while the board was discussing the issue, the UN General Assembly adopted the

Convention on the Elimination of All Form of Discrimination against Women and many Japanese Women NGOs put pressure on the Japanese government. Consequently, the Nationality Law was amended to provide for the sexual equality on succession of Japanese nationality. Another example is from an individual communication under the Optional Protocol to ICCPR, where a Dutch Law on Unemployment Benefits provided for discrimination to married women as compared with unmarried women as well as with men. According to the Law, married women had to prove that she was not a breadwinner for the family in order to obtain full unemployment benefits, whereas unmarried women and men could obtain full benefits without such a proof. HRC adopted a view that the law constituted a violation of ICCPR, and the Dutch government amended the law although HRC's view was of recommendatory nature. As a matter of fact, a recommendation may produce the same result, if the people and the government concerned are prepared to accept it.

The second argument against the criticism is that judicial remedy may not always provide for an effective remedy against a violation of any human rights. In the world as it is, the concept of universally applicable human rights standards sometimes encounters a difficult situation, in particular when the standard relates to the protection of economic and social rights. For example, in Japan immediately after the Second World War, there was a severe shortage of food, where a prosecutor eating only officially distributed amount of rice died. The family sued the government as not observing the Constitutional provision to guarantee the minimum standard of living to all Japanese. The government countered that, in the prevailing situation, it was impossible to officially provide more rice to all Japanese due to general shortage of food and that there was not sufficient foreign exchange to import rice from abroad. The Supreme Court of Japan decided for the government. In fact, there are cases where alternative dispute resolution (ADR) system may function better than the judicial remedy, and considering that a diversity of value judgments exists in the world, flexible interpretation and application of legal norms is sometimes desirable. HRC has been advocating the importance of continuing dialogue with states with the record of poor human rights performance in the hope that the situation will improve in the future. In this sense, the procedure of consideration can be described as "constructive dialogue" aiming at gradual and voluntary realization of international human rights standards in domestic legal system.

V. Some Additional Remarks

Several years ago when I was still a member of HRC, a Taiwanese friend of mine came to see me in Geneva where I was attending the Committee meeting. I introduced him to my colleagues of the Committee and he asked each one of them if Taiwan could join ICCPR. Their reply was unanimous: “It is not a legal but a political question!” Article 48, paragraph 1, of ICCPR provides that: “The present Covenant is open to for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.” Since Taiwan is not a member of UN nor any of its specialized agencies nor a party to the Statute of the International Court of Justice, the only possibility is to be invited by the UN General Assembly to become a party to ICCPR. However, considering the current position of the People’s Republic of China, it is highly unlikely that the General Assembly will extend such an invitation. Therefore, my colleagues are right in what they said to him.

Nevertheless, in both Hong Kong and Macao ICCPR is applied because the United Kingdom and Portugal, when they returned their sovereignty over the respective territory to China, successfully persuaded China to continue to apply ICCPR to the two regions in the name of Special Administrative Region of Hong Kong and that of Macao. This implies that the People’s Republic of China has allowed the continuous application of ICCPR in parts of its territory. While the situation of Hong Kong and Macao is completely different from that of Taiwan, Taiwan may look into a possibility that it may become a party to ICCPR in one way or another. Of course, in my view, the human rights situation of Taiwan is equivalent or even better when compared with the actual situation of some states parties to ICCPR. As far as I can see, the Taiwanese seem to be enjoying most of the human rights enshrined in the Covenant, and democracy is certainly working well in Taiwan. The Taiwanese people should be proud of this fact and should show to the people of the mainland China the reality of human rights situation on this beautiful island.

場次二：兩公約與一般性評議

Panel II: The Two Human Rights Covenants and the General Comments

- 主持人/Moderator：洪德欽 教授
(Professor Der-Chin Horng)
- 發表人/Presenters：張文貞 副教授
(Associate Professor Wen-Chen Chang)
高涌誠 律師
(Mr. Yung-Cheng Kao)
- 與談人/Discussants：姚孟昌 助理教授
(Assistant Professor Meng-Chang Yao)
Mr. Edmond Bon

演進中的法： 一般性意見作為兩公約的權威解釋

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摘要

公民與政治權利國際公約及經濟社會文化權利公約，透過兩公約施行法的實施，已正式成為我國法律體系的一部份。兩公約施行法第 3 條規定：「適用兩公約規定，應參照其立法意旨及兩公約人權事務委員會之解釋。」不過，究竟兩公約的規範意旨及相關解釋是什麼？表現在什麼樣的法律文件？具備什麼樣的規範地位及效力？負責兩公約的執行機構一直以來均有一般性意見(general comments)的作成。這些一般性意見或建議作成的依據、其規範地位及效力為何？是否即為我國公約施行法中所稱的解釋而為我國相關機關在適用公約權利時應加以參照？為釐清前述問題，本文探討一般性意見作成的規範依據、功能演變、及其規範地位與效力加以探討，並對其於我國法律體系的進一步適用，提出具體建議。

關鍵字

兩公約、一般性意見、一般性建議

壹、前言

〈公民與政治權利國際公約〉(International Covenant on Civil and Political Rights, ICCPR)及〈經濟社會文化權利國際公約〉(International Covenant on Economic, Social and Cultural Rights, ICESCR) (以下簡稱兩公約)，在 2009 年 3 月 31 日經我國立法院以條約案方式通過，同時制定兩公約施行法，此一施行法於 2009 年 12 月 10 日正式實施。¹ 兩公約施行法第 2 條規定：「兩公約所揭示保障人權之規定，具有國內法律之效力。」同法第 3 條亦規定：「適用兩公約規定，應參照其立法意旨及兩公約人權事務委員會之解釋。」這不但使得兩公約所保障的人權，成為我國內國法的一部分，更重要的是，我國政府、尤其是法院，在適用及解釋兩公約人權時，必須參照兩公約的規範意旨、以及兩公約委員會所作的解釋。不過，究竟兩公約的規範意旨及相關解釋是什麼？表現在什麼樣的法律文件？具備什麼樣的規範地位及效力？

無獨有偶，我國政府在 2007 年 2 月正式完成加入〈消除對婦女一切形式歧視公約〉(Convention on the Elimination of All Forms of Discrimination against Women, CEDAW)的內國程序，同時在 2009 年 3 月公布加入後的首次國家報告。² 2011 年 5 月 20 日，立法院通過 CEDAW 施行法，同年 6 月 8 日總統正式公布，並明定將於 2012 年 1 月 1 日正式實施。跟兩公約施行法的規定一樣，CEDAW 施行法第 2 條也明文規定：「公約所揭示保障性別人權及促進性別平等之規定，具有國內法律之效力。」同法第 3 條也規定：「適用公約規定之法規及行政措施，應參照公約意旨及聯合國消除對婦女歧視委員會對公約之解釋。」同樣的問題是：究竟 CEDAW 公約的意旨及其委員會對公約所作的解釋是什麼樣的法律文件？具備什麼樣的規範地位及效力？

不管是兩公約或 CEDAW，其所負責執行的委員會均有所謂一般性意見

¹本文以下單獨提到〈公民與政治權利國際公約〉，係以 ICCPR 簡稱；單獨提到〈經濟社會文化權利國際公約〉，則以 ICESCR 簡稱；同時提到兩個公約時，方以兩公約簡稱，先予說明。兩公約批准案，是民進黨執政時的行政院於 2008 年 2 月 13 日經行政院院會決議，認為我國已於 1967 年 10 月 5 日由當時常駐聯合國代表團的劉鍇大使代表政府簽署，但迄未完成批准程序，遂決定送立法院審議以完成批准程序，而於 2008 年 2 月 19 日將兩公約批准案送國民黨占絕大多數的第 7 屆立法院審議。立法院於 2009 年 3 月 31 日三讀通過批准案。參見：立法院公報，98 卷 14 期，頁 378-433。同時，行政院鑑於我國國際處境特殊，兩公約正式批准後是否能順利完成交存秘書長的手續，尚有極大困難，為了確保兩公約在我國法律體系上的定位及效力，也同時提出兩公約施行法，使兩公約所保障的權利具有國內法上的效力。兩公約施行法三讀通過的決議及討論，參見：立法院公報，98 卷 14 期，頁 433-257。

² 2006 年 7 月 12 日，行政院院會決議將我國加入 CEDAW 的條約案送立法院審議，立法院 2007 年 1 月 5 日通過此一條約案；同年 2 月 9 日，陳水扁總統頒佈我國的簽署加入書。外交部透過友邦國家，希望將我國的加入書於聯合國秘書長處存放，可惜於同年 3 月 29 日即被潘基文秘書長予以拒絕。關於 2009 年的國家報告、國外專家的審查、以及後續討論，均經財團法人婦女權益促進發展基金會（以下簡稱婦權基金會）整理，收錄於婦權基金會網站上的 CEDAW 專區，參見 http://wrp.womenweb.org.tw/Page_Show.asp?Page_ID=632

(general comments)或一般性建議(general recommendations)的作成。這些一般性意見或建議作成的依據、其規範地位及效力為何？是否即為我國公約施行法中所稱的解釋而為我國相關機關在適用公約權利時應加以參照？為釐清前述問題，本文以下將從 ICCPR、ICESCR 及 CEDAW 相關規定，對一般性意見及一般性建議的規範依據、功能演變、及其規範地位與效力加以探討，並對其於我國法律體系的進一步適用，提出具體建議。

貳、一般性意見的規範依據

我們從 ICCPR 及 ICESCR 的官方網站，都分別可以看到其所作成的一般性意見。³ 不過，這兩個公約作成一般性意見的機構、以及其作成一般性意見的規範依據，其實並不相同。

一、公民與政治權利國際公約

ICCPR 第 28 條設立人權事務委員會(Human Rights Committee)來負責該公約的監督與執行。公約第 40 條第 1 項規定締約國繳交國家報告的義務，同條第 2 項規定國家報告應送交聯合國秘書長轉交人權事務委員會審議。同條第 4 項並進一步規定：「委員會應研究本公約締約國提出之報告書。委員會應向締約國提送其報告書及其認為**適當之一般性意見**（或譯一般評議⁴, general comments）。委員會亦得將此等一般性意見連同其自本公約締約國收到之報告書副本轉送經濟暨社會理事會。」而這正是人權事務委員會作成一般性意見的規範依據。

值得注意的是，委員會依據本條所作的一般性意見，究竟是針對繳交國家報告的特定國家？抑或並不針對特定國家，而是在審查所有或部分締約國的國家報告後所作成的通案性意見？事實上，在聯合國大會討論 ICCPR 草案時，原本的條文只有「.....應向締約國提送其報告書及其認為適當之意見。.....」。直到最後一刻，才在適當意見的前面，加上一般(general)這樣的文字。(Steiner, Alston & Goodman, 2007) 也因為這樣的文字更動，使得後來人權委員會在作成一般性意見時，認為因為加上了「一般」這樣的文字，而認為一般性意見是廣泛適用於全體的締約國。⁵ (Steiner et al., 2007) 而此一對於一般性意見的定位，也被其他公約如 ICESCR 及 CEDAW 所接受。

人權事務委員會在 1981 年作成第 1 號一般性意見，該號意見正是針對所有

³ ICCPR: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>,
ICESCR: <http://www2.ohchr.org/english/bodies/cescr/comments.htm>

⁴ 「一般評議」是公約繁體中文版的譯法，這也是我國正式批准及簽署的版本；公約簡體中文版則譯為「一般建議」，而國內目前官方及民間多數使用「一般性意見」。本文作者過去間或使用一般評議或一般性意見，本文則採國內多數譯法的「一般性意見」。

⁵ See also MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 748 (2nd Revised Edition, 2005).

公約締約國繳交國家報告的議題。從那時開始，截至 2011 年 11 月底，人權事務委員會總共作成了 34 號一般性意見。⁶

二、經濟社會文化權利國際公約

ICESCR 一開始是直接以聯合國經濟暨社會理事會（以下簡稱經社理事會）作為公約的監督及執行機構。ICESCR 第 16 條第 1 項規定締約國繳交國家報告的義務，同條第 2 項第 1 款則規定國家報告應送交聯合國秘書長轉交經社理事會進行審議。有意思的是，ICESCR 第 16 條並未如同 ICCPR 第 40 條般，直接對經社理事會作成一般性意見予以規定。不過，ICESCR 第 21 條卻也規定了經社理事會「得隨時向大會提出報告書，連同**一般性質之建議(recommendations of a general nature)**，以及從本公約締約國與各專門機關收到關於促進普遍遵守本公約確認之各種權利所採措施及所獲進展之情報摘要。」

1985 年，經社理事會作成決議，另外設立經濟社會文化委員會(Committee on Economic, Social and Cultural Rights, 以下簡稱經社文委員會)來負責該公約的執行。⁷ 1987 年，經社理事會又再次作成決議，明白授權並規定經社文委員會作成前述一般性質之建議的具體程序；並在該決議第 9 段的文字中，具體建議經社文委員會採用人權事務委員會作成一般性意見(general comments)的方式。⁸ 二年後，經社文委員會於 1989 年 2 月，就公布了其第 1 號的一般性意見(general comment)，內容也是針對締約國國家報告的繳交及審查等相關程序。截至 2011 年 11 月底，經社文委員會總共作成了 21 號一般性意見。⁹

三、消除對婦女一切形式歧視公約

值得併予一提的是，CEDAW 也有這樣的制度。CEDAW 第 17 條設立〈消除對婦女歧視委員會〉來負責公約的監督與執行，第 18 條則規定締約國的國家報告應送交聯合國秘書長轉送此一委員會來加以審議；第 21 條第 1 項則規定委員會「可根據對所收到締約各國的報告和資料的審查結果，提出意見(suggestions)和一般性建議(general recommendations)。」委員會在 1986 年針對締約國的國家報告事項公布第 1 號一般性建議，迄今已作成總共 28 號一般性建議。¹⁰

⁶ 這些一般性意見的內容均公布於人權事務委員會的網站(<http://www2.ohchr.org/english/bodies/hrc/comments.htm>)，多數都有中文翻譯。

⁷ Economic and Social Council resolution 1985/17, available at <http://www2.ohchr.org/english/bodies/cescr/> (last visited Nov. 28, 2011) 在該決議中，經社理事會就特別強調設立經社文委員會來承擔其基於 ICESCR 第 21 條及第 22 條所負的義務。

⁸ Economic and Social Council resolution 1987/5, available at <http://www.radioradicale.it/exagora/resolution-1987-5> (last visited Nov. 28, 2011)

⁹ 這些一般性意見的內容均公布於經社文委員會的網站(<http://www2.ohchr.org/english/bodies/cescr/comments.htm>)，多數都有中文翻譯。

¹⁰ 這些一般性意見的內容均公布於消除對婦女歧視委員會的網站(<http://www2.ohchr.org/english/bodies/cedaw/comments.htm>)，多數都有中文翻譯。

參、一般性意見的功能演進

不管是兩公約的一般性意見(general comments)或是 CEDAW 的一般性建議(general recommendations)，從一開始協助委員會執行及監督締約國國家報告的撰寫及繳交 (Nowok, 2005: 873-876)，到後來針對公約相關條文的文義釐清與解釋，甚至是最近對公約內容所作體系化的解釋、以及相當程度的解釋造法(interpretation as law-making) (Black, n.d.: 9)，都是經過一段不算短的時間的功能演變 (參表 1)。¹¹ (Black, n.d.)

表 1：兩公約一般性意見及 CEDAW 一般性建議的功能演變

	ICCPR	ICESCR	CEDAW
國家報告撰寫的協助	GC01 (1981) - GC15 (1986)	GC01 (1989) - GC03 (1990)	GR01 (1986) - GR13 (1989)
公約內容的釐清與解釋	GC16 (1988) - GC22 (1993)	GC04 (1991) - GC13 (1999)	GR14 (1990) - GR22 (1995)
公約內容的體系化與完整化	GC23 (1994) - GC34 (2011)	GC14 (2000) - GC21 (2009)	GR23 (1997) - GC28 (2010)

來源：作者自製¹²

一、國家報告撰寫的協助

一般性意見早期的功能，在於協助締約國撰寫並提出國家報告。人權事務委員會一開始所作成第 1 號及第 2 號的一般性意見，就是直接針對締約國提出國家報告的義務以及撰寫國家報告的準則。經社文委員會的第 1 號一般性意見，消除婦女歧視委員會的第 1 號及第 2 號一般性建議，也都是針對國家報告的撰寫及提出所作。

而由於締約國在提出國家報告、或者委員會在審查各國國家報告時，可能會對公約相關條文的文義有所疑問，委員會在這段時間所作的一般性意見，也會對相關條文的文義予以釐清。不過，由於委員會作成一般性意見的權威地位尚未完全建立，在這個時期，委員會針對公約相關條文或權利所作的解釋，大體上趨於保守。(Steiner et al., 2007: 878-880) 這個保守性可以從兩個面向看出。首先，一

¹¹對於人權事務委員會在一般性意見作成上的功能演變，詳參 HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS 875 (3rd ed., 2007): 873-886.

¹² 本表在 ICCPR 一般性意見的功能演進上的分析，參考 Steiner 的見解。不過，Steiner 是從時間的角度來分析 ICCPR 的一般性意見。他從四個時期（1981-1983, 1984-1988, 1989-1999, 2000-present）來討論一般性意見所扮演的不同功能，不同功能在不同時間或有重疊，而其所涵蓋的功能，也與本表相似。(Steiner et al., 2007: 878-884)

一般性意見的篇幅都很短。人權事務委員會在這個時期所作的一般性意見約在一兩頁的範圍內，最多不會超過 20 個段落的文字說明。經社文委員會、消除婦女歧視委員會的文字篇幅更短。其次，在必須釐清或解釋公約相關條文的文義時，委員會傾向以公約所使用的文字直接予以闡明，並不會給予太多其他的詮釋。

不過，雖然委員會在一般性意見的內容上傾向謹慎及保守，但在這個一般性意見的制度草創初期，委員會作成一般性意見的速度倒是相對快速，數量也頗為可觀。人權事務委員會從 1981 年到 1986 年就作成 15 號一般性意見，其中有 11 個一般性意見是在 1981 年到 1983 年間作成。消除婦女歧視委員會也是一樣，從 1986 年到 1989 年間，就作成 13 號一般性意見。¹³ 這也讓締約國明顯感受到委員會希望快速建立其作成一般性意見權威地位的企圖。(Steiner et al., 2007: 877)

二、公約內容的釐清與解釋

不論是負責 ICCPR 的人權事務委員會、負責 ICESCR 的經社文委員會、或是負責 CEDAW 的消除婦女歧視委員會，從 1980 年代中、後期開始，因應前蘇聯、東歐等前共產政權的轉型，面對全球所展開的一個全新的人權與憲政秩序，逐步開始解放過去趨於保守的一般性意見，而在闡釋公約權利時，其法律論述均較之前更形豐富。

以人權事務委員會為例，這段期間的一般性意見的篇幅開始增多，而對於公約具體權利的釐清，也會開始從公約的相關條文¹⁴、其他國際公約如消除對種族一切形式歧視公約(Convention on the Elimination of All Forms of Racial Discrimination, CERD)及 CEDAW¹⁵、甚至是引述委員會在審查締約國相關國家報告時，所曾經引述各種規範，包括聯合國體系中各種原則或準則¹⁶。值得注意的

¹³ 經社文委員會因為比較晚才開始作成一般性意見，這個時期的一般性意見主要是針對國家報告的撰寫，當經社文委員會開始針對 ICESCR 的條文作釐清與解釋時，即已經採取跟人權事務委員會在第二階段一樣趨於積極的解釋方法。

¹⁴ 例如，第 17 號一般性意見雖然是針對 ICCPR 第 24 條的兒童權利保障；不過，該號意見詳細闡述兒童同樣享有公約各條的其他權利如生命權、受平等審判的權利等。第 18 號一般性意見針對公約所定不歧視原則(non-discrimination)而發；不過，該號意見並不以公約第 2 條或第 26 條所規定的不歧視原則為限，而是擴張到各個相關權利去探究其實現上的平等、不歧視的內容及保障。

¹⁵ 委員會第 18 號一般性意見闡述 ICCPR 所禁止的「歧視」(discrimination)時，就提到因為 ICCPR 並未對此一用語直接加以定義，但不管是 CERD 或是 CEDAW 均有對此一用語給予相同的定義，即使此一定義是適用在特定種族或對婦女歧視的脈絡，但委員會認為此一定義的一般含義仍適用於公約所稱的歧視。參見第 18 號一般性意見，第 6 段及第 7 段文字。

¹⁶ 例如，在第 21 號一般性意見，委員會針對公約所定第 10 條第 1 款「自由被剝奪支人，應受合於人到及尊重其天賦人格尊嚴之處遇」進行闡述，而認為這裡所謂「人道及尊重人格的對待方式」至少應適用相關的聯合國標準，包括〈囚犯待遇最低限度標準規則〉(1957 年)、〈保護所有遭受任何形式居留或監禁的人的原則〉(1988 年)、〈執法人員行為守則〉(1978 年)、〈關於醫務人員、特別是醫生在保護被監禁和居留的人不受酷刑和其他殘忍、不人道或有辱人格的待遇或處罰方面的任務的醫療道德守則〉(1982 年)，而締約國在國家報告中應清楚以這些規範來討論其遵守

是，ICCPR 的締約國，不見得也是其他公約如 CERD 或 CEDAW 的締約國而必須受其等規範內容的拘束，人權事務委員會在解釋及闡述 ICCPR 公約內容時積極引用其他國際公約、甚至是聯合國體系內的軟法(soft law)文件，等於實質上擴大了 ICCPR 締約國對公約所負擔的義務內容及範圍。這也讓國際人權法學界及實務界清楚感受到，在東西方冷戰的國際局勢改變後，人權事務委員會積極擴張其解釋權、整合聯合國相關人權規範的高度企圖。(Steiner et al., 2007: 874) 經社文委員會在這個時期所作的一般性意見，更是如此。不但在篇幅上動輒以數頁、包括數十個文字段落，更重視一般性意見的結構，清楚闡述公約所保障權利的定義、締約國在此一權利下的各項具體義務、何種情況即可視為是締約國義務的違反。¹⁷ 在其他國際公約及各種軟法文件的直接適用或引用上，也是相當積極。¹⁸

最值得我們注意的是，經社文委員會在這段期間的一般性意見中，已經主動注意到經濟社會文化人權的內國落實問題。在第 9 號一般性意見中，經社文委員會特別直接引用〈維也納條約法公約〉第 27 條規定，明白指出締約國不得援引國內法規定為藉口而不履行條約。雖然 ICESCR 第 2 條對締約國履行公約的方式，採取了「以一切適當方法」的文字，來給予締約國比較寬廣及靈活的彈性，但這並不表示締約國就完全沒有必要修改內國法令政策，以實現公約所要求的義務。¹⁹ 同時，委員會也援引〈世界人權宣言〉第 8 條及 ICCPR 第 2 條第 2 項中權利必須受有效司法救濟的規定，認為在經濟社會文化權利受侵害時，如果不能以司法救濟作為輔助或補充的手段，很難認定該權利已受有效保障。委員會在本號一般性意見中，清楚明列出可在內國直接受司法救濟的經濟社會文化權利，也要求各國法院應該在內國管轄相關案件時，引述公約的權利及規定。²⁰

消除婦女歧視委員會在這段期間所作的一般性建議，也不例外。其中最重要的可以說是第 19 號及第 21 號一般性建議。在第 19 號一般性建議，委員會將對婦女的暴力行為(violence against women)，直接以 CEDAW 第 2 條規定認為是一種「嚴重阻礙婦女與男子平等享受權利和自由的歧視」，並詳列各種行為類型，

及實現的情況。甚至對少年犯人的待遇，該意見也提到締約國必須表明其是否遵行〈聯合國少年司法最低限度標準規則〉(又稱 1987 年的北京規則)。參見第 21 號一般性意見，第 5 段及第 13 段文字。

¹⁷ 在本時期所作一般性意見中，體系最完整的就是針對 ICESCR 第 11 條取得足夠食物的權利所作的第 12 號一般性意見，以及針對第 13 條受教育權所作的第 13 號一般性意見。

¹⁸ 例如，在第 4 號一般性意見針對 ICESCR 第 4 條適足住房權的解釋上，委員會就參考了〈無家可歸者收容安置國際年〉大會所通過有關全球住房戰略的決議(第 2 段、第 15 段)、〈住房保健原則〉(第 8 段)。第 5 號一般性意見針對身心障礙者的權利，委員會對於何謂「身心障礙」一詞的定義，就認為應該參考 1993 年的〈身心障礙者機會均等標準規則〉(第 3 段)，同時也參考了〈兒童權利國際公約〉、〈非洲人權和人民權利憲章〉、〈美洲人權公約經濟社會文化權利附加議定書〉的相關條文(第 6 段)。第 6 號一般性意見中，關於老人的定義，直接採用聯合國大會相關決議的術語(第 9 段)，而對老人權利的保障，也引述聯合國大會 1991 年所通過的〈聯合國老年人原則〉，認為此一原則的相關內容與 ICESCR 所確認的各項權利密切相關(第 4 段)。第 7 號一般性意見針對強迫驅逐的問題，再次引用全球住房戰略(第 2 段)。第 8 號一般性意見則引用兒童權利公約及世界人權宣言，來說明締約國尊重國際規範的義務(第 8 段)。

¹⁹ 參見第 9 號一般性意見，第 3 段文字。

²⁰ 參見第 9 號一般性意見，第 3 段、第 10 段及第 13 段文字。

要求締約國予以禁止，以確保婦女的權利。在第 21 號一般性意見，針對女性在婚姻與家庭關係中的平等，委員會清楚羅列出 CEDAW 所有相關條文，具體闡述這些權利關係中的性別平等。

三、公約內容的體系化與完整化

1990 年代末期、乃至新的千禧年來臨，全球重視人權的民主憲政國家達到史無前例的高峰，這也使人權事務委員會、經社文委員會及消除婦女歧視委員會在一般性意見的作成上，對公約所保障的權利內容，開始進行完整化及體系化的闡述，甚至以解釋來造法。(Black, n.d.: 9; Steiner et al., 2007: 873-336) 其中一個最重要的發展，就是人權事務委員會開始將其在個人申訴(individual communications)決定中²¹、或是審查各國國家報告的觀察結論(concluding observations)上²²，所表示的法律見解，直接作為一般性意見的內容，並且在註腳、甚至是一般性意見的本體中予以直接引用。

然而，個人申訴制度，並未見於 ICCPR，而是在第一任擇議定書(First Additional Protocol)中，截至目前為止，ICCPR 的 167 個締約國中，也只有 114 個締約國也同時加入了此一任擇議定書。²³ 而個人申訴制度，是指加入此一任擇議定書的締約國，允許其人民在受公約所保障權利受侵害、用盡內國救濟程序後，向人權事務委員會提出申訴，而委員會可認定系爭締約國是否確有違反公約權利保障規定之情事。如前所述，ICCPR 的締約國，不一定加入第一任擇議定書；而即使加入第一任擇議定書的國家，如果不是系爭個人申訴案件的當事國，亦不受委員會具體決定的拘束。委員會將其在個人申訴決定中所表示的法律見解納入一般性意見的結果，將使非第一任擇議定書、以及非受申訴國的國家都會受到其在個案中所表示法律見解的實質拘束。而委員會將其對特定國家的國家報告審查結論中所表示的法律見解，也納入一般性意見中，同樣有類似的問題。

人權事務委員會這種將個人申訴或國家報告觀察結論所表示的法律見解納入一般性意見的作法，從 1994 年第 23 號一般性意見開始，逐步成為其作成一般性意見的常態，也實質上擴張了其權限，將其在解釋公約、審查國家報告及作成個人申訴決定的各個權力面向作了有機結合。透過這樣的方式，人權事務委員會可以說讓自己從一個委員會的身分，逐步走向實質的人權法院，實質建構其作為 ICCPR 最終司法權威解釋機構的地位。

²¹ 人權事務委員會第一次引用其在個人申訴案件中所表示的法律見解，就是在 1994 年所作關於 ICCPR 第 27 條少數族群權利的第 23 號一般性意見(第 4 段及第 5 段文字及其腳註)。自此之後，人權事務委員會即將個人申訴案件的引用視為常態，在第 28 號針對男女權利平等所作的一般性意見中，個人申訴案件的引用甚至已經出現在本文(第 32 段)。

²² 例如，第 29 號關於緊急狀態下公民與政治權利是否得以減損的一般性意見，委員會就多次具體引用其對相關締約國國家報告審查的觀察結論(第 3 段、第 7 段、第 16 段、第 17 段文字及其腳註)。

²³ ICCPR 第一任擇議定書的締約國，參見 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en

除了將其在個人申訴及國家報告審查結論中所表示的法律見解納入一般性意見之外，近年來人權事務委員會對於 ICCPR 公約所保障權利的效力及公約的拘束力，也出現突破性的見解。²⁴ 其中最重要的就是第 24 號、第 26 號、第 29 號及第 31 號的一般性意見。

在 1994 年的第 24 號一般性意見中，人權事務委員會首次針對締約國對公約部分條款加以保留的作法，作出完整的闡述，並進一步劃出保留的界線。委員會透過一連串包括強行國際法論述在內的法律論證，具體指出有些公約條款是不可保留、或在特定情況下不能予以保留。²⁵ 委員會從公約的目的及功能(object and purpose of treaty)來決定保留的界限，甚至提到其自身基於公約第 40 條規定，所享有的解釋公約的權限，就是為達公約目標實現所不可或缺的條文，因此也屬於不可保留的部分！由於 ICCPR 並沒有明文限制締約國的保留，本號一般性意見的作成也引發委員會透過解釋來加以造法的爭議及討論。(Nowak, 2005: XXXI-XXXIII; Steiner et al., 2007: 886-888)

在 1997 年的第 26 號一般性意見中，委員會作風更形大膽。當時面對的問題是，前南斯拉夫解體後的各國，是直接繼受前南斯拉夫的締約國地位？抑或必須重新加入公約？人權事務委員會在本號一般性意見特別指出，ICCPR 之所以沒有廢止或退出公約的相關規定，就是因為「公約所保障的各項權利是屬於締約國領土上的人民。一旦人民在公約下獲得保障，此一保障即隨領土轉移並持續歸屬於人民所有，不論締約國政府是否更迭、解體成一個以上的國家或國家繼承」，都不影響人民繼續享有公約權利的保障。」人權事務委員會此一見解，明顯使 ICCPR 的規範地位更形崇高，但同樣引發解釋造法的爭議。

同樣地，在 2001 年的第 29 號關於緊急狀態下的人權保障是否可以減損的一般性意見中，人權事務委員會用了將近八頁的篇幅，來闡述 ICCPR 第 4 條所定不得扣減的權利(non-derogable rights)與絕對法(jus cogens)間的關係。委員會認為 ICCPR 所列在緊急狀態下不得減損保障的權利，雖然不能直接就認為等同於強行國際法的內容，但確實與其有關；而且第 4 條將這些權利定位為是不得扣減的權利，也有助於這些權利被認定為是強行國際法或絕對法的內容，尤其是第 6 條關於生命權及死刑、第 7 條關於酷刑禁止的規定。更重要的是，委員會甚至進一步闡述，認為即使是公約所並未列舉之不得扣減的權利，如構成強行國際法或絕對法之內涵，公約締約國亦不得因其並未列舉而於緊急狀態中予以限制，這樣的權利包括：違反國際人道法之劫持人質罪行、禁止集體懲罰(collective punishments)、禁止人權之恣意侵害(arbitrary deprivations of liberty)、禁止違反受公平審判權利保障之核心內容（如無罪推定原則）(deviating from fundamental

²⁴ 當然，這些見解也在國際人權法學界引起了相當多的爭議及討論，參見 HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS 875 (3rd ed., 2007): 886-890.

²⁵ 第 24 號一般性意見，第 6 段、第 8 段及第 10 段文字。

principles of fair trial)。²⁶ 很顯然地，這又是委員會再一次地以解釋造法，實質擴張 ICCPR 第 4 條的權利保障範圍。

2004 年人權事務委員會所作成的第 31 號一般性意見，是對透過一個完整的體系化方式，來清楚闡釋 ICCPR 締約國基於公約第 2 條所應負擔的義務。委員會不但強調締約國政府的所有部門，包括行政、立法及司法，以及地方政府，均有義務必須實現締約國的公約義務²⁷，甚至還首次強調了締約國在領土外也可能承擔的義務(extra-territorial application)。²⁸ 人權事務委員會還特別強調了締約國司法部分在內國實現公約的義務包括：直接在內國執行公約的權利，或在適用內國法律時援引公約來予以解釋。²⁹ 這也是委員會首次對締約國司法部門應積極適用或援引公約作為規範依據的清楚表態。

如果我們認為人權事務委員會在近年透過一般性意見，對 ICCPR 規範內容的解釋造法，已達顛峰；那我們會更驚訝於經社文委員會在一般性意見上所作規範型塑的大幅進展。從 2000 年第 14 號關於健康權的一般性意見開始，經社文委員會就透過完整化及體系化闡釋 ICESCR 權利，實質擴增了其權利內涵及保障程度。在第 14 號一般性意見，經社文委員會對公約第 12 條健康權規定範圍給予清楚定義，同時對平等、不歧視享有健康權、健康權的性別觀點、健康權的保障與特定族群包括女性、兒童青少年、老年人、身心障礙者及原住民等，均鉅細靡遺加以闡釋。更重要的是，委員會清楚指出締約國對於健康權保障實現的內國及國際義務，並進一步劃出核心義務的範圍，具體指出國家可能違反此一權利保障的情況，甚至對國家如何於內國具體實現相關義務的政策、制度、指標等方法，都逐一予以羅列。這樣一個完整化及體系化的解釋方式，繼續出現在接下來第 16 號關於男女平等享有經濟社會文化權利、第 18 號關於工作權、第 19 號關於社會權、第 21 號關於文化權等一般性意見中，而逐步成為常態。經社文委員會採行此種完整化及體系化的闡釋方式，在在都是要打破一般人對經社文權利是無法立即要求國家予以實現的錯誤印象。

2002 年經社文委員會所作第 15 號一般性的意見，透過解釋 ICESCR 第 11 條及第 12 條規定而創設出水權(right to water)的保障，更是被認為這一波解釋造法的顛峰。在該意見中，委員會開宗明義就指出人民享有乾淨、充足的水權(right to water)，是一項不可缺少的人權，不但是維持有尊嚴生活的必要條件，也是其他人權獲得實現的前提。³⁰ 確保人民得以取得充足、安全的水，是立即生效的國家義務，也是每個國家在加入公約之後就必須立即採取的措施，不會因為區

²⁶ 第 29 號一般性意見，第 11 段文字。相關討論，亦可參見張文貞，〈國際人權法與內國憲法的匯流：臺灣施行兩大人權公約之後〉，收於社團法人臺灣法學會主編：《臺灣法學新課題（八）》，台北：元照出版，頁 1-26（2010）。

²⁷ 第 31 號一般性意見，第 4 段文字。

²⁸ 第 31 號一般性意見，第 10 段文字。

²⁹ 第 31 號一般性意見，第 15 段文字。

³⁰ 參見 ICESCR 第 15 號一般性意見，第 1 段文字。

域、國家、文化而有所不同。³¹

消除婦女歧視委員會跟人權事務委員會及經社文委員會一樣，也在近年表現出積極透過一般性意見完整化及體系化 CEDAW 所保障的權利。這個趨勢不僅可以從其一般性建議篇幅的大幅成長，也可以從註腳的出現可以看出。

肆、一般性意見的規範地位與效力

從 ICCPR、ICESCR 及 CEDAW 條文中關於一般性意見或建議作成的依據來看，誠如許多論者已經指出，這些公約一開始完全無法預期到後來人權事務委員會、經社文委員會及消除婦女歧視委員會在作成這些一般性意見及建議上會有這樣精彩的論述，在公約權利解釋有如此完整化及體系化的發展。(Nowak, 2005: 748; Steiner et al, 2007: 886-888; Blake, n.d.: 33-34) 這也是當前國際人權法學界在論述一般性意見的規範地位與效力時，所不得不正視的巨幅改變。

一、拘束力有無之辯

多數國際人權法學者都會認為人權事務委員會、經社文委員會及消除婦女歧視委員會所作成的一般性意見及一般性建議，與公約本身的規範不同，對締約國並無傳統意義下的規範拘束力。(Black, n.d.: 33-34) 不過，多數學者也會很快地指出，這點並非毫無爭議，而且沒有如公約本身一般的規範拘束力，並不表示這些一般性意見的內容對於締約國就毫無拘束的可能。

何以如此？因為人權事務委員會、經社文委員會及消除婦女歧視委員會，都是各該公約的執行及監督機構，其等對於締約國國家報告的審查、加入第一任擇議定書國家的個人申訴的決定，都還是會依據其等在一般性意見及一般性建議中對於公約內容所作的闡述及已經表現的法律見解。從這個角度來說，主張一般性意見或一般性建議對締約國實現公約義務完全沒有拘束力，並非正確。只要各該委員會確切遵循其所作成的一般性意見或一般性建議，來監督各締約國的執行，這些一般性意見或一般性建議就還是對締約國有發揮規範上的拘束功能。從而，不論是否承認一般性意見的拘束力，即使是將一般性意見定位為僅具有軟法(soft law)地位的學者，也無法不正視這些一般性意見及一般性建議實質上所發揮的規範功能。

另外一個令人無法忽視一般性意見拘束力的原因在於這些一般性意見所處理的議題及其所使用文字的規範強度。如前所述，人權事務委員會在第 24 號針對公約的保留、以及第 26 號針對公約義務的延續性、第 31 號針對締約國的義務，均作成規範強度相當高的解釋，並仰賴習慣國際法及強行國際法作為其論述基

³¹ 參見 ICESCR 第 15 號一般性意見，第 37 段文字。進一步討論，參見，張文貞、呂尚雲，〈兩公約與環境人權的主張〉，《臺灣人權學刊》，創刊號，頁_- (2011)。

礎。基於這些論述基礎所形成的一般性意見，縱令其拘束力並非直接來自於作成此一一般性意見的 ICCPR 第 40 條，也會有來自強行國際法或習慣國際法的規範拘束力。(Black, n.d.: 26) 這也是何以近年來委員會愈來愈強調以強行國際法、習慣國際法或其他國際法上原理原則來強化這些一般性意見所作規範詮釋論據的原因。

二、權威解釋的確立

不論對一般性意見拘束力有無的主張為何，許多論者也無法不注意到這些一般性意見作為公約權威解釋地位，一再受到各個國際、區域及內國法院確認的趨勢。³² 歐洲法院(European Court of Justice)在 1990 年代末期開始就多次具體適用相關委員會的一般性意見。(Black, n.d.: 17) 美洲人權法院(Inter-American Court of Human Rights)也是多次在判決中直接適用相關委員會所作的一般性意見。(Black, n.d.: 18) 人權事務委員會所作的一般性意見，也受到前南斯拉夫特別國際刑事法庭的直接引用。(Black, n.d.: 19) 不僅如此，許多國家的內國法院，包括加拿大、英國、甚至是美國，以及我們鄰近的印度及香港，也會直接在個案中適用或引用各個委員會所作的一般性意見。(Black, n.d.: 20) 從這些實踐我們可以清楚看出，人權事務委員會、經社文委員會或消除婦女歧視委員會對於各該公約所作的一般性意見及建議，已經在跨國司法實踐上，穩穩地建立起其作為公約權威解釋的地位。

伍、結語：不只是參照、而須積極適用

我國兩公約施行法第 3 條規定：「適用兩公約規定，應參照其立法意旨及兩公約人權事務委員會之解釋。」從本文前述討論我們可以發現，本條有立法疏漏、甚至是立法錯誤的問題。事實上，ICCPR 的執行監督機構為人權事務委員會，其作成 ICCPR 相關的一般性意見。至於 ICESCR 的執行監督機構原本是經社理事會，後來授權經社文委員會，而 ICESCR 一般性意見的作成，均由經社文委員會為之。因此兩公約施行法所謂「兩公約人權事務委員會」的文字，應正確認為 ICCPR 的人權事務委員會及 ICESCR 的經社文委員會。³³

而兩公約施行法第 3 條所指的「解釋」，當然包括人權事務委員會及經社文委員會所作成的一般性意見。更重要的是，誠如前述討論所指出，這些委員會在近年的一般性意見中，也已經納入其等在審查締約國國家報告所作的觀察結論中、以及個人申訴案件決定中所表示的法律見解；委員會在這些觀察結論或申訴案件對公約所保障的權利所作的解釋，亦當然在本條所稱「解釋」的範圍內，我

³² 詳細探討，參見 Conway Blake, *Normative Instruments in International Human Rights Law: Locating the General Comment*, Working Paper Series, Center for Human Rights and Global Justices, New York University School of Law, at 16-23.

³³ 這一點亦經國內外多位學者專家所清楚指出。

國政府機關，尤其是法院，均應積極予以適用。³⁴

³⁴ 同樣地，CEDAW 施行法第 3 條所指「聯合國消除對婦女歧視委員會對公約之解釋」，也應作如此解。

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Evolving Law: General Comment as Authoritative Interpretations of Human Rights Covenants

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Abstract

Taiwan ratified both International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights in March 2009. At the same time, an Implementation Act was passed to make all of the rights enshrined in the two Covenants directly applicable in the domestic legal regime, having become effective in December 2009. This Implementation Act further demands the applications of the two Covenants to be made reference to the interpretations by the respective instruments. It is thus worthy of analysis on what are these “interpretations” and their legal status and effect. Beginning in the 1980s, the human rights committee, the committee on economic, social and cultural rights, and the committee on the elimination of discriminations against women all have issued “General Comments” or “General Recommendations.” This article is aimed to analyze the legal basis, the evolving functions, and the legal status and legal effects of these general comments and recommendations, and provide suggestions on how these comments and recommendations should be resorted to in the domestic legal system of Taiwan.

Keywords

the Two Covenants, General Comments, General Recommendations

I. Introduction

Taiwan ratified both International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights in March 2009. At the same time, an Implementation Act was passed to make all of the rights enshrined in the two Covenants directly applicable in the domestic legal regime, having become

effective in December 2009. Article 2 of such Implementation Act gives all of the rights enshrined in the two Covenants the domestic legal status. Article 3 further demands that applications of the two Covenants make reference to their legislative purposes and interpretations by the Human Rights Committee.¹

Earlier, in February 2007, our government also ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the initial state report was released in 2009. This year, an Implementation Act on CEDAW was passed, which also gave gender equality rights specified in the convention the domestic legal status and demanded domestic applications make reference to interpretations by the committee on the elimination of discriminations against women (cedaw).

Based upon these two implementation acts, interpretations by human rights committee, committee on economic, social and cultural rights (cescr) and cedaw are to be made reference to in the domestic application of the rights in the two Covenants and CEDAW. It is thus worthy of analysis on what are these “interpretations” and their legal status and effect. Beginning in the 1980s, the human rights committee and cescr have since issued “General Comments,” and cedaw “General Recommendations.”² Are these comments or recommendations meant to be interpretations that must be made reference to in the two implementation act? What are the legal basis, functions, legal status and effects of these comments or recommendations? This article is aimed to answer these questions and provide suggestions on how to apply these General Comments and General Recommendations in the domestic legal system of Taiwan.

II. Legal Basis of General Comments

While the human rights committee, cescr and cedaw all have issued general comments or general recommendations, the legal basis on which these instruments are issued vary from one to another.

1. ICCPR

Article 28 of the ICCPR creates a human rights committee to carry out the

¹ The Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, English text of which is available at <http://www.humanrights.moj.gov.tw/lp.asp?CtNode=30637&CtUnit=10696&BaseDSD=7&mp=200>

² ICCPR: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>, ISESCR: <http://www2.ohchr.org/english/bodies/cescr/comments.htm>

functions for the implementation of the ICCPR. Article 40, Section 1 of the same instrument obligates its member states to submit state reports on the measures they undertake to implement the ICCPR rights. Section 4 of such article stipulates: “*The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties.*” This has been thought as the legal basis on which the human rights committee issued General Comments.

One question rose as to the nature of these comments and to whom these comments were to be made in the beginning. It was quickly resolved due to the last-minute addition of the term “general” prior to “comments,” (Steiner, Alston & Goodman, 2007) and the human rights committee concluded that general comments are to be issued to all member states based upon its general findings on the Covenant’s implementation.³ (Steiner et al., 2007) This view was later accepted also by cescr and cedaw. The human rights committee issued the first general comment in 1981, and up till the end of November 2011, it has altogether issued 34 general comments.⁴

2. ICESCR

The United Nations Economic and Social Council (ESC) was made to the initial machinery that directly supervised the implementation of ICESCR. Thus, Article 16 of the ICESCR directs copies of the state reports to be transmitted to the ESC, and Article 21 authorizes it to “*submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.*”

In 1985, the ESC decided to create the Committee on Economic, Social and Cultural Rights (cescr) to carry out the functions for the implementation of the ICESCR.⁵ Two years later, in 1987, the ESC made explicit that the cescr was to render “recommendations of a general nature” stipulated in Article 21 of the ICESCR in the form of General Comment.⁶ In 1989, the cescr issued the first general comment,

³ See also MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 748 (2nd Revised Edition, 2005).

⁴ These general comments are available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>

⁵ Economic and Social Council resolution 1985/17, available at <http://www2.ohchr.org/english/bodies/cescr/> (last visited Nov. 28, 2011)

⁶ Economic and Social Council resolution 1987/5, available at <http://www.radicale.it/exagora/resolution-1987-5> (last visited Nov. 28, 2011)

and has since issued altogether 21 general comments.⁷

3. CEDAW

It is worthy of noting that Article 17 of the CEDAW also create a committee on the elimination of discriminations against women (cedaw) for the instrument's implementation. Article 18 authorizes the cedaw to study the state reports submitted to it, and Article 21 authorizes it to issue suggestions and general recommendations. The cedaw issued the first general recommendation in 1986, and has since issued 28 general recommendations.⁸

III. The Evolving Functions of General Comments

The initial function of general comments under the two Covenants or general recommendations was to facilitate the writing and submission of state reports. However, this rather narrowly defined initial function has over time evolved into more sophisticated interpretative functions and even to progressive law-making functions. (Black, n.d.: 9, Steiner et al., 2007: 873-876) (Table 1)

Table 1 The Evolving Functions of General Comments

	ICCPR	ICESCR	CEDAW
Facilitation of the submissions of state reports	GC01 (1981) - GC15 (1986)	GC01 (1989) - GC03 (1990)	GR01 (1986) - GR13 (1989)
Clarification & interpretation of the instrument	GC16 (1988) - GC22 (1993)	GC04 (1991) - GC13 (1999)	GR14 (1990) - GR22 (1995)
Comprehensive interpretation of the instrument as well as law-making	GC23 (1994) - GC34 (2011)	GC14 (2000) - GC21 (2009)	GR23 (1997) - GC28 (2010)

Source: by author⁹

1. Facilitation of state reports submission

Initially, general comments were made to facilitate the submission state reports. General Comments No.1 and No.2 by the human rights committee, General Comment No.1 by the cescr, and General Recommendations No.1 and No.2 were all issued for such purpose.

To facilitate submission of state reports, the committee may also clarify wordings or meanings of certain rights or provisions. However, in this initial period, the

⁷ These general comments are available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>

⁸ These general recommendations are available at <http://www2.ohchr.org/english/bodies/cedaw/comments.htm>

⁹ This table was made in some reference to Steiner's similar view. See Steiner, *id.* at 878-84.

authority of the committees¹⁰ to interpret these instruments was not yet firmly established, and as a result, the attitude of the committees towards general comments or recommendations was rather “conservative” which was clearly observable in the length of these comments. These general comments were often very short, no more than one page and adopted formalistic and simplistic method of interpretation if so required. (Steiner et al., 2007: 878-880)

Short in length notwithstanding, the committees quickly issued quite a number of general comments or recommendations: 11 for the human rights committee in just two years between 1981 and 1983, and 13 for the cedaw in three years between 1986 and 1989. The speed in the issuance of these comments was clear evidence of the attempt by the committee in establishing their own institutional interpretive authority. (Steiner et al., 2007: 877)

2. Clarification and interpretation of the respective instruments

Beginning in the mid-1980s, along with the new global wave of democratic transitions following, the collapse of the communist regimes in the former Soviet Union and Eastern Europe, all three committees began to liberate their past rather conservative attitude in issuing general comments or recommendations.

For example, general comments issued by the human rights committee during this period not only directly addressed the concept, scope and limitation of the rights within the ICCPR but also began making references to other conventions and international rights instruments¹¹ such as the Convention on the Elimination of All Forms of Racial Discrimination (CERD) or CEDAW and even to non-binding international soft laws.¹² This cross-reference to other international human rights instruments certainly enriches quite substantially the rights enshrined in the ICCPR. And more importantly, it indicates the ambitions of the human rights committee to take the lead in integrating and even harmonizing various human rights instruments within the United Nations. Yet not all member states to the ICCPR are member states to other human rights instruments of the United Nations, cross-referencing thus may come under criticism as it creates extra burdens borne by member states. (Steiner et

¹⁰ For the convenience of writing, the committees hereinafter point to all three committees including the human rights committee, cescr, cedaw.

¹¹ For example, General Comment No.18 addresses the concept of discrimination by making reference to CERD and CEDAW.

¹² For instance, in General Comment No.21, references were made to the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982), and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the Beijing Rules (1987). G.C. No.21, paras. 5, 13.

al., 2007: 874)

Like the human rights committee, the cescr also began issuing lengthy general comments. These comments articulated the ICESCR rights in a very systematic and well-structure fashion. They typically included a clear definition of the right, the scope of the right, the obligations states must bear under such right and the articulated situations where states can be found as violating such a right.¹³ Similar to the cross-referencing method employed by the human rights committee, the cescr also made references or even directly applied other international human rights instruments.¹⁴

Also noteworthy was the focus on the domestic implementation of economic, social and cultural rights by the cescr during this stage. In General Comment No.9, the cescr makes reference to Article 27 of the Vienna Convention on the Law of Treaties of 1969¹⁵ to affirm the obligations that member state must bear under the ICESCR, and makes it explicit that the wording of “by all appropriate means” in Article 2 does not immune states from core obligations.¹⁶ In addition, the right to judicial remedy on social, economic and cultural rights was strongly emphasized. The key reference was made to Article 8 of the Universal Declaration of Human Rights, according to which “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Compared to Article 2, Section 3 of the ICCPR that obligates states to provide judicial remedies for civil and political rights, the ICESCR has no such explicit demand. Yet the cescr emphasizes that if states fail to provide any domestic legal remedies for violations of economic, social and cultural rights, they “would need to show either that such remedies are not ‘appropriate means’ or that, in view of the other means used, they are unnecessary.” For the cescr, the other means used are more likely to be rendered “ineffective if they are not reinforced or complemented by judicial remedies.” In this comment, the cescr also advice courts to

¹³ The best examples are General Comments No.12 regarding right to food, and No. 13 on right to education.

¹⁴ For instance, in General Comment No.4 on right to adequate housing, referencing was made to the Global Strategy for Shelter to the Year 2000 adopted by the General Assembly in its resolution 42/191 of 11 December 1987 (paras.2, 15). In General Comment No.5, on the term of “disability”, the cescr adopted the definition in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (para.3), and references were also made to the Convention on the Rights of the Child (art. 23); the African Charter on Human and Peoples' Rights (art. 18 (4)); and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (art. 18) (para.6).

¹⁵ Article 27 prescribes that “[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”

¹⁶ GC/CESCR No.9, para.3.

make reference to ICESCR rights in their domestic application.¹⁷

This progressive attitude in interpreting rights was made no exception to the cedaw. Among all general recommendations, most critical were General Recommendations No. 19 and 21. The former defines “*gender-based violence*” as “*a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men*” and hence demands states to provide for effective measures to deal with this form of discrimination against women.¹⁸ The latter focuses on women’s equality in marriage and family relations, and points to all relevant provisions to construe a comprehensive protection.¹⁹

3. Provision of comprehensive interpretation & law-making of the respective instrument

At the turn of this new millennium, the number of constitutional democracies reached to an unprecedented peak, and even an International Criminal Court was about to assume functions. Faced with this new global environment that seems very friendly to the development of human rights, all three committees undertook an even bolder step in issuing their general comments and recommendations. These general comments and recommendations were aimed at providing systematic and comprehensive constructions –and at times even law-making– of the rights enshrined in both covenants and convention. (Black, n.d.: 9; Steiner et al., 2007: 873-876) Most important step was the inclusion –in footnotes or even in the main text– of legal opinions that the committees had expressed in individual communications²⁰ or concluding observations when reviewing state reports²¹ into these general comments.

However, the institution of individual communications was adopted not in the ICCPR but in its First Additional Protocol, to which only 114 of 167 member states to the ICCPR have so far acceded.²² The decisions that the human rights committee made in individual communications –along with the legal opinions expressed in these decisions– are binding only to the disputed states, rendering no effects on states outside the dispute, let alone states that are not parties to the additional protocol. The

¹⁷ GC/CESCR No. 9, paras.3, 10, 13.

¹⁸ GR/CEDAW No. 19, paras.1, 2.

¹⁹ GR/CECAW No. 21.

²⁰ The first time that the human rights committee cited its own legal opinion in the general comment was General Comment No. 23 regarding minority rights in Article 27 of the ICCPR (paras.4, 5 and footnotes). Since then it has become a standard practice. In General Comment No.28, the reference to the individual communication even appeared at the main text (para.32).

²¹ For example, in General Comment No.29 regarding non-derogable rights, the human rights committee refers many times to its own concluding observations (paras. 3, 7, 16, 17 and accompanying footnotes).

²² The number of state parties to the First Additional Protocol is available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en

same line of reasoning is also applicable to the concluding observations that the human rights committee expressed when reviewing any particular state reports, rendering no effect on other states. While it is plausible to distinguish decisions in individual communications from legal opinions expressed in those decisions and argue that the human rights committee are at its own interpretive discretion to apply its legal opinions whenever it sees fit, this practice nevertheless engenders certain controversy.

The human rights committee began referring to its own legal opinions expressed in individual communications and concluding observations in General Comment No. 23 and has since developed into a standard practice. This interpretive strategy has enabled the committee to integrate many faces of its own jurisdictions such as issuing general comments, reviewing state reports and adjudication in individual communications, and as a result substantially enlarge its own interpretive powers and perhaps also its institutional authority.

Aside from the expansion in interpretive powers, the human rights committee has also striven to strengthen normative superiority of the ICCPR. (Steiner et al., 2007: 886-890) Most important views were expressed in General Comment No.24, 26, 29 and 31. In General Comment No. 24, the human rights committee deals with the issue concerning reservations. It notes that the ICCPR “*neither prohibits reservations nor mentions any type of permitted reservation*”²³, but “*the absence of a prohibition on reservations does not mean that any reservation is permitted.*”²⁴ More importantly, the committee adopts the “object and purpose” test in deciding permissible or impermissible reservations. Under this test, reservations of non-derogable provisions are found offensive against objects and purposes of the ICCPR.²⁵ Equally found offensive is the reservation of the obligation to present state reports and have them considered by the Committee.²⁶ The human rights committee emphasizes its own role under Article 40 of the ICCPR, necessarily entailing interpreting powers and the development of jurisprudence. As a result, the committee boldly asserts that “a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of

²³ GC/CCPR No. 24, para.5.

²⁴ GC/CCPR No. 24, para.6. The Committee notes that, for example, reservation to article 1 denying peoples the right to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant. Equally, a reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis (article 2 (1)) would not be acceptable. Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (article 2 (2)). (para.9)

²⁵ GC/CCPR No. 24, para.10.

²⁶ GC/CCPR No. 24, para.11.

that treaty.”²⁷ Since the ICCPR stipulates no restriction on reservation, the human rights committee’s bold stand in General Comment No.24, making reservations of many provisions even including Article 40 regarding its own interpretive powers impermissible reservations, has unsurprisingly triggered debates. (Nowak, 2005: XXXI-XXXIII; Steiner et al., 2007: 886-888)

In 1997, the human rights committee issued General Comment No. 26 to give the ICCPR a normative superior status. The question was on continuity or discontinuity of ICCPR obligations after the collapse of Former Yugoslavia Republic. Noting that the ICCPR does not contain any provision regarding its termination nor provide for denunciation or withdrawal, the committee reasoned that:

“..the rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant. The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.”²⁸

Similarly, General Comment No. 29 illustrates non-derogable rights in states of emergency. By giving non-derogable rights listed in Article 4 a peremptory nature, the human rights committee asserts that the category of peremptory norms extends beyond this very list.²⁹ As a result, it will be up the interpretive power of the committee to decide if there are other non-derogable rights in states of emergency. Some of the examples are given such as “*acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.*”³⁰ This was again an evident exercise of interpretive law-making by the human rights committee.

The last but not the least example is General Comment No. 31 regarding the

²⁷ GC/CCPR No. 24, para.11.

²⁸ GC/CCPR No. 26, paras.4, 5.

²⁹ GC/CCPR No. 29, para.11.

³⁰ *Id.*

general legal obligation of member states to the ICCPR. The human rights committee interprets Article 2 into a systematic legal obligation member states must bear and implement through domestic legislative, executive and judicial mechanisms.³¹ Certain extra-territorial applications of the ICCPR rights are also in illustration.³² The Committee particularly emphasizes domestic courts' obligation to address claims of ICCPR rights violations under domestic law.³³

Evidently, the interpretive law-making function has become pivotal in the issuance of general comments by the human rights committee, and seems to be unsurpassed. Yet the recent general comments issued by the cescr seem to have achieved it even further. The first systematic and comprehensive interpretive approach was adopted by the cescr in General Comment No.14 of 2000 regarding the right to the highest attainable standard of health. This comment includes a clear definition of the right to health stipulated in Article 12 of the ICESCR, emphasizes equal and non-discriminatory enjoyment of this right, pays attention to disadvantaged groups and minorities such as women, the elderly, the disabled, children and indigenous for their rights, and mostly importantly points to specific obligations states must bear and varied approaches of implementation. This comprehensive method of interpretation continues in the following General Comments No. 16, 19 and 21. The cescr pays special attention to illustrating situations where states are deemed as violation of social, economic and cultural rights, facilitating their judicially enforceable nature.

Most radical interpretive law-making was the creation of the right to water by the cescr in General Comment No.15 of 2002. Based upon Articles 11 and 12 of the ICESCR, the committee asserts a human right to water that entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.³⁴ According to the committee, this right to water may also be derived from a number of international human rights instruments, most important among which are the right to life and human dignity.³⁵ Core obligations of states on the fulfillment of right to water are specified without distinctions of region, resources, economic developments or culture.³⁶

This bold attitude in interpretative law-making was also followed by various other international human rights committee including the cedaw. (Black, n.d.: 33-34) General recommendations issued by the cedaw since 1997 began to adopt the systematic and comprehensive interpretive approach and include numerous footnotes

³¹ GC/CCPR No. 31, para.4.

³² GC/CCPR No. 31, para.10.

³³ GC/CCPR No. 31, para.15.

³⁴ GC/CESCR No. 15, para.2.

³⁵ GC/CESCR No. 15, para.3.

³⁶ GC/CESCR No. 15, para.37.

in lengthy discussions.

IV. Legal Status and Effects of General Comment

As discussed earlier, the initial function of general comments or general recommendations was to facilitate the submission of state reports in the respective human rights instruments. The extension to interpretive or even law-making functions was undoubtedly beyond the original expectation. Yet it has been happening for more than a decade. (Nowak, 2005: 748; Steiner et al., 2007: 886-888; Black, n.d., 33-34) These evolving functions of general comments and general recommendations hence pose new challenges to the international human rights community in construing their legal status and legal effects.

1. The futile debate

The debate on the legal status and legal effects of general comments or general recommendations is easily divided. One traditional view is accorded with the initial function of general comments –facilitating submission of state reports– and hence gives these comments no legal effects and nonbinding to member states. (Black, n.d.: 33-34) However, the other view quickly points out self-contradicting logic in the traditional view and the evolving functions of general comments and general recommendations to support their legal authority.

For, if general comments are issued to facilitate submissions of state reports, to the extent these comments involve the understandings of the Covenants whereby states are obligated to comply and even submit in writing the extent to which of their compliance, these general comments insofar as clarifying and interpreting the commands of the Covenants and obligations states must bear cannot be deemed as without legal authority or completely non-binding. Hence, the evolving functions of general comments from facilitation to interpretation or even to interpretive law-making is only a natural development and in no way surprising.

In this view, these comments and recommendations are of legal authority and binding so long as states are binding to the respective instruments. Even if these comments or recommendations are to be defined as of no formal legal authority, in this view, they continue to possess de facto legal authority and binding to states that are obligated under the respective Covenants or human rights conventions. (Black, n.d.: 33-34)

Another important development to render the debate on legal status and effects of general comments futile is the normative superiority of the ICCPR and its general

comments articulated in General Comment No. 24, 26 and 31. Most important is General Comment No. 24, in which the human rights committee makes a reservation that rejects the interpretive authority of the committee as contrary to the object and purpose of the ICCPR and thus impermissible!³⁷ As the human rights committee, cescr and cedaw are accorded with supervisory functions to the implementation of the respective human rights instruments, they are likely to assert their interpretive authority over normative nature of their supervised instruments, rendering their interpretive products either de jure or de facto binding to their member states. (Black, n.d.: 26)

2. The Authoritative Interpretation

Notwithstanding various stands on their legal status and legal effects, general comments and general recommendations have over time earned and been confirmed with their superior interpretive authority across jurisdictions. When interpreting rights enshrined in these respective human rights instruments, many international or domestic courts have become accustomed to consulting these general comments or recommendations issued by the human rights committee, cescr and cedaw. (Black, n.d.: 16-23) Among those courts, most renowned were the European Court of Justice (Black, n.d.: 17) and the Inter-American Court of Human Rights. (Black, n.d.: 18) General comments issued by the human rights committee have been cited by the special tribunals on international humanitarian law. (Black, n.d.: 19) Domestic courts such as Canada, England, United States or even our neighboring jurisdictions such as India and Hong Kong also constantly referred to general comments or general recommendations in course of application or interpretation of relevant rights. (Black, n.d.: 20) As a result, general comments and general recommendations as authoritative interpretations of the rights enshrined in the respective Covenants and conventions have firmly established.

V. Concluding Remark: More than Reference

Article 3 of our Implementation Act on the two Covenants demands their applications to be made reference to interpretations by the Human Rights Committee. Based upon the above discussion, references demanded by this article include not only general comments made by the human rights committee but also those issued by

³⁷ GC/CCPR No. 24, para.11.

the committee on economic, social and cultural rights.³⁸

The interpretations by the respective committee are present at mostly their general comments or general recommendations as well as their legal opinions in concluding observations and in individual communications. These legal opinions are authoritative interpretations of the respective instruments and should be made reference to by our government especially our courts in course of their implementation and applications. Given the superior normative status of the two Covenants and the respective general comments, our government and especially courts should not only make reference to these authoritative interpretations but more importantly directly apply them.³⁹

³⁸ Article 3 of the Implementation Act may have committed a legislative error in writing down only the interpretations by the human rights committee. Yet, as most scholars in Taiwan agree, this mistake should not bar the references to general comments made by the cescr.

³⁹ The same can be said to the Implementation Act on CEDAW.

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兩公約與其施行法之適用與解釋—— 並評論我國實務運作之幾個事例

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摘要

我國於 2009 年經立法院審議通過兩公約及其施行法，以特殊模式使兩公約具有國內法效力後，對於國內法制產生一定衝擊。

依據兩公約施行法第 3 條之規定，適用兩公約時需參照立法意旨及條約專門機構之解釋，這讓國際人權法與國內法從此全面接軌，而解釋方法也必須以國際見解為據。再依據施行法第 4 條、第 8 條等規定，各級政府機關除了必須優先適用兩公約保障人權外，還必須於二年內檢討修正改進不符兩公約之法令與行政措施。從而兩公約及其施行法生效近二年來，國內「各級政府機關」到底運作如何？對於兩公約是否有正確的認識、適用與解釋？有無與如何適用一般性評議？本文特別列舉事例，認為行政與立法機關未依限完成法令檢討修正、總統府人權諮詢委員會錯解人權事務委員會之解釋、最高法院之裁判違反人權事務委員會之解釋意旨等等，足供政府引為殷鑑。

關鍵字

兩公約、兩公約施行法、法規檢討

壹、前言

我國於 1967 年簽署《經濟社會文化權利國際公約》及《公民與政治權利國際公約》(以下簡稱兩公約)，而在 42 年之後的 2009 年 3 月 31 日，立法院正式議決通過兩公約，同時訂定《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》¹(以下簡稱兩公約施行法)，以特殊的國內立法模式使兩國際人權公約具有國內法效力(廖福特，2010：45)，也讓我國法制自此與國際人權法接軌。

兩公約除了依據兩公約施行法第 2 條之規定取得內國法效力外，由施行法第 8 條：「各級政府機關應依兩公約規定之內容，檢討所主管之法令及行政措施，有不符兩公約規定者，應於本法施行後二年內，完成法令之制(訂)定、修正或廢止及行政措施之改進。」可知，兩公約關於人權保障之規定，有優於國內法律之效力，其他任何規範不得抵觸兩公約規定。

另外，由兩公約施行法第 4 條：「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。」²與第 3 條：「適用兩公約規定，應參照其立法意旨及兩公約人權事務委員會之解釋。」之規定觀之，所謂「各級政府機關」，立法者既無特別保留之表示，自然應當包括總統、行政、立法、司法、考試、監察等所有政府機關，而其在行使職權時，與兩公約所保障之人權有關的事項，都必須從國際人權法的角度切論，並應參照兩公約人權事務委員會之解釋(尤其是一般性評議 General Comments)，不能再以慣用的法制思維處理。

上述這種全新的國際公約內國法化模式，勢必對國內的法制運作產生重大影響。但兩公約施行法生效近二年來³，國內「各級政府機關」到底運作如何？對於兩公約是否有正確的認識、適用與解釋？有無與如何適用一般性評議？都頗值得國內學界深入研究與提出論述，讓實務界得以參酌，才能真正讓臺灣與國際人權接軌，落實人權保障。本文意在拋磚引玉，謹就筆者觀察到的一些實務運作，提出分析意見。

¹ 請參照立法院立法紀錄。<http://lis.ly.gov.tw/ttscgi/lgimg?@981401;0518;0526>。

² 兩公約施行法第 4 條所揭示國家有不侵害(不干涉)人權、保護人權不受私人侵害與積極促進實現人權的義務，與《公民與政治權利國際公約》第 2 條規定國家有尊重和保證《公約》權利的義務具有相同旨趣，Manfred Nowak 教授稱之為「國家義務的三重性」。

³ 兩公約於 2009 年 3 月 31 日立法院審議通過，總統於同年 5 月 14 日簽署批准書，後請友邦送交聯合國秘書長存放而遭退回，但兩公約施行法卻係在同年 12 月 10 日才生效，則在總統簽署批准書後至兩公約施行法生效之期間，兩公約究竟有無國內法效力？學者廖宗聖採肯定說。廖宗聖。2010。〈我國刑事裁判如何適用公民與政治權利國際公約—以最高及高等法院刑事裁判實證研究為中心〉。陳運財主編《刑事司法與國際人權公約學術研討會實錄》：134-136。台中：東海大學法律學院。

貳、兩公約之適用與解釋

一、兩公約於國內應如何適用

國際公約應如何在國內適用，向來有所謂包容模式（Incorporation）與變型模式（Transformation）二種不同之類型。採包容模式的國家一般是在憲法中直接承認公（條）約的國內效力，不需透過特別的轉換程序，即可直接適用公約於國內法秩序中；採變型模式的國家，則認為公約規定不能直接或自行適用於國內，必須經過「變型」（transformation）程序，轉化為國內法後，國內才能適用（許慶雄、李明峻，2009：31）。

而在我國，依據憲法第 38 條、第 58 條第 2 項與第 63 條之規定，國際條約經總統簽署後，再由行政院會議議決，並送至立法院審議通過，最後再由總統批准締結，經過此一程序後，依據大法官釋字第 329 號解釋所示「依上述規定所締結之條約，其位階同於法律」，是可推認我國應是採包容模式的國家。然而我國在退出聯合國後，國際地位甚為特殊，已無法依照國際多邊公約之規定存放批准書，在國際法上之生效要件不無爭議⁴，有必要另以法律規定公約在我國法律體系上之定位及效力⁵。因此，我國在批准兩公約後，另由立法院制定兩公約施行法明文使兩公約取得國內法效力，則此種模式又較近似於變型模式⁶。換言之，我國係採特殊之模式使公約取得國內法效力⁷，而這也衍生了接軌磨合的一些問題，本文將於後再為詳述。

⁴ 學者廖宗聖以 1974 年國際法院法國核子試爆案件中指出：「當作出宣言的國家意圖賦予該宣言法律承諾的特性…如果承諾公開的，而且意圖被拘束…在此種情況下，宣言生效不需憑藉條件交換，對宣言的接受或他國的反應…」之見解，認為我國對兩公約予以批准而受拘束的意圖，已符合「具體」、「公開」要件，亦當然產生國際法上的拘束力。同前註。

⁵ 同前揭註 1 之立法說明。另法務部曾提出對《「國際公約內國法化之實踐」委託研究報告》之對案建議，就我國失去聯合國代表權後常面臨條約批准書、加入書、接受書無法完成存放程序，致條約效力遭受質疑之問題，提出二種處理建議：1、於「條約締結法」（草案）中明定解決，因外交部 98 年修正版之「條約締結法」（草案）第 11 條第 1 項規定「定有批准、接受、贊同或加入條款之條約案，經立法院審議通過，咨請總統批准時，主辦機關應即送外交部報請行政院轉呈總統頒發批准書，完成批准手續或任何其他同意方式後，並互換或存放批准書、接受書、贊同書或加入書生效後，由總統公布施行。但情況特殊者，得由總統完成批准手續或其他同意方式後公布施行。定有接受或加入條款之條約案，亦同」依上開但書規定，不必完成存放即可公布施行，再配合同條第 4 項「條約經總統公布後，除條約另有規定其生效日期，於公布之日起算至第三日起發生國內法效力」之規定，已可解決上開無法存放及條約國內法效力之問題。2、隨所締結之條約制定施行法，於施行法中規定解決，上揭「條約締結法」（草案）規定，未完成立法前，我國參加之條約，如有上述無法存放之困難，建議參考「兩公約施行法」第 2 條明定「兩公約所揭示保障人權之規定，具有國內法律之效力」之模式，逐約制定施行法，並於施行法中明定該公約之規定，具有國內法律之效力。
<http://www.humanrights.moj.gov.tw/lp.asp?ctNode=30747&CtUnit=10724&BaseDSD=7&mp=200>。

⁶ 真正的變型模式，是要由簽署國的立法機關將條約內容重新制定成相關的法律，但我國的兩公約施行法並非此種模式之立法。

⁷ 英國在 1998 年通過人權法（Human Rights Act 1998）用以接軌歐洲人權公約（ECHR），其模式近似於我國用施行法銜接，但其後還是透過法院判決促進國會修正國內法以符合 ECHR，詳請參照翁國彥。2010。〈兩公約在我國法庭適用的潛能兼論李明璁教授被控違反集會遊行法事件〉。《THAR 報/THAR Pas》10 Spring：58。

二、兩公約的法律位階

兩公約施行法第 2 條固然解決了公約內國法化的問題，但兩公約除了效力問題外，還有法律位階上的問題。因為國際公約常常會與國內既有法令抵觸，此時公約與國內法應如何適用，是必須要解決的問題。雖然憲法第 141 條：「中華民國之外交，應本獨立自主之精神，平等互惠之原則，敦睦邦交，尊重條約及聯合國憲章，以保護僑民權益，促進國際合作，提倡國際正義，確保世界和平。」規定中之「尊重條約」之意義，曾有臺灣高等法院 79 年度上更（一）字第 128 號判決認為「...依憲法第 141 條『尊重條約』之規定，條約之效力應優於國內一般法律（參照最高法院 23 年上字第 1074 號判決）而居於特別規定之地位，故條約與內國一般法律抵觸時，依特別法優於普通法之原則，自應優先適用條約之規定」，而民國 72 年 2 月 21 日法務部（72）律字第 1813 號函也指出：「...復從憲法第一百四十一條精神以觀，條約與法律衝突時，似宜優先適用條約」，然而前述大法官釋字第 329 號解釋卻又明示「依上述規定所締結之條約，其位階同於法律」，是我國通說之見解固然認為條約在我國屬於特別法而應優先適用，但學者廖宗聖基於第 329 號解釋，主張亦應同時採後法優於前法之原則，也就是讓立法機關在認為必要時有權通過新的法律，解決與先前締結條約所發生之衝突（廖宗聖，2010：143-144）。

不過，兩公約施行法第 8 條：「各級政府機關應依兩公約規定之內容，檢討所主管之法令及行政措施，有不符兩公約規定者，應於本法施行後二年內，完成法令之制（訂）定、修正或廢紙及行政措施之改進。」之規定，似又明定了公約之優位性，因其立法說明為：「**兩公約所揭示之規定，係國際上最重要之人權保障規範**。為提升我國人權之標準，重新融入國際人權體系及拓展國際人權互助合作，自應順應世界人權潮流，確實實踐，進而提升國際地位，爰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，有不符兩公約規定者，應於本法施行後二年內，完成法令之制（訂）定、修正或廢紙及行政措施之改進。」⁸且如前述所謂「各級政府機關」應包括立法院本身，亦即立法院所制定之法律，不得有不符兩公約之情形，而這正是立法說明所稱之「人權之標準」。換言之，兩公約之位階依據兩公約施行法第 8 條已有如同「人權基本法」之優位性（廖福特，2009：226）。

不惟如此，學者張文貞更主張，依據國際人權法界及人權事務委員會之觀點⁹，兩公約的部分權利內容，已構成強行國際法或絕對法，而於國內法律體系的位階應等同於憲法。¹⁰因此，兩公約的法律位階應高於一般法律殆無疑義。

⁸ 同前揭註 1。

⁹ 依據兩公約施行法第 3 條：「適用兩公約規定，應參照其立法意旨及兩公約人權事務委員會之解釋」之規定，人權事務委員會之解釋亦有國內法效力。

¹⁰ 張文貞。2009。〈國際人權法與內國憲法的匯流—臺灣實施兩大人權公約之後〉。《臺灣法學會 2009 年學術研討會》。

三、兩公約之解釋與一般性評論

兩公約除了依據憲法第 38 條、第 58 條第 2 項與第 63 條規定之程序，以及立法院訂定兩公約施行法之模式，獲得優於一般國內法律之內國法效力外，更重要的是因此與國際人權法接軌，而必須從國際角度反向將國際人權思維灌注於國內法之中¹¹。也因此，國際人權公約的適用，勢必對國內既有的法律體系產生重大的影響，而首要面對的就是如何正確理解（解釋）公約。

一般在國內法體系中，最後的解釋判定者，是具有仲裁權威的司法機關，但在國際法上，多邊國際公約的權威解釋者，可能是條約專門機構。以兩公約而言，各自依據不同公約分別設有「經濟社會及文化權委員會」(Committee on Economic, Social and Cultural Rights) 與「人權事務委員會」(Human Rights Committee) 二聯合國專門機構，因此，關於兩公約條文的解釋，當然必須先參考這二個委員會的見解，也就是說這二個委員會所做的決定和其他決議在兩公約的解釋方面具有權威的地位 (Manfred Nowak, 2008: 10)。

在解釋的方法論上，依據人權事務委員會在 *Alberta Union v. Canada* 一案中之見解，《公民與政治權利國際公約》的解釋應遵循《維也納條約法公約》中所規定的一般解釋原則 (Manfred Nowak, 2008: 8)。有學者就《維也納條約法公約》第 31 條至第 33 條之規定參酌其他國際法解釋原則，整理出以下各原則，足供參考 (趙明義, 2011: 344):

- 不需要解釋者，不予解釋。
- 依善意及互信原則解釋。
- 依據字義及締約國的意旨解釋。
- 依據條約的目的與上下文義解釋。
- 依據合理與一致的原則解釋。
- 依據有效原則解釋。
- 依條約以外的補充資料解釋。

另外，在國際人權法上被普遍承認的人權條文解釋原則還有：對「權利」應作廣義的解釋 (*in dubio pro libertate*)，對「限制性規定」則應作狹義解釋 (Manfred Nowak, 2008: 9-10) 等等，均是兩公約解釋重要的參考原則。

在解釋的實際運作上，以人權事務委員會形成《公民與政治權利國際公約》之一般性評論¹²為例，通常是由四位委員組成一個工作小組，根據《議事規則》第 62 條規定，在委員會召開之前即開會一星期，除了對報告程序的其他職能預

¹¹ 從國內法的角度以觀，是「引進」國際人權思維，但依據兩公約施行法第 6 條及兩公約之國家報告制度，顯然會有國際關（灌）注的面向。

¹² 即《公民與政治權利國際公約》第 40 條第 4 項之一般評議。

作準備外，還會依據前述解釋原則起草一般性評論形成規則，並為這些一般性評論的具體表述提出建議。而經委員會決議通過後，即在各年度報告中發表（Manfred Nowak, 2008：777）。截至 2011 年 9 月 20 日止，《公民與政治權利國際公約》有 34 則一般性評論，《經濟社會文化權利國際公約》有 21 則一般性評論¹³。而因為一般性評論是由委員會大會通過，也就是經過不同傳統、文化、宗教、意識型態和法律制度背景的委員們討論協商而一致通過的，這增強了一般性評論的權威性與普遍性（Manfred Nowak, 2008：778）。

參、兩公約施行法之適用與解釋

如前所述，我國因國際地位特殊，必須另採用訂定兩公約施行法的模式，才能讓兩公約取得國內法效力。從而，除了兩公約條文本身的適用與解釋外，對於具有「橋樑法」性質的兩公約施行法，如何予以適用及正確理解，也應該有同樣的重要性。

一、兩公約施行法的效力

一般國內法律另定有施行法者，多在解決母法如何適用的問題，尤其是時的效力、是否溯及既往或適用範圍等等，而其亦遵循法律適用的一般原則，並具有強行法與普遍法等性質，乃屬當然。然而，兩公約施行法雖亦名為施行法，也確有兩公約應如何適用的條文，但自第 4 條起至第 8 條，均是以「政府」為規範對象，是則兩公約施行法另有其異於一般施行法之特性，對於「各級政府機關」而言，尤其有特別的強制規範效力，也就是說，「各級政府機關」應受兩公約施行法之特別拘束，以符合將兩公約作為人權基本標準之立法精神。

因此，「各級政府機關」原應依據兩公約施行法第 4 條之規定行使職權，則當司法機關未適用兩公約而為判決時，自屬判決違背法令（廖福特，2010：45）；而行政機關未依據兩公約行使職權時，其行政處分應屬違法，該公務員則屬違法失職，應受懲戒處分。換言之，兩公約施行法雖未特別規定違反時之效果，但其屬於強行法無庸置疑，故「各級政府機關」於違反時應受制裁。

二、兩公約施行法的一些疑義與解釋

兩公約施行法的最主要目的，是要讓兩公約具有國內法之效力，然而當其成為橋樑後，兩公約在國際人權法上之一些基本概念，也會衝擊我國既有的法律體系與觀念¹⁴，尤其兩公約施行法部分條文文義並不明確¹⁵，在接軌國際人權法概

¹³ 請參照兩公約施行監督聯盟網頁。<http://covenants-watch.blogspot.com/2010/12/3.html>。

¹⁴ 法務部為符合《公民與政治權利國際公約》及《消除對婦女一切形式歧視公約》規定，將民法第 973 條及第 980 條現行條文所定之男女訂婚最低年齡 17 歲及 15 歲、結婚最低年齡 18 歲及 16 歲，修正為男女最低訂婚皆為十七歲，結婚皆為十八歲，卻引來立法委員群轟，即為一例。<http://news.chinatimes.com/focus/50109892/112011110100101.html>。

¹⁵ 此外，亦有立法用語與公約文本不一致的情形。例如兩公約施行法第 3 條稱「人權事『務』委員會」，但《公民與政治權利國際公約》第 28 條則是稱為「人權事『宜』委員會」。

念後，究竟應如何理解與適用，實有待學界與實務界繼續研究。

例如，兩公約施行法第 2 條係規定：「兩公約所『揭示保障人權之規定』，具有國內法效力。」則兩公約條文中，與實體權利無關的規定¹⁶，是否也依該條而具有國內法效力？若謂「兩公約所揭示保障人權之規定」不包括「與實體權利無關的規定」，則顯然又與兩公約本身將「與實體權利無關的規定」作為「制度性保護」重要一環（Manfred Nowak, 2008：4）之見解矛盾。何況，依據兩公約施行法第 6 條之規定，政府的人權報告制度必須依據「兩公約規定」，是第 2 條所謂「揭示保障人權之規定」應無限制上¹⁷之意義，也就是說第 2 條應理解為：兩公約係保障人權之規定，而其全部具有國內法效力。

又兩公約施行法第 3 條規定：「適用兩公約規定，應參照其立法意旨及兩公約人權事務委員會之解釋。」而所謂「兩公約人權事務委員會」，應有錯誤，因為如前所述兩公約各自有監督之專門機構，一般稱之「人權事務委員會」僅監督《公民與政治權利國際公約》部分，

《經濟社會文化權利國際公約》係另有「經濟社會及文化權委員會」負責，而該二委員會針對各國提出之報告審查後，形成一般性評議之決議，固然為本條所稱「解釋」無疑，但在國際人權法一般概念上，人權事務委員會的權威解釋不僅含括一般性評議（General Comments），至少還包括審查各國報告之結論性意見（Concluding Observation）與個人來文之案例法¹⁸二者（廖福特，2010：45）（Manfred Nowak, 2008：10），故如認為兩公約施行法第 3 條所稱之「解釋」僅指一般性評議（General Comments），即與兩公約之國際運作不符。

再者，兩公約施行法第 4、5、7、8 條所稱之「各級政府機關」究為何義，學者已多有討論（廖福特，2010：45），而本文除了如前所述認為立法者既無特別保留之表示，自然應當包括行政、立法、司法、考試、監察等所有政府機關外，主要還是基於《公民與政治權利國際公約》第 2 條第 1 項之規定，對於國家應尊重與確保人權之義務，依據國際人權法的普遍觀念，認為包含國家「採取積極的立法、行政、司法和實際措施實施人權的義務」（Manfred Nowak, 2008：3），則我國法制下之行政、立法、司法、考試、監察等機關自然亦涵蓋在國家應尊重與確保人權義務之下，而此種解釋方法，即是從兩公約國際人權法之角度反向解釋國內法（所稱「各級政府機關」）之例，這也正是前述反向灌注與接軌磨合的問題，仍有待國內各界持續研究。

此外，還有一些不同語言文本翻譯及法律用語之問題，亦頗生困擾。例如依據我國中央法規標準法第 8 條規定，「條」下係先分「項」，然而國際人權法所使用的中文標準文本是簡體字版，而其用法是「條」下係先分「款」，又如「一般

¹⁶ 如《公民與政治權利國際公約》第 28 條以下關於聯合國人權事務委員會運作相關規定或《經濟社會文化權利國際公約》第 16 條以下關於國家報告之規定。

¹⁷ 即依前述「限制性規定作狹義解釋」之原則。

¹⁸ 所謂「個人來文之案例法」，即加入「第一任擇議定書」國家之人民向委員會申訴個案之決定。

性評議」簡體版稱為「一般性意見」，而其內容之簡體版翻譯用語亦與繁體字用語頗有差異，此一問題亦有待權責機關解決。

綜言之，兩公約經兩公約施行法賦予國內法效力後，就理解與解釋的範圍，不再僅侷限於國內法慣用概念上，還包括反向解釋的可能，而不僅兩公約在翻譯與文本的選擇上，還有待決定，兩公約施行法本身也有諸多疑義尚待釐清，惟不論如何，都必須依國際人權標準做合宜的處置。

肆、我國實務運作案例之觀察與檢討

兩公約及其施行法自 2009 年 12 月 10 日生效施行至今，將近二年。兩公約施行監督聯盟曾於 2010 年 12 月 10 日提出《一年又七個月來政府落實兩公約及其施行法之檢討》¹⁹報告，筆者於附錄 2 中撰有〈兩公約施行一年來司法判決之觀察〉，就兩公約施行一年時，各級法院對於兩公約應用之情形，提出觀察心得，當時之結論為各級法院對於國際人權法相當陌生，適用兩公約之比例極低。如今又經過將近一年，法院適用兩公約作為判決理由之情形已逐漸提高，但仍未見有在判決書中論述一般性評論者²⁰，是法院實務運用還未盡如人意，司法實務界應持續開展兩公約的論述。本文不擬再全面檢視各級法院適用兩公約之判決，而將挑選明顯違反兩公約或其施行法的行政、立法、司法作為（或判決）事例，檢討其對於兩公約及施行法適用與解釋之錯誤。

一、行政機關與立法機關並未依兩公約施行法第 8 條完成法令之檢討修正

行政院為因應兩公約及其施行法之施行，曾核頒「人權大步走計畫」，並依據兩公約施行法第 8 條：「各級政府機關應依兩公約規定之內容，檢討所主管之法令及行政措施，有不符兩公約規定者，應於本法施行後二年內，完成法令之制（訂）定、修正或廢止及行政措施之改進。」之規定，清查不符兩公約規定之法令及行政措施後，認為有 219 項不符兩公約，而製作清冊追蹤管考²¹，要求於 2011 年 12 月 10 日前修正或改進完畢。然而，由法務部向立法委員所提之報告統計²²，已確認有編號第 53 號之「監督寺廟條例第 8 條」、第 65 號之「集會遊行法第 9 條」、第 70 號之「人民團體法」、第 75 號之「工業團體法」、第 107 號之「商業團體法」、第 147 號之「集會遊行法第 4 條」、第 177 號「監督寺廟條例第 12 條」、第 190 號「消防法第 19 條」、第 196 號「建築師法第 4 條」與第 197 號「消防法第 7 條第 3 項」等應修正之法律，無法依限在 2011 年 12 月 10 日前修正完成而

¹⁹ <http://www.tahr.org.tw/files/2010report.pdf>。

²⁰ 台北高等行政法院 100 年度停更一字第 1 號裁定，係由律師引用一般性評論作為論述理由之第一個案件。

²¹ <http://www.humanrights.moj.gov.tw/lp.asp?ctNode=27273&CtUnit=8930&BaseDSD=7&mp=200>。

²² 法務部 2011 年 8 月 19 日提交立法院之「219 則違反兩公約未修正完成之【法律案】、【命令案】及【行政措施案】檢討進度評估」參照。

確定跳票²³。

惟如前所述，兩公約施行法第 8 條所指之「各級政府機關」，應包含總統、行政、立法、司法、考試、監察機關，然而行政院在清查不符兩公約規定之法令及行政措施時，並未見立法或監察機關同時清查不符兩公約規定之法令及行政措施²⁴。何況所謂「完成法令之制（訂）定、修正或廢止」，並非僅依靠行政機關提出法律修正草案即完事，還須待立法機關審議通過，故上開無法依限完成法律修正之責任，應由行政與立法機關共同承擔。

二、總統府人權諮詢委員會 2011 年 4 月 12 日第三次委員會案三之會議結論錯解人權事務委員會之解釋

我國自 2006 年停止死刑執行 4 年後，於 2010 年 4 月 30 日再次執行張俊宏等四人之死刑，對此，臺灣廢除死刑推動聯盟質疑各該死刑犯均已向總統提出赦免或減刑之請求，法務部長在總統未駁回其赦免或減刑之請求前即執行死刑，已違反《公民與政治權利國際公約》第 6 條第 4 項，係屬違法執行²⁵。總統府人權諮詢委員會委員黃默、李念祖與李永然三人也針對我國現行《赦免法》對於死刑犯請求赦免時，未有權利行使與回應程序之相關規定，認為該法是否符合《公民與政治權利國際公約》第 6 條第 4 項不無疑義，乃提請總統府人權諮詢委員會討論。案經總統府人權諮詢委員會 2011 年 4 月 12 日第三次委員會作成案三之決議：「一、聯合國人權事務委員會既認為公民與政治權利國際公約第 6 條第 4 項並未指定行使寬赦特權的模式，而賦予締約國廣泛自由裁量權，則我國赦免法已提供被告尋求赦免之機會，且未排除受死刑宣告者請求赦免之權利，並無抵觸公民與政治權利國際公約第 6 條第 4 項之規定。二、惟兩公約施行後，是否應參考德、日、美立法例，設置赦免審議委員會或其他機制，請法務部邀請學者專家審慎研議，檢視赦免法有無進一步修正之必要。」²⁶然而其中所謂「聯合國人權事務委員會既認為公民與政治權利國際公約第 6 條第 4 項並未指定行使寬赦特權的模式，而賦予締約國廣泛自由裁量權...」顯有誤解人權事務委員會解釋之情事，茲分析如下：

1、聯合國人權事務委員會在肯尼迪 v. 特立尼達和多巴哥（Kennedy v. Trinidad and Tobago）一案中，就申訴人之辯護律師主張《公民與政治權利國際公約》第 14 條所規定的程序保障，應適用於尋求赦免和減刑的程序，委員會就此則認為第 6 條第 4 款的措辭並沒有指定行使寬赦特權的模式，因此締約國在這方面具有自由裁量權（Manfred Nowak, 2008: 152）。然細譯其全文而前後對照，可知人權事務委員會的意思是指尋求赦免和減刑的程序不必與訴訟審判程序有

²³ 此為政府機關自認不符兩公約之法律而確定跳票之部分，並不包含民間團體認為不符兩公約之集會遊行法、勞資爭議處理法、刑事訴訟法等等，均確定無法於 2011 年 12 月 10 日前檢討修正。

²⁴ 見前揭註 19。

²⁵ 《抗議法務部違法執行》。2010。 <http://www.taedp.org.tw/index.php?load=read&id=683>。

²⁶ <http://www.president.gov.tw/Default.aspx?tabid=1328&itemid=24784&rmid=3655>。

相同的保障密度，而可由締約國自由裁量，但委員會從未宣稱：尋求赦免和減刑的程序可以任由國家決定是否回應，縱不回應也不違反《公民與政治權利國際公約》第 6 條第 4 項。

2、人權事務委員會反而是在穆本哥 v. 扎伊爾 (Mbenge v. Zaire) 一案中，就《公民與政治權利國際公約》第 2 條第 3 項第 1 款之情形指出，如果一個締約國所提供的補救辦法是無效的，如在決定是否赦免方面給予政治機構無限制的自由裁量權，那麼它就沒有實現其根據第 2 條所承擔的義務 (Manfred Nowak, 2008: 66)。從這項人權事務委員會解釋可以清楚瞭解，當死刑犯請求赦免或減刑時，如果政府可以自由決定不予回應，其所提供之救濟就是無效的，當然也就違反《公民與政治權利國際公約》第 2 條與第 6 條第 4 項之規定。

3、聯合國經濟社會及文化權委員會於 1984 年 5 月 25 日第 1984/50 號決議通過《關於保護死刑犯權利的保障措施》，其中第 8 項規定：「在上訴或採取訴訟程序或與赦免或減刑有關的其他程序期間，不得執行死刑」(盧建平等，2010: 412)，由此可知，不論人權事務委員會或經濟社會及文化權委員會都認為：在尋求赦免或減刑之程序未獲任何回應之程序進行間，不得執行死刑。

因此，我國赦免法未就死刑犯尋求赦免或減刑之權利救濟程序為較詳盡之規定，而任由總統決定是否回應，確已違反《公民與政治權利國際公約》第 2 條與第 6 條第 4 項規定，總統府人權諮詢委員會未確實瞭解人權事務委員會在肯尼迪 v. 特立尼達和多巴哥一案中之解釋真意，不僅斷章取義也未參照其他解釋文獻，而誤認我國政府可自由裁量是否回應赦免或減刑之請求，其錯大矣！

三、最高法院 100 年台抗字第 113 號刑事裁定²⁷與《公民與政治權利國際公約》第 9 條第 3 項所定之「候訊人通常不得加以羈押」之原則不符

最高法院在司法院大法官作成釋字第 665 號解釋就刑事訴訟法第 101 條第 1 項第 3 款予以限縮後，對於審理中之重罪羈押案件，多採取「重非常伴逃亡」之

²⁷ 其裁定要旨為：「按基於憲法保障人民身體自由之意旨，被告犯刑事訴訟法第一百零一條第一項第三款所示之罪，嫌疑重大者，且有相當理由足認其有逃亡、湮滅、偽造、變造證據或勾串共犯或證人之虞，亦無不得羈押之情形，法院斟酌能否以命該被告具保、責付或限制住居等侵害較小之手段代替羈押後，仍認非予羈押，顯難進行追訴、審判或執行者，方得羈押，始符合憲法第八條保障人民身體自由及第十六條保障人民訴訟權之意旨，司法院釋字第 665 號解釋著有明文。依上述解釋及其理由書綜合以觀，其並非逕宣告刑事訴訟法第一百零一條第一項第三款重罪羈押原因係屬違憲，而係要求附加考量被告除犯重罪外，是否有相當理由認為其有逃亡、湮滅、偽造、變造證據或勾串共犯或證人等之虞。而依法條之體系解釋，該等附加考量與單純考量同條第一項第一款、第二款之羈押原因仍有程度之不同。基此，伴同重罪羈押予以考量之逃亡之虞，與單純成為羈押原因之逃亡之虞其強度仍有差異，亦即伴同重罪羈押考量之逃亡之虞，其理由強度可能未足以單獨成為羈押原因，然得以與重罪羈押之羈押原因互佐。又重非常伴伴逃亡、滅證之高度可能，該高度可能性乃本於趨吉避凶、脫免刑責及不甘受罰之基本人性，是若依一般正常人之合理判斷，可認為該犯重罪嫌疑重大之人具有逃亡或滅證之相當或然率存在，即已該當於前述解釋之認定標準，不以達到充分可信或確定程度為必要。又上開解釋已對同法第一百零一條第一項第三款為限縮解釋，應可認係對公民與政治權利國際公約第九條第三項規定之具體落實，法院審酌應否羈押被告時，若依一般人合理判斷涉犯重罪之被告有逃亡之相當或然率存在，即非不得依同法第一百零一條第一項第三款規定羈押被告。」另最高法院 99 年度台抗字第 1 號亦同其旨。

見解，而用第 101 條第 1 項第 1 款之規定，繼續維持重罪案件審理中被告之羈押。觀諸最高法院 100 年台抗字第 113 號刑事裁定之理由，即係用犯重罪嫌疑重大之人具有逃亡或滅證之「相當或然率」為標準，認為不以達到充分可信或確定程度為必要，並自認為係「對公民與政治權利國際公約第九條第三項規定之具體落實」。

然而，人權事務委員會在希爾 v. 西班牙（Hill v. Spain）一案中重申：「審前拘禁應該作為例外，除非存在著被告潛逃或毀滅證據、影響證人或逃出締約國管轄範圍的可能情況，否則應該准允保釋。被告是外國人的這一單純事實本身並不意味著可以在待審期間拘禁他。締約國的確主張說，他們有充分理由擔心提交人一旦取保開釋，就將離開西班牙領土。然而，締約國沒有提供任何資料說明這種擔心的基礎是什麼，以及為何不能通過設定適當的保釋金額和開釋的其他條件來處理這種擔心的原因。締約國只是推測如果一個外國人取保開釋，他就可能離開它的管轄範圍，這種推測不能作為對《公約》第 9 條第 3 款確立的規則作出例外的正當合理理由。在這些情況下，委員會認定就提交人而言，這一權利已經被違反了。」（Manfred Nowak，2008：244）足見國家不能僅用「相當或然率」而缺乏充分可信之證據或資料，就剝奪個人受《公民與政治權利國際公約》第 9 條第 3 項保障之「候訊人通常不得加以羈押」之權利。

最高法院很明顯未依據兩公約施行法第 3 條之規定，參照兩公約之立法意旨及人權事務委員會之解釋，並引用國際案例作論證、說明與闡述，其判決自屬違背法令。

伍、結語

我國在退出聯合國後，離開國際人權體系長達四十年，國內法制對於國際人權公約之運作與發展甚為陌生，在兩公約及兩公約施行法於二年前施行生效後，理論上應對國內法制產生重大影響。然而，由本文所舉各級政府機關動輒違反或錯解兩公約之事例可知，政府對於落實兩公約一事，似未全力以赴。依本文之見解，兩公約經由兩公約施行法之特殊模式，已與我國法制接軌，而因其具有「最低人權標準」之定位，國內法與之抵觸者無效，且該所謂「最低人權標準」係隨國際人權法之變化而發展，各級政府機關本應透過條約專門機構之權威解釋瞭解國際人權標準。再者，依據兩公約施行法第 3 條，對於我國人權法制之解釋，將有全新的面向，積極與國際人權社群溝通，將是無法避免的趨勢。然而，二年來我國之實務運作頗令人失望，不僅司法判決仍然故步自封，甚至沒有引用一般性評論之案例；行政與立法機關對於兩公約施行法第 8 條之二年修法與改進之期限要求，視而未見，監察院對於政府違法跳票亦完全不見追究責任，令人懷疑政府落實兩公約之決心。

因此，政府既然當初已決心和國際人權重新接軌，自應參照國際標準與兩公

約施行法第 6 條之規定，建立具有國際監督機制的人權報告制度，透過國際人權專家定期檢視並引進最新國際人權標準，才能真正提升臺灣的人權。不過，更重要的還是國內學界與實務界必須開始重視兩公約與施行法，唯有透過不斷研究論述，兩公約人權法制才能不斷進步，而真正適用於臺灣社會。

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The Application and Interpretation of Two Human Rights Covenants: Some Examples from Taiwan

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Abstract

The passage by Taiwan's national legislature in 2009 of two human rights covenants, namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights¹⁰¹, and the use of an extraordinary method to allow the two covenants to have effect in domestic law is having a major impact on our legal system.

According to Article Three of the "Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights" promulgated in April 2009, applications of the two covenants should make reference to their legislative purposes and interpretations by the specialized agency governing the covenants and the method of interpretation must be based on international perspectives. In addition, according to Articles Four and Eight of the same act, all levels of governmental institutions, besides placing priority on applying the human rights protections of the two covenants, must review and revise or improve all laws or administrative measures that are incompatible with the two covenants within two years. How much have "all levels of governmental institutions" in Taiwan really done during the past two years since the two covenants and their implementation act were approved and promulgated? Have government agencies correctly understood, applied and interpreted the two covenants? How have they utilized the General Comments of the United Nations Human Rights Committee? This paper will use concrete examples to illustrate that executive and legislative agencies have not fulfilled the requirement to review and revise laws or administrative measures incompatible with the two covenants within two years, that the Presidential Office Human Rights Consultative Committee has misunderstood the Human Rights Committee's interpretations of the two covenants, and that judgements of the Supreme Court have clashed with the interpretations of the Human Rights Committee.

Keywords

Human Rights Covenants, Implementation Act, Review of Laws and Regulations

¹⁰¹ Refer to the Legislative Yuan's Legislative Record (<http://lis.ly.gov.tw/ttscgi/lgimg?@981401;0518;0526>).

I. Preface

In 1967, Taiwan signed the “International Covenant on Economic, Social and Cultural Rights” and the “International Covenant on Civil and Political Rights” (which will be referred to as the “two covenants”). Forty-two years later on March 31, 2009, the Legislative Yuan, Taiwan’s parliament, officially ratified the two covenants and also approved the “Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights” (which will be referred to below as the “Implementation Act”) and thereby employed an extraordinary method to grant application in domestic law to the two human rights covenants and bring our country’s legal code in line with international human rights law. (Liao Fu-teh, 2010: 45)

According to Article Two of the Implementation Act, the provisions for human rights protections in the two covenants have domestic legal status. In addition, Article Eight of the same act mandates: “All levels of governmental institutions and agencies should review laws, regulations, directives 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 force by new laws, revisions of laws, abolition of laws and improved administrative measures.” From these two articles, it is clear that the provisions of the two covenants regarding human rights protections have effect above ordinary domestic law and that none of the provisions of other laws can conflict with the provisions of the two covenants.

In addition, Article Four of the Implementation Act mandates: “Whenever exercising their functions, all levels of governmental institutions and agencies should conform to human rights protections in the two Covenants; avoid violating human rights; protect the people from infringement by others; and, positively promote realization of human rights.”¹⁰² Article Three states “applications of the two Covenants should make reference to their legislative purposes and interpretations by the Human Rights Committee.” Since the legislators did not make any special reservations during the passage of the two covenants, the term “all levels of governmental institutions” naturally should encompass the Office of the President and

¹⁰² Article Four of the Implementation Act for the two covenants mandates that the state has the obligations to “avoid violating human rights; protect the people from infringement by others; positively promote realization of human rights.” This provision is similar to the provision in Article Two of the ICCPR that each State Party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the covenant. Manfred Nowak terms these obligations as the “triple obligation of the State.”

all five branches of government, namely the Executive Yuan (the Cabinet), the Legislative Yuan, the Judicial Yuan, the Examination Yuan and the Control Yuan. In the implementation of their operations with regard to items relating to the human rights protection provisions of the two covenants, these governmental institutions must all consider their actions from the perspective of international human rights law and should respect the interpretations (especially the General Comments) of the United Nations Human Rights Committee and no longer simply rely on customary legal concepts in handling such affairs.

The above-mentioned brand-new model of the domestication of the international covenants undoubtedly will have a major impact on the operation of Taiwan's legal system. However, a critical question is how have "all levels of governmental institutions" actually operated during the nearly two years since the Implementation Act took effect.¹⁰³ Have they displayed correct understanding, applications and interpretations of the two covenants? How have they utilized the General Comments of the Human Rights Committee? These questions merit serious study and discourse by academics as reference for agencies and persons involved in actual legal and administrative practice in order to genuinely bring Taiwan in line with international human rights practice and realize human rights guarantees. This paper aims to "toss out a rock in hopes of finding jade" and spark wider and more profound study and will consist of the author's observations and analysis of some actual implementation experiences.

The Application and Interpretation of the Two Covenants

1. Domestic application of the two covenants

The issue of how international covenants should be applied domestically has involved two distinct models of "incorporation" and "transformation."

Countries that have adopted the "incorporation" model usually directly acknowledge in their constitutions that the covenants (or some of their articles or provisions) have domestic effect and therefore can directly applied to domestic legal procedures without a particular legislative process. Countries which adopt the

¹⁰³ The two covenants were approved in third readings by the Legislative Yuan on March 31, 2009 and were signed by President Ma Ying-jeou on May 14, 2009 and submitted through the agency of an allied country to the United Nations Secretariat, but was rejected by that body. However, the two covenants and the Implementation Act officially took effect on December 10, 2009. Therefore, there is a question as to when the Implementation Act had actually taken effect after the president signed the ratification document and whether the two covenants were effective in domestic law during this period. Professor Liao Tsung-sheng firmly believes that this was the case. (Liao Tsung-sheng, 2010: 134-136).

“transformation” model maintain that the covenants cannot be applicable to domestic law directly or by their own accord but must go through a process of “transformation” through the legislative process and become part of domestic law before their content can take domestic effect. Hsu Ching-hsiung and Lee Ming-chun, 2009:31.

According to Article 38, Article 58 Paragraph Two and Article 63 of our Constitution, international treaties that are signed by the premier or responsible ministers must be referred by the Executive Yuan to the Legislative Yuan for review before being concluded by the president. Interpretation 329 issued by the Constitution Court on December 24, 1993 stated that “treaties concluded according to the above procedures hold the same status as laws.” From these stipulations and interpretations, it can be deduced that our country is one which should adopt the “incorporation” model. Nevertheless, after withdrawing from the United Nations (in October 1971), our country’s international status has been extraordinary. Taiwan can no longer deposit a copy of ratified international or multilateral treaties with the United Nations Secretariat. Since the conditions of the validity and effectiveness of such ratifications in international law is by no means undisputed¹⁰⁴, it is necessary to use another law to endow domestic legal effect for the covenants in our legal system.¹⁰⁵ Therefore, after

¹⁰⁴ Professor Liao Tsung-sheng cites the statement made by the International Court in 1974 regarding French nuclear bomb tests: “

¹⁰⁵ Please refer to the legislative explanation mentioned in Footnote (1). In addition, the Ministry of Justice issued a report in 2009 entitled “The Proposals of the Ministry of Justice Regarding the ‘Commissioned Research Report on ‘the Practice of the Incorporation of International Treaties into Domestic Law’” which reviewed the problems faced with regard to the instruments of ratification, accession and approval or acceptance of treaties and the deposit of such instruments with the United Nations Secretariat after our country lost its representation rights in the United Nations and the resulting doubts on the effectiveness of such treaties. The MOJ put forward two proposals: (1) clearly state in the draft “Law on the Conclusion of Treaties” because in the Article 11 Paragraph One of the draft revisions for “Law for the Conclusion of Treaties” submitted by the Ministry of Foreign Affairs mandated that “when bills for the ratification, acceptance, approval or accession of treaties approved by the Legislative Yuan are submitted to the President, the initiating agencies should immediately send the Ministry of Foreign Affairs a request to ask the Executive Yuan to submit a request to the President to issue an instrument of ratification and should be promulgated by the President after the ratification or other procedures for the approval of the treaty are completed and the instruments of ratification, acceptance, approval or accession are mutually exchanged or deposited and take effect. However, in extraordinary situations, the President can promulgate and implement treaties after the completion of the ratification or other approval procedure. Treaties of acceptance or accession are also to be treated in the same manner.”

From the above document, it can be seen that treaties do not have to be deposited for them to be promulgated and implemented. Moreover, the provision of Article Four of the same bill that “unless a separate date is determined, treaties will take effect on the third day after the day of promulgation by the President” also can be used to resolve the question of whether treaties can be effective in domestic law if they are not deposited; or, (2) If, before the completion of the legislation of the afore-mentioned “Law for the Conclusion of Treaties,” treaties concluded by our country experience the difficulty of being unable to be deposited, the model utilized in Article Two of the “Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights” to the effect that “(h)uman rights protections provisions in the two covenants have domestic legal status” can be proposed in which an implementation act is legislated and a provision included in the implementation act to the effect that covenant has domestic legal status.
<<http://www.humanrights.moj.gov.tw/public/Data/16193214581.doc>>

our country ratified the two covenants, the Legislative Yuan approved the Implementation Act which clearly mandated that the two covenants have domestic legal status. This method would appear to be closer to the transformation model.¹⁰⁶ In other words, our country has adopted an extraordinary model to allow the two covenants to have domestic legal status.¹⁰⁷ This state of affairs has in turn given rise to problems in the adaption process which this paper will discuss.

2. The legal level of the two covenants

Article Two of the Implementation Act for the two covenants resolved the question of their incorporation into domestic law, but there is the matter of their level of status or ranking in our legal system. Because the provisions of the two covenants conflict with numerous existing laws and regulations, the issue of how the two covenants and domestic law should be applied is a problem that urgently needs to be resolved.

Article 141 of the Constitution states: “The foreign policy of the Republic of China shall, in a spirit of independence and initiative and on the basis of the principles of equality and reciprocity, cultivate good-neighborliness with other nations, and respect treaties and the Charter of the United Nations, in order to protect the rights and interests of Chinese citizens residing abroad, promote international cooperation, advance international justice and ensure world peace.”

The meaning of the phrase “respect treaties” was defined in the judgement No. 128 (revision 1) issued by the Taiwan High Court in its judgment Number 128 in 1990 which maintained that “.....based on the requirement in Article 141 of the Constitution to ‘respect treaties,’ the effect of treaties should be higher than ordinary domestic law (refer to Supreme Court Judgement Number 1074 in 1934) and should be endowed with an extraordinary status. Therefore, when treaties conflict with ordinary internal law, priority should naturally be granted to the requirement of the treaty based on the principle that special laws have higher rank than ordinary laws.” In addition, the Ministry of Justice, affirmed in its Statement No. 1813 issued in 1983 that “.....in light of the spirit of Article 141 of the Constitution, priority should be applied to the treaty when treaties conflict with law.” Nonetheless, despite the position adopted statement in the afore-mentioned Interpretation 329, the Constitutional Court

¹⁰⁶ The genuine transformation model would consist of the direct incorporation of the content of the covenants into new legislation of related laws by the ratifying legislature, but the Implementation Act for the two covenants in our country is not that type of legislation.

¹⁰⁷ England’s Human Rights Act of 1998 brought the English legal system in line with the European Covenant of Human Rights (ECHR) through a method similar to that adopted in Taiwan’s Implementation Act. However, court judgments later pressed the Parliament to revise domestic law to be in line with the ECHR. Details can be found in Weng Kuo-yen (2010).

that “treaties concluded according to the above procedures hold the same status as laws,” the commonly held view in our country undoubtedly is that treaties belong to special law and should take precedence in their application. However, with regard to Interpretation 329, Professor Liao Tsung-sheng advocates that the principle that a later law should take precedence over an earlier law would thus allow legislative agencies the power to approve new laws if they believed it was necessary to resolve conflicts between previously concluded treaties. (Liao Tsung-sheng, 2010: 143-144)

However, Article 8 of the Implementation Act for the two covenants states: “All levels of governmental institutions and agencies should review laws, regulations, directives 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 force by new laws, revisions of laws, abolition of laws and improved administrative measures.” This requirement seems to clearly mandate the superiority of the covenants. Indeed, the accompanying legislative explanation for the Implementation Act noted with regard to Article Eight states that “the requirements manifested in the two covenants constitute the most important international framework for human rights guarantees. In order to raise the human right standards, return to the international human rights system and expand international human rights mutual assistance and cooperation, our country should follow world human rights trends and genuinely put these covenants into practice and thereby enhance our international position. Therefore, this article clearly mandates that governmental institutions at all levels should review laws and regulations within their scope of responsibility based on the content of the two covenants and should complete needed changes within two years after this Act enters force through by the legislation of new laws, revisions of existing laws, the abolition of laws and the improvement of administrative measures”.¹⁰⁸ The afore-mentioned “all levels of governmental institutions” should include the Legislative Yuan itself. The principle that the laws that the Legislative Yuan approves do not themselves violate the two covenants should constitute the “human rights standard” delineated in the legislative explanation of the Implementation Act. In other words, the legal rank of the two covenants based on Article Eight of the Implementation Act should be that of a superior nature equivalent to a “human rights basic law” (Liao Fu-teh, 2009: 226).

In addition, National Taiwan University Professor of Law Chang Wen-chen advocates that, based on the positions in the international human rights community

¹⁰⁸ See Footnote 1.

and the Human Rights Committee¹⁰⁹, some of the content of the two covenants already comprise required or mandatory international law which has a rank in the domestic legal system that would be equal to the Constitution.¹¹⁰ Therefore, there should be no room for doubt that the legal ranking of the two covenants should be higher than ordinary law.

3. The two covenants and the General Comments

Besides having been approved through the required procedure laid out in Article 38, Article 58 Paragraph Two and Article 63 of the Constitution, the two covenants have received a rank that transcends ordinary domestic law through the means of the passage of the Implementation Act. Even more important is the fact that due to the linkage with international human rights law, Taiwan must examine its domestic legal system from an international perspective and incorporate international human rights concepts into domestic law.¹¹¹ The application of the human rights covenants is therefore bound to have a considerable impact on the existing domestic legal system. The first issue that will be encountered in this process is the question of how to correctly understand and interpret the two covenants.

In ordinary legal systems, the final arbiters of legal interpretations are the judicial agencies or courts which possess the authority of arbitration. However, in international law, the authority to interpret multilateral covenants lies in the hands of the specialized agencies created by such treaties. The two covenants have distinct specialized U.N. agencies which govern such interpretation, namely the Committee on Economic, Social and Cultural Rights for the “International Covenant on Economic, Social and Cultural Rights” and the Human Rights Committee for the “International Covenant for Civic and Political Rights.” Therefore, any interpretation of articles of the two covenants must first consider the positions of these two committees. In other words, the decisions and other resolutions made by these two committees with regard to the two covenants have an authoritative status (Manfred Nowak, 2008: 10).

In terms of methodology, the Human Rights Committee’s decision in the case of “Alberta Union versus Canada” indicates that the interpretation of the International Covenant on Civil and Political Rights should respect the principle of general

¹⁰⁹ Article Three of the Implementation Act states: “Applications of the two Covenants should make reference to their legislative purposes and interpretations by the Human Rights Committee.” Based on this provision, interpretations by the Human Rights Committee have force in Taiwan’s domestic law.

¹¹⁰ Chang Wen-chen (2009).

¹¹¹ From the standpoint of domestic law, the concepts of international human rights law are “imported.” However, it should be clear from the human rights reporting system mandated by Article Six of the Implementation Act, and the state party reporting system in the two covenants that the direction is actually from international “concern” (or “irrigation”).

interpretation in the “Vienna Convention on the Law of Treaties” (Manfred Nowak, 2008: 8). Scholars have pointed out that Articles 31 through 33 of the “Vienna Convention on the Law of Treaties” take into consideration the interpretation principles of other international laws and have sorted out the following principles for reference (Chao Ming-yi, 2011: 344)

- λ no interpretation when no interpretation is needed;
- λ interpretation based on good faith and mutual trust;
- λ interpretation based on the ordinary definition of the terms of the treaty and the intention of the countries concluding the treaty;
- λ interpretation based on the purpose of the treaty and its context;
- λ interpretation based on reason and consistency;
- λ interpretation based effect; and,
- λ interpretation based on supplementary material in addition to the treaty itself.

In addition, interpretative principles for human rights statutes commonly accepted in international human rights law include the broad “general freedom right” of “in dubio pro libertate” or “when in doubt favor liberty” and the narrow “restrictive definition” Manfred Nowak, 2008: 9-10), both of which can be important references for interpretation of the two covenants.

In the actual operation of interpretation, taking the General Comments for the “International Covenant for Civil and Political Rights” formulated by the Human Rights Committee as an example¹¹², usually four commissioners form a task force. Based on Rule 62 of the “Rules of Procedure of the Human Rights Committee, one week before the Human Rights Committee meets, in addition to preparations for the reporting system procedures and other functions, it must formulate General Comments based on the previously mentioned interpretation principles which after passage by the committee are published in annual reports. (Manfred Nowak, 2008: 777)

As of September 20, 2011, a total of 34 General Comments have been issued by the Human Rights Committee regarding the “International Covenant for Civil and Political Rights” and 21 General Comments have been approved for the “International Covenant for Economic, Cultural and Social Rights”.¹¹³ Moreover, since the General

¹¹² See Article 40 Section Four of the International Covenant on Civil and Political Rights regarding General Comments.

¹¹³ See Covenants Watch’s web page. <<http://covenants-watch.blogspot.com/2010/12/3.html>.

Comments have been approved by plenary sessions of the respective committees and thus have been approved through debate and consultations followed by unanimous vote by commissioners from different backgrounds in traditions, cultures, religions, ideologies and legal systems. This aspect enhances the authority and universality of the General Comments. (Manfred Nowak, 2008: 778)

II. The Application and Interpretation of the Implementation Act

As mentioned above, our country's international status is extraordinary led to the adoption of a special model of the legislation of an Implementation Act for the two covenants before they could have effect in domestic law. Therefore, the question of how to apply and correctly interpret the “bridging” Implementation Act has equal importance with the question of the application and interpretation of the two covenants themselves.

1. The status of the Implementation Act

Ordinary domestic laws are also often accompanied by implementation acts which are usually added to resolve questions concerning the implementation of the mother law, such as the time when the mother law will take effect, the question of whether it will have retroactive application, the scope of its application and other issues, and the issue of whether the new statute will possess mandatory and universal character just as other ordinary laws. Although this law is referred to formally as an “implementation act” and certainly has articles regarding how the two covenants should be applied, the fact that Articles Four through Article Eight are all aimed at “government institutions” indicate that this Implementation Act is different in character from ordinary implementation acts. Moreover, this Implementation Act possesses a mandatory effect, which is to say that “all levels of governmental institutions” should be subject to the particular constraints of the “Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights” and must comply with its legislative intent and take the two covenants as fundamental human rights standards.

Moreover, since “all levels of governmental institutions” should abide by Article Four of the Implementation Act in exercising their functions, judgments by judicial agencies which do not apply the provisions of the two covenants can also be considered as violations of the law (Liao Fu-teh, 2010). Actions taken by administrative agencies which do not abide by the two covenants in their operations should also be considered as illegal, and civil service personnel who violate the law

and are derelict in their duty to abide by the covenants should be subject to sanctions. In other words, although penalties for violations are not specified, the Implementation Act is nonetheless has mandatory application and “all governmental institutions” should be subject to sanction when they violate its provisions.

2. Some doubts and interpretations regarding the Implementation Act

The most important purpose of the Implementation Act is to ensure that the two covenants have domestic legal effect and, since it has become a bridge, the some of the basic human rights concepts in the two covenants are already having impact on our existing legal system and concepts.¹¹⁴ Since some of the language in the articles of the Implementation Act is not very rigorous or precise¹¹⁵, the question of how actually its provisions should be understood and applied in the process of coming into compliance with international human rights concepts truly merits continued study by scholars and practitioners.

For example, Article Two of the Implementation Act mandates: “Human rights protections provisions in the two covenants have domestic legal status.” Therefore, the question arises articles in the two covenants which are not related to specific rights¹¹⁶ have effect in our domestic law. If “human rights protections provisions in the two covenants” do not include “provisions which are not related to substantial rights,” such an interpretation will obviously contradict the perspective of the two covenants which treats “provisions which are not related to substantive rights” as important elements of “institutional protection”. (Manfred Nowak, 2008: 4) Even more to the point, Article Six of the Implementation Act mandates that the government should set up a human rights reporting system in accordance with the two covenants, but this provision would appear not to fall within the scope of what Article Two defines as “provisions which manifest human rights protections”.¹¹⁷ Actually, Article Two should be understood as meaning that the two covenants themselves are

¹¹⁴ One example of this trend was the decision in November 2011 by the Ministry of Justice to propose revisions to the Civil Law in order to be in compliance with provisions of the “International Covenant on Civil and Political Rights” and the “Convention on the Elimination of All Forms of Discrimination against Women.” The MOJ proposed to revise Article 973 and Article 980, respectively, in the Civil Code to change the current minimum ages for engagement for men at 17 years and for women at 15 years of age and for marriage from 18 years of age for men and 16 years of age for women to new minimums of 17 years of age for engagement for both men and women and 18 years of age for marriage for both sexes. This proposal was bombarded by many legislators. <<http://news.chinatimes.com/focus/50109892/112011110100101.html>>

¹¹⁵ In addition, there are also inconsistencies in the use of legal terminology in the legislation and the covenants. For example, the Chinese translation of the term “Human Rights Committee” in Taiwan’s Implementation Act is “renquan shiwu weiyuanhui” while the official United Nations translation in Article 28 of the ICCPR is “renquan shiyi weiyuanhui.”

¹¹⁶ Examples include the provisions in Article 28 of the ICCPR with regard to the operations of the Human Rights Committee or the provisions of Article 16 in the ICESCR for reports by state parties.

¹¹⁷ This is based on the afore-mentioned “restrictive regulation and narrow interpretation” principle.

provisions for the protection of human rights and should entirely have effect in domestic law.

In addition, Article Three of the Implementation Law states: “Applications of the two covenants should make reference to their legislative purposes and interpretations by the Human Rights Committee.” The phrase “Human Rights Committee” for the two covenants should be seen as an error since, as noted above, each covenant has its own distinct specialized monitoring organization.

The term “Human Rights Committee” actually only refers to the agency charged with monitoring the “International Covenant for Civil and Political Rights.” The Committee on Economic, Social and Cultural Rights bears responsibility for monitoring the implementation of the “International Covenant for Economic, Social and Cultural Rights.” The two respective committees do formulate general comments after review the reports submitted by signatory countries which undoubtedly comprise “interpretations” as noted in Article Three. However, the authoritative interpretations of the Human Rights Committee are not limited to its “General Comments” but also include both the “Concluding Observations” issued by the HRC after reviewing the reports submitted by each signatory country and decisions on individual complaints submitted to the HRC.¹¹⁸ (Liao Fu-teh, 2010: 45; Manfred Nowak, 2008: 10). Therefore, the position that the term “interpretations” in Article Three only refers to “General Comments” is not in accordance with the actual international operation of the two covenants.

In addition, scholars have engaged in considerable debate regarding the actual meaning of the term “all levels of government institutions” in Articles Four, Five, Seven and Eight in the Implementation Act. (Liao Fu-teh, 2010: 45). Since legislators did not make any special reservations during the passage of the two covenants, this term should naturally include all governmental agencies within the Executive, Legislative, Judicial, Examination and Control branches of government. Moreover, based on the provisions of Article Two, Section One of the “International Covenant for Civil and Political Rights,” each state party to the covenant has the obligation to respect and ensure human rights based on the universal concepts of international human rights law. Scholars generally maintain that this requirement includes the obligation by each state party to “adopt active legislative, administrative, judicial and other substantive measures to carry out its human rights obligations” (Manfred Nowak, 2008: 3). Hence, the Executive, Legislative, Judicial, Examination and Control agencies under our country’s legal system naturally should all be included in

¹¹⁸ The so-called “individual communications” method through which individual citizens can file complaints against their state to the Human Rights Committee which is included in the First Optional Protocol to the ICCPR.

the scope of the obligation of the state to respect and ensure human rights. This type of interpretation is an example of interpreting domestic law (the so-called “all levels of governmental institutions”) from the reverse angle of international human rights law and is an example of the previously mentioned reverse flow and adaption problem that awaits further study by scholars in our country.

In addition, there are some troublesome issues concerning translations from different languages and legal terminology. For example, according to Article Eight of our country’s Central Regulation Standard Act, the code of a regulation should be written under the sequence from “articles” (tiao) and divided into “paragraphs” (xiang) or “subsections” (kuan) subsequently, but international human rights laws translated into Chinese with simplified characters such as in the United Nations system employ a regulation standard that uses lists first “articles” (tiao) but then uses the term “sections” (kuan). Another example concerns the “General Comments,” which in Chinese using simplified characters is rendered into “yibanxing yijian” or the equivalent of “ordinary opinions.” From these two examples, it is evident that there is a considerable gap in the use of terminology in Chinese written in simplified characters (as used in the People’s Republic of China) and complex characters (as utilized in Taiwan). This problem also awaits resolution by the authorities in the responsible agencies.

In general, the Implementation Act has given domestic legal status to the two covenants and regarding the scope of understanding and interpretation is no longer restricted to the accustomed conceptions in domestic law but also include the possibility of reversed interpretation from international to domestic concepts. Moreover, problems remain that concern both choices of translated or original versions of the two covenants which need to be resolved and numerous doubts regarding the Implementation Act which require clarification and suitable handling based on the international human rights standards.

III. Observations on Applications in Taiwan

Two years have passed since the two covenants and their Implementing Act took effect on December 10, 2009. On December 10, 2010, Covenants Watch published a report entitled “An Re-examination of the Government’s Implementation of the Two Covenants and their Implementing Act during the Past 19 Months”.¹¹⁹ The second appendix to this report was a paper by this author entitled “Observations on Judicial Judgments during the Past Year of Implementation of the Two Covenants” which

¹¹⁹ <http://www.tahr.org.tw/files/2010report.pdf>.

reviewed how courts of all levels had applied the two covenants during the first year in which they had effect and offered some observations based on his experiences. At that time, the author's conclusion was that courts at all levels were still rather unfamiliar with international human rights law and that the degree to which the courts applied the two covenants was extremely low. After another year, the degree to which courts have applied the two covenants as justification for judgments has gradually risen, but so far we have not seen any court judgments which have made reference to any of the General Comments in their discourse.¹²⁰ The degree of application in the courts is still not satisfying and judicial practitioners should continue to develop their discourse regarding the two covenants. This article will not conduct a comprehensive review of the application of the two covenants in their judgments, but will select some obvious examples of violations of the two covenants or the Implementation Act in actions (or judgments) in the Executive, Legislative and Judicial branches as case examples and review their errors in the application and interpretation of the two covenants or their implementation act.

1. The failure by Executive and Legislative agencies to complete fulfill the review and revisions of laws required by Article Eight

In order to implement the two covenants and the Implementation Act, the Executive Yuan approved and promulgated a "Big Step Forward for Human Rights Program." Moreover, the Executive Yuan conducted a review of existing laws, regulations and measures in compliance with the directive of Article Eight of the Implementation Act that all levels of governmental institutions and agencies should review laws, regulations, directives and administrative measures within their functions according to the two Covenants and that all laws, regulations, directions and administrative measures incompatible to the two Covenants should be amended within two years after the Act enters force by new laws, revisions of laws, abolition of laws and improved administrative measures.

The Executive Yuan found that 219 items were not compatible with the two covenants and drafted a list of items for liquidation, tracking and control and evaluation and required the completion of related revisions or improvements by December 10, 2011.¹²¹ Nevertheless, statistics provided in a report presented by the Ministry of Justice to legislators in August 2011¹²² acknowledged that the revisions

¹²⁰ The No. 1 judgment issued in 2011 by the Taipei District High Administrative Law Court was the first case in which lawyers cited a General Comment in their discourse.

¹²¹ <http://www.humanrights.moj.gov.tw/lp.asp?ctNode=27273&CtUnit=8930&BaseDSD=7&mp=200>

¹²² On August 19, 2011, the Ministry of Justice submitted to the Legislative Yuan for the latter's reference a "Re-examination and Progress Report on the "219 `Laws,` `Decrees` and `Administrative Measures` that Violate the Two Covenants Whose Revision has yet to be Completed."

of numerous laws that should be revamped will not be completed by the deadline of December 10, 2011. These bills include Number 53 (Article Eight in the Statute for Temple Registration), Number 65 (Article Nine of the Assembly and Parade Act), Number 70 (the Civil Associations Act), Number 75 (the Industrial Group Law), Number 107 (the Commercial Group Law), Number 147 (Article Four of the Assembly and Parade Act), Number 177 (Article 12 of the Temples Registration Act), Number 190 (Article 19 of the Fire Act), Number 196 (Article Four of the Architects Act) and Number 197 (Article 7, Paragraph Three of the Fire Act). Hence, the government will fail to meet the deadline of December 10, 2011.¹²³

As mentioned above, the phrase “all governmental institutions” in Article Eight of the Implementation Act should encompass the president and the Executive, Legislative, Judicial, Examination and Control branches.

However, while the Executive Yuan was checking the checking compatibility of laws and administrative measures with the requirements of the two Covenants, there were no signs that the Legislative Yuan or the Control Yuan were similarly inspecting laws or administrative measures under their scope of responsibility for compatibility with the two covenants¹²⁴, not to mention “completing the legislation, revision or abrogation of laws” incompatible with the provisions of the covenants. In addition, the fulfillment of the obligations of the Legislative Yuan and the Control Yuan also cannot simply depend on the Executive Yuan agencies to propose draft revisions but must await legislative review and passage. Therefore, the responsibility for the failure to meet the deadline for these revisions in the legal code should be shared by both the Executive Yuan and Legislative Yuan.

2. The erroneous interpretation of the Presidential Office Human Rights Consultative Committee on Case No. 3 in the conclusions of its third meeting on April 12, 2011.

Over four years after our country ceased carrying out death sentences in December 2006, the government resumed the implementation of death sentences on April 30, 2010 with the execution of Chang Chung-hung and three other convicts. In response, the Taiwan Alliance for the End of the Death Penalty (TAEDP) expressed doubts as to whether the decision by the justice minister to carry out these executions

¹²³ This statement refers to the portion of laws which government institutions themselves believe do not comply with the two covenants but which the government will fail to revise before the December 10, 2011 deadline and does not include laws which civil society organizations believe also conflict with the two covenants but will not be revised by the deadline set in the Implementation Act, including the Assembly and Parade Act, the Law for the Settlement of Labor-Management Disputes and numerous articles in the Code of Criminal Procedures.

¹²⁴ See Note 19.

while the president had yet to reject petitions submitted by the prisoners for pardons or reduction of sentences violated Article Six Section Four of the “International Covenant for Civil and Political Rights” and were thereby illegal executions.¹²⁵ Presidential Office Human Rights Consultative Committee (POHRCC) members Huang Mo, Lee Nien-tzu and Lee Yuan-ran maintained that there was room for doubt that the “Amnesty Law” violated Article Six Section Four of the ICCPR due to its lack of regulation of the exercise of the right of petition for commutation and the absence of a detailed procedure for response when death row prisoners were petitioning for pardons and therefore proposed that the issue be discussed by the POHRCC.

On April 12, 2011, the POHRCC approved a resolution on Case No. 3 during its third meeting which stated: “(1) Since the United Nations Human Rights Committee advocates that Article Six Section Four of the ICCPR does not designate a model for the exercise of the right of commutation or amnesty, the HRC thereby endows state parties with a wide range of discretionary freedom. As our country’s Amnesty Act already provides the opportunity for defendants to seek amnesty and does not preclude pleas by persons subject to death sentences for amnesty, it does not conflict with Article Six Section Four of the ICCPR. (2) Since the two covenants have been implemented, we request the Ministry of Justice to invite scholars and professionals to carefully study whether we should consider the legislative precedents of Germany, Japan and the United States and establish a committee to review pleas for commutation or amnesty or another equivalent institution and to review the necessity for further revisions of the Amnesty Act.”¹²⁶

However, the resolution’s statement that “(s)ince the United Nations Human Rights Committee advocates that Article Six Section Four of the ICCPR does not designate a model for the exercise of the right of commutation or amnesty, the HRC thereby endows state parties with a wide range of discretionary freedom” evidently misunderstands the facts regarding the interpretation of the Human Rights Committee as can be seen from the following analysis:

- (1) In the case of Kennedy v. Trinidad and Tobago reviewed by the Human Rights Committee, the defense counsel for the author of the complaint advocated that the procedural guarantees mandated by Article 14 of the ICCPR should be applied to the procedure for the procedure for application for commutation or reduction of sentence. The Human Rights Committee maintained that the language of Article

¹²⁵ “Protest Against The Ministry of Justice’s Illegal Executions,” the Taiwan Alliance to End the Death Penalty (TAEDP), May 1, 2010
<http://www.taedp.org.tw/index.php?job=tags&seekname=EN%2BVersion&page=7>.

¹²⁶ <http://www.president.gov.tw/Default.aspx?tabid=1328&itemid=24784&rmid=3655>

Six Section Four did not designate a model for the exercise of the special power of commutation and therefore the state party possessed freedom of discretion. (Manfred Nowak , 2008: 152) However, a careful reading of the context of the entire text shows that the HRC's intention was to indicate that the lack of the procedure to plead for commutation or a reduction of sentence did not necessarily have to have the same intensity of protection as a trial process and could be freely decided at the discretion of the state party. Nevertheless, the Committee did not state that the state party could decide whether or not to respond to a request for commutation or a reduction of sentence or even that the lack of response to such a petition did not violate Article Six Section Four of the ICCPR.

- (2) In the case of Mbenge v. Zaire, the Human Rights Committee pointed out with regard to Article Two Section Three Subsection One that if the remedial measures provided by a state party are ineffective and if political institutions are given unlimited discretionary power to decide on commutation, then that state party is not realizing its obligations under Article Two of the ICCPR. (Manfred Nowak, 2008: 66) From this interpretation by the Human Rights Committee, we can clearly understand that if a government can have the freedom to refuse to respond when a death row prisoner is applying for commutation or a reduction of sentence, the remedies that such a government is providing are not effective and that state party is therefore in violation of Article Two and Article Six Section Four of the ICCPR.
- (3). Article Eight of Resolution 1984/50 entitled "Safeguards guaranteeing protection of the rights of those facing the death penalty" approved by the UN Committee on Economic, Social and Cultural Rights on May 25, 1984 states: "Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence". (Lu Jianping et al, 2010: 412) From this resolution it can be seen that both the HRC and the ESCRC believe that capital punishments must not be carried out if there has not been any response to any appeals or recourse procedures relating to pardon or the commutation of sentences.

Therefore, the fact that the Amnesty Act in our country does not contain relatively detailed regulation on remedial procedures for petitions for commutations or reductions of sentences and that it permits the president to decide not to respond to such petitions marks a clear violation of the provisions of Article Two and Article Six Section Four of the "International Covenant for Civil and Political Rights." The mistaken understanding of the Presidential Office Human Rights Consultative Committee to correctly understand the true meaning of the Human Rights

Committee's interpretations in "Kennedy v. Trinidad and Tobago" and "Mbenge v. Zaire" took its core statements out of context and failed to refer to other interpretation documents and thereby arrived at the mistaken belief that our government has the discretionary power to decide to respond or not to respond to petitions for commutation or pardons. This was indeed a huge mistake.

3. The Supreme Court's criminal appeal judgment No. 113 in 2011¹²⁷ and is incompatible with the principle embodied in Article Nine Section Three of "International Covenant for Civil and Political Rights" that "it shall not be the general rule that persons awaiting trial shall be detained in custody."

In the wake of Interpretation 665 by the Constitutional Court which restricted the application of Article 101 Paragraph One Section Three of the Code of Criminal

¹²⁷ The judgment's key point was the following: "Based on the constitutional guarantee for personal freedom of the people, defendants who are strongly suspected of having committed offenses indicated in Article 101 Paragraph One Subsection Three of the Code of Criminal Procedures and it is apparent that there are grounds sufficient to justify an apprehension that he may abscond, or destroy, forge, or alter evidence, or conspire with a co-offender or witness and also no reason not to detain, the court can exercise its discretion on whether to order that the accused be released on bail, or to the custody of another, or with a limitation on his residence or other methods less infringing on rights to substitute for detention. However, if it is apparent that there will be difficulties in prosecution, trial, or execution of sentence unless the detention of the accused is ordered, the judge can order the detention of the accused. Interpretation 665 of the Judicial Yuan has indicated that such detention is not in contravention of the constitutional guarantees of people's personal freedom and of the people's right to institute legal proceedings under Articles 8 and 16 of the Constitution, respectively. Based on the above interpretation and its reasoning, it is not necessary to declare that Article 101 Paragraph One Subsection Three of the Code of Criminal Procedures regarding the reasons for the detention of suspects for major offenses contravenes the Constitution, but that it can be considered to request the addition of considerations, besides simply whether the defendant is under strong suspicion of having offense, there is considerable reason to justify an apprehension that he may abscond, or destroy, forge, or alter evidence, or conspire with a co-offender or witness. Moreover, based on the interpretation of the structure of the law, there is still a considerable difference between such additional considerations and the simple consideration of the reasons for detention under Paragraph One Section One and Section Two of the same article. Based on this reasoning, there is a considerable difference between the granting of detention out of consideration of an apprehension that a suspect of a serious crime may abscond and the degree of intensity of the apprehension of flight that by itself becomes the justification for detention. In addition, the strength of the reasons for the possibility of abscondment may not be sufficient by itself to become justification for detention of a suspect in a serious offense but nonetheless can be considered with other reasons for detention. In addition, serious offenses are often accompanied by high possibilities of abscondment or destruction of evidence. Such a possibility also may be associated with the tendency in basic human nature to try to seek for good luck and avoid calamity, to avoid responsibility for crimes and not suffer punishment. It would be a reasonable judgement of the part of ordinary and normal persons that a person who is under strong suspicion of having committed a serious offense would have a strong possibility or near certainty of absconding or destroying evidence. Since the above mentioned interpretation sets such a standard, there is no need for the degree of full confidence or certainty. In addition, the above interpretation also provides a restrictive interpretation on Article 101 Paragraph One Subsection Three which should be seen as a concrete realization of Article Nine Section Three of the International Covenant on Civil and Political Rights since when the court considers whether to detain a suspect, if based on the reasonable judgement by an ordinary person that there is a considerable possibility or near certainty that a suspect may abscond, then there would be no choice but to act based on Article 101 Paragraph One Subsection Three of the same law and detain the suspect." The judgment by the Supreme Court in the Number 1 Appeal Case in 2010 contains the same reasoning.

Procedures, the Supreme Court in its review of cases involving the detention of defendants on trial in major criminal cases has frequently adopted the view that “major criminals often flee” and used Article 101 Paragraph One Subsection One’s provisions to continue to uphold the detention of defendants who are in trials for major crimes. Looking at the explanation for the Supreme Court’s No. 113 judgement in 2011, we can see that it utilizes the assertion that suspects in major criminal cases have an “extremely high probability” of fleeing or destroying evidence as the foundation for its belief to uphold the practice of detaining defendants under trial in major criminal cases unless there is full confidence or certainty that they will not flee or destroy evidence. The Supreme Court itself believes that its position is “a concrete realization of Article Nine Section Three of the International Covenant for Civil and Political Rights.”

Nevertheless, the Human Rights Committee in its communication on the case of “Hill v. Spain” reaffirmed: “The Committee reaffirms its prior jurisprudence that pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party. The mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial. The State party has indeed argued that there was a well-founded concern that the authors would leave Spanish territory if released on bail. However, it has provided no information on what this concern was based and why it could not be addressed by setting an appropriate sum of bail and other conditions of release. The mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in article 9, paragraph 3, of the Covenant. In these circumstances, the Committee finds that this right in respect of the authors has been violated”. (Manfred Nowak, 2008: 244)

From this communication, it can be seen that a state party cannot simply use reference to “an extremely high probability” without convincing evidence or data to abrogate the right to his or her protection under Article Nine Section Three of the ICCPR that “it shall not be a general rule that persons awaiting trial shall be detained in custody.” The Supreme Court has evidently failed to act on the requirement of Article Three of the Implementation Act that applications of the two covenants should make reference to their legislative purpose and interpretations by the Human Rights Committee and make reference to international cases as evidence or proof in the explanation or exposition of judgements and therefore its judgment is in violation of the law.

IV. Conclusion

Our country withdrew from the United Nations and has left the international human rights system for over 40 years and our domestic legal institutions are very unfamiliar with the application and development of international human rights covenants. After being in effect for two years, the two covenants and their Implementation Act theoretically should already have had considerable influence on domestic legal institutions. However, as illustrated by the examples raised in this paper concerning the violations or mistaken interpretation of the two covenants, the government has apparently not done its best to implement the two covenants. This paper maintains that the special method adopted by through the passage of the Implementation Act has already incorporated the two covenants with our domestic legal system and therefore have the status of “minimum human rights standards.” Domestic laws that conflict with this “minimum human rights standards” should be invalid. Moreover, this “minimum human rights standard” should further develop in step with the transformation of international human rights law and all levels of governmental institutions should learn about and understand the nature of international human rights standards through the authoritative interpretations of the specialized treaty organizations.

In addition, based on Article Three of the Implementation Act, our country will inevitably be compelled to have entirely fresh directions for the interpretation of our country's human rights laws and should actively engage in dialogue with the international human rights community. Nevertheless, the actual record of our country's application of the two covenants in the past two years has been most disappointing. Judicial judgments have remained conservative and closed minded and have even failed to make reference to precedents in the General Comments; the Executive Yuan and the Legislative Yuan have ignored the two-year deadline set in Article Eight of the Implementation Act to complete necessary revisions to laws or administrative measures; and, the Control Yuan has entirely failed to pursue the question of responsibility for the government's illegal failure to meet these legal requirements. These trends unavoidably give rise to doubts regarding the government's resolve to implement the two covenants.

Therefore, if the government truly possessed the will to bring our domestic legal code in line with international human rights standards, it should have promptly established a human rights reporting system including international monitoring mechanisms based on the international standards and the provisions of Article Six of the Implementation Act and thereby endeavor to genuinely enhance Taiwan's human rights through regular review and monitoring by international human rights experts

and the importation of the newest changes in international human rights standards. What is most important now is for domestic scholars and legal practitioners to begin to pay serious attention to the two covenants and their implementation act since only through continuous research and discourse will allow the two human rights covenants be truly practiced in Taiwan society.

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場次三：專題演講

Panel III: Speech

主持人/Moderator：黃秀端 教授
(Professor Shiow-Duan Hawang)

講者/Speaker：Professor Margaret Ann Bedggod

社會經濟和文化權利之進展與政治

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壹、導論

我今天是想討論由世界人權宣言(UDHR)所衍生的兩項人權公約中，處理「經濟、社會與文化權利」(ESC)的那一項，即社會經濟與文化權利國際公約((ICESCR))。我將從如何定位此一公約，並在更廣泛地保障這些權利開始。進而觸及到在國家管轄內與國際體系中社會與經濟層面的不正義。讓我先來談談我指的究竟是什麼？

貳、社會與經濟上的正義

過去幾年，在我土生土長的紐西蘭以及其他地方，像是日本或是更遠的海地。重大災難的發生，突顯出人類基本需求之底線-如食物、水、避難所與衛生，也包涵了仍在發生中的，在工作、教育與家庭生活方面的不足。危難憂患之時，我們本能的注意到這些需求並採取行動。對災難地受害者，全世界的人們迅速伸出援手。(在日本震災之後，一篇報紙上的文章正描述出我們作為人類最值得一提的特徵：我們共同具有的人性。)

然而在世界各個地方，基本需求的匱乏仍出現在許多人的日常生活之中。社會與經濟上的正義之理念始於這樣的前提，就是將這些令人難堪的貧窮、剝削與排除，視為無法接受之景象，但這些事情卻正發生在我們周遭。經濟(oikumene)原來的意義為家計的管理，在最寬廣的意義上，應該是要讓所有人都能滿足其基本需求並享有人類生活中的基本尊嚴；令所有人各自的潛能都應得到發展的機會。無論是在地方、國家或是國際社會，這都是我們攜手追求共善的唯一可能。

諾貝爾經濟學獎得主沈恩(Amartya Sen)在最新的一本書 *The Idea of Justice* 中提到：我們的直覺足以讓我們辨識出不正義，無論是發生在我們自身或是他人身上。除以之外，當我們面對不正義時，我們更能辨認出那些情況是可以被平復的。沈恩以此發展出一套關於正義的理論，或該說是理念；這套理論讓我們能為這些不正義建立起立即，同時也是長期的解決之道。為了讓解決之道能被接受，並經得起考驗，沈恩認為不正義的警訊必須受到具有批判性且具客觀性的檢驗。

在檢驗中，普遍的公眾討論乃是必經之路，甚至如他自己所承認地，解決不正義的方法可能不只一種。這些評估與討論必須將制度上之缺陷與行為上之失度的重大程度納入思考。

現代人權運動的誕生，足可視為對不正義之界定與尋求平復在時代中劃出一條分水嶺。1945 年的聯合國憲章與 1948 年的世界人權宣言都對二次大戰末期所發生的暴行做出回應，將之視為最極端、最徹底的不正義。但是憲章與宣言亦都是沈思的「第二階段」之例子，是在多元聲音理性思考和反思下的結果。其不企求去平復過去-著實也作不到-但是希望設下行為的框架與準則，使這些不正義不要再次發生（如同憲章前言所提及的一般）。

某種程度上，在過去的六十年間，人權的理論和實踐有確實有所進展。其成果可見於最近的身心障礙者權利公約(CRPD，2006)與原住民族權利宣言(DRIP，2007)。此一進展被稱之為「權利革命」(the rights revolution)。在其中，我所關注的社會與經濟正義與經社文權利扮演著重要角色。

政治哲學家邊沁的一段話，可將我適才所提及的，妥善地連結在一起。

作為人權之一環，經濟與社會權利之理念如同一種道德直覺。在這資源充足且人類知識盈滿之世界，任何人應被保證享有不虞匱乏之生活。同時，被排拒在不虞匱乏生活之外者，乃是不正義的受害者。(Beetham 1995)

參、權利的語彙

首先，關於權利的字眼通常只有一到兩個。這是因為有許多對人權奇怪的想法（這或許不符合這裡的情況，不過最好還是一開頭就先把我要談得搞清楚。）無論是對人權進行倡議，或在學者與實踐者的口中被談論，往往都只短短地用「人權」兩個字含括一切。用這兩個字代稱，各社群的使命與關懷中，各種人類權利與義務間的連結。由此所描繪出的人權圖像全然地偏向個人性的權利，個人可以透過法庭不計一切的追求權利，對大多數人來說像是諷刺漫畫的內容，但此種模式看來仍受較多人相信。接下來，我們將更詳細的去看看關於經社文權利的諸多迷思。

肆、重新界定經濟、社會與文化權利

在被納入世界人權時宣言，經社文權利，至少在西方，已擁有悠久的歷史。在對抗奴隸制與為女人發聲的反歧視運動中；在國家層級的勞動相關法律，像工廠法中，或像國際勞工組織(ILO)中經社文權利亦產生影響，在公共衛生領域，則首開風氣，讓健康照顧被視為所有人的基本需求。

縱使有這段歷史、縱然被納入世界人權宣言，經社文權利在尋求作為一種「真正的權利」，尋求和公民與政治權利（CP）被平等看待時，仍步上了一條顛簸之路。可以聽聽看聯合國經濟、社會與文化權利委員會在 1993 年的維也納世界人權會議時所指出的：

令人吃驚的現實是……許多國家與國際社會仍持續地對廣泛存在的經濟、社會及文化權利上之缺失視而不見。但當這些事情與公民和政治權利有關時，就會被宣告為恐怖和暴亂的體現，並因此引發立即性的行動。儘管口頭上說沒有差別，但實際效應上，對公民和政治權利之侵犯顯然地被看作更加的重、更加的不可忍受。同時對經社文權利仍存有大量且直接的否定

有許多理由造成此不願意行動之現象：反應冷戰情勢的東西方意識形態差距，在由世界人權宣言而衍生的兩項密不可分地國際人權公約中畫出了界線，但這卻超出了原本的立意。經社文權利被畫到蘇聯的那一方。兩公約的不同說法也造成了影響。像是義務（見 ICESCR, 第二條第一款）在 ICESCR 中的說法中，給人的印象是經社文權利不必立即施行。「第一代、第二代人權」的說法，也讓公民和政治權利看起來具有優先性。對經社文權利的認識往往也不是將之視為一種「真正」的權利，不是種「法律上」的權利，這讓西方律師覺得很陌生。種種理由導致經社文權利在各個層級都只享有更少的資源。其被排除在大憲章與權利法案之外，同時也甚少有關於經社文權利的法律見解。並在國際層級缺乏訴訟機制（一項關於此一程序的任擇議定書），但這些都能在對防止公民和政治權利的侵害上被運用。

在過去的 20 年中，（在各個層級）其較低的法律位階漸漸的有所提昇。著作與學說充實了經社文權利。但律師、決策者與一般大眾對其所抱持的遲疑仍未消失。所以我今天想著重在以下三個層面來消除對經社文權利的遲疑，指出各種主張的謬誤，也許將有助於改變。這三個層面是：經社文權利的定義與義務、經社文權利的可訟性以及如何在大地全球發展脈絡下落實經社文權利。這些問題雖然有理論上的解答，但在實踐上的落實仍有所阻礙。

伍、對權利進行定義

對經社文權利最常見的一種批評大概就是它「太含糊」，沒辦法明確的透過法庭或政策措施強制施行。它並沒有講清楚如何在作為權利持有者的個人層次上施行，也沒有說明相應的義務將由誰承擔。

但這些主張都忽略了學術界、實務界上或晚期來自法庭自身，都產出了某些重要成就足以解決前述困境。尤其是，如同其他關於經社文權利之事務，乃由聯合國所指派之經濟、社會與文化權利委員會（CESCR）監督經社文公約的執行。

從 1990 年起，委員會努力的透過兩項主要管道去實現經社文權利：對國家報告得觀察結論與一連串更廣泛基礎得的一般性意見（GCs）。但以上種種，我必須補充我十分尊重在場的律師，都並不是強制性的法律。但是這些負責進行監督或推廣公約的專家的觀點，使得一般性意見特別地具有高度說服力。

某些條文，如十分重要的第 3 號一般性意見（1990），從本質上賦予國家在公約下的義務。包含：不可迴避、對受害人採取行動與三項「核心義務」：尊重、保障與落實。其他各項則能為特定權利提供更詳盡的分析。這些典型的一般性意見，舉例來說，第 14 號關於健康權的一般性意見包涵了關於各種情況下對權利的詳細定義，例如免於歧視的主題下，包涵了其國際義務、怎樣構成侵犯、在地方層級的適用、非國家行為者的義務等等，如眼前所見的十分完整。透過汲取學院般的禪精竭慮（如「林堡宣言」、「關於侵犯經濟、社會、文化權利行為的馬斯特里赫特準則」）或實踐者與 NGOs（像是居住與反迫遷中心與國既特赦組織），以及晚近由法庭自身，委員會能夠靠自己做出種種法律見解。

在這全球化且國家不再那麼居於中心地位的世界，一些國家之外的政治實體同樣地會在此一議題上受到關注。這些實體同樣有義務去尊重、保障並落實經社文權利，即作為所謂的權利承擔者。除此之外，國家內部的武裝團體，有時宛如另一個政府，國際組織如：是國際間的金融與貿易組織和跨國公司，也一樣被看作是能對經社文權利有所貢獻的。承襲最後一點，我們進一步可透過種種指標、基準與預算分析去發展出一套監察、評估與測量在經社文權利上之進步的方法。

以上種種努力為消解另一個關係到經社文權利之迷思建立了基礎。該項迷思為：堅持經社文權利不具有可訟性。可訟性是指能透過法庭審判或其他法律程序進行討論並加以施行。這便是我接下來所要談到的議題。

即便沒有人認真去討論法律自身是否足以引領人權進步，法律仍然是十分重要的工具。不只是律師，對許多人來說，這與如何認定「權利」是牢牢綁在一起的。當然，毋庸置疑的，透過各種由國家所簽署的國際條約，在前面所提及的歷史進程中，人權已然普遍的受到肯認。

然而爭論仍未消逝。經社文權利無法清楚地被架構，同時無法透過國內法強制施行，令經社文權利不被視為一種真實的權利。另一個理由乃是經社文權利之關懷乃是針砭社會政策和資源分配，並對行政機關、決策者以及預算制定者提出建言。對司法部門來說，將自身介入此一爭論，乃是越過了三權分立之界線。

在這裡，歷史背景同樣地造成很大的影響。如先前所提及，西方律師，早已對政治與公民權利之相關法律論據十分嫻熟（從大憲章到法官裁示）。對較不熟悉的領域卻會戒慎恐懼。前述現象，因果循環地讓經社文權利，直到晚近仍未被奉於與大憲章、權利法案並列之高位。同樣地，直到晚近，在 ICESCR 下並沒有屬於個人的訴訟機制，像是，ICCPR 於 1966 年所制定的任擇議定書所能發揮之功效。ICCPR 的監察機構，即人權委員會(HRC)已然針對進行訴訟之相關權利做

出法律見解。在各區域層級也有同樣的機制。但經社文權利卻沒有。不過近二十年來，情況漸漸轉變。

在國際上，許多新近的人權機制，像是身心障礙者權利公約(CRPD, 2006) 原住民族權利宣言(DRIP, 2007)都無分公民、文化、經濟、政治與社會納入所有權利。此一不可分割性與相互依賴性反應著世界人權宣言與維也納宣言之精神，並重新肯定我們應以同等地標準看待經社文權利。在 2008 年的聯合國大會中所頒布的任擇議定書使個人能根據 ICESCR 向委員會提起訴訟。此任擇議定書雖然尚未生效，卻能為此一權利的真實性進行背書。其同時也強化了經社文權利的地位與可訟性。可想而知的，更多的義務亦將隨之而生，無論是在國際或國內層次。前段所提及的委員會之細部工作，將由參與者、行動者，尤其是大型的國際 NGOs，透過倡議、透過律師、透過決策者、透過學院共同的加以實行。

在地方層級，經社文權利普遍——當然或許不是全面地——被包涵在憲法及權利法案之內。有個早期的例子就是 1948 年的印度憲法，其已將經社文權利含納在內，但僅有指導性原則。在更近期的憲法中，經社文則被納入為憲法的權利。例如 1996 年的南非憲法就是一例，其將居住權與醫療照顧納入保障（至今已有數不清的例子）。直接納入憲法的作法亦能對法庭形成鼓舞。像是南非憲法法庭就願意審理關於經社文權利之案件——比方說居住權、醫療照顧或是最新近的水權

其他司法體系也表現出類似的傾向。舉例來說，哥倫比亞憲法法庭已然對享有醫療照顧之權利做相當全面地判決。區域組織亦朝向類似方向前進。比方說社會權利歐洲委員會所審理的，居住與反迫遷權利中心訴義大利政府案與非洲人權及民族委員會所受理的 SERAC and CESR 訴奈及利政府案，居住與反迫遷人類中心訴蘇丹政府。（最近則是肯亞的案例）

有趣的是，若我們檢閱關於某些經濟與社會權利之歷史，像是工作權、佃權或教育權早已成為法庭裁定的主題。我們可以回頭去看美國的經典案例：布朗訴托皮卡教育委員會案(1954)，雖然許多這類侵犯經社文權利的案件是在歧視的角度下被檢視。你可以翻開國際法院紀錄和點開居住與遷徙權利中心的網站，可發現許多關於經社文權利的判例。

所以，問題不再是經社文權利是否具有可訟性，很明顯地「有」！如同我所提及的眾多案例。當下的問題是在於如何讓跳脫訴訟的外殼：那些該讓法官退場，而讓決策者、行政官員或是立法單位來接手？法院在檢查各種被詳盡說明的方案或措施時，應保留多少餘地？又該在各種資源之分配上作出多詳細的建議？

（重要案例：：Grootboom, the TAC 案, the “engagement” 案）

基於以上焦慮，對於那些在這條路上躊躇不前得律師與法官，我將引用英國法官 Lord Denning 在 70 年前的案例中之見解作為建議：

另一面又會有什麼爭論？只有這點我們無法在任何案例中尋獲解答。這樣的說法至少不會對我造成妨礙。如果我們不破除舊規，我們就無法往

任何地方前進。讓法律一成不變，令世界徒具和諧對兩者都不是好事。

陸、全球脈絡下的經社文權利

我想要回到我一開始所提的，在全球脈絡下所發生的不平等與剝削。舉例來說，海地仍然處於震災後的重建階段，我們在這看到了一個許多人受苦於極端貧困中的例子。剝削與被邊緣化將讓貧窮成為揮之不去的循環。類似的情況也出現在「開發中」國家。要如何能在這遼闊範圍中實現社會與經濟上的正義？又要如何能在這廣大脈絡中對經社文權利施以援手。這裡我們將透過交互地以論述與發展策略兩個層面來看人權。顯然的，既有的著作把這件事講得太複雜，且把主題扯得太遠。不過今天我僅會討論「國際合作及援助上」這一部份。

國際合作及援助如今皆以成為聯合國編制內的作業。其在與維和、社會正義與人權（既使字面上不這樣用）以及經濟發展相關的早期文件中早已被肯認。比方說國際勞工組織的組織章程(ILO 1919)。很明確地，在聯合國憲章的第一條第三款，亦將之納入宗旨之內。

促成國際合作，以解決國際間屬於經濟、社會、文化及人類福利性質之國際問題。(亦可見於 13、55 和 56 條)

隨後的各類人權文獻亦納入此一機制：如世界人權宣言的 22 條及 28 條。ICESCR 的第一條第二款、11 及 12 條。1989 年兒童權利公約的第四條與 24 條第四款關於健康權方面的規定，並充分落實於 2006 年的身心障礙者權利公約第 32 條當中。其在條約機構的書寫下反覆出現，比方說在人權委員會、聯合國特別報告員之筆下，特別是在關於健康、居住、對婦女所施行之暴力等方面；並在聯合國的會議記錄中也反覆被提及，像是維也納宣言與 1993 年行動綱領的前言與第一條之中。

「國際合作與援助」的重要性無論在人權上或是發展方面均受到肯定，從對 1986 年發展權利宣言的爭論開始，其就變成一項重大議題。(見 Salomon 2007; Hunt 2008)) 在實踐層次，其中一項概念乃是推動發展企業，其能透過許多種方式實行：比方說透過多邊及雙邊機制：如聯合國和其他締約機構、各類援助及發展計畫、由國家直接靠自己實行或由國際組織中的成員為之，或其他行為者，像是國際性的金融與貿易組織、跨國公司 (MNEs) 以及非政府組織(NGOs)，。其也被近來諸多全球性援助計畫-比方說千禧年發展目標(MDGs)-的參與者視為自身之使命。比方說目標 8 便是在提倡要「制訂促進發展的全球夥伴關係」。

但是，很明顯的可以看出，像海地這類國家，就是因為缺乏這些計畫的援助，而難以將之達成。經社文權利委員會便是在此一層面上，將國際援助及合作視為「可用資源」的一部分。第二條第一款的義務便包涵了，當有需要的時候可向「國

際尋求援助及合作」。舉例來說，在若干總結描述與一般性意見中，委員會皆鼓勵國家透過報告尋求援助並述明其需求。（見 Hunt 2008; Carmona 2009）

作為國際社會的一分子，在此，已開發國家擔當著不同地角色與責任。如同先前所提及的，大多數這些國家皆肯認在發展脈絡中，國際援助的角色，尤其是簽署了千禧年發展目標的國家。但千禧年發展目標並沒有賦予法律上的連帶責任，無疑的這將是令各國更積極任事的一項動力。這不單令人失望，更有許多學術性的意見指出，這將使朝向千禧年發展目標的發展架構與人權架構間相關努力，在兩者間長期且徹底地缺乏一統合機制，縱使這兩者間有相當多的共通之處。

但最近，有更多努力肯定且運用兩者作為互補性的議程。

已開發國家在發展架構下，可以直接透過雙邊或多邊協定進行捐助。他們同時也是國際條約體的成員，像是金融方面的國際組織如，世界銀行、國際貨幣基金(IMF)；或是貿易相關連的世界貿易組織(WTO)。或是說跨國公司的母國(或該說是註冊國)。漸漸地，尤其是透過日益增加地，關於健康、水、工作與社會安全(前面所提及地)，透過深思熟慮的一般性意見，委員會利用公約第二條第一款的機制，將維護公約之權利納入在國際體系中，賦予這些已開發國家某些角色與責任。

如果一個已然簽署公約的國家，想要確實擔起捐助者的角色，其需要承擔特定義務。在其向受助者所提出的各項計畫中，無論是單獨或是有其他捐助者，至少需要詳查確認各項權利是否受到侵害，不管是因其自身或是因第三方(即尊重與保護之責任)。被界定為「核心義務」者亦必須被確保。這些計畫之施行不得帶有歧視，同時弱勢群體也不能因此處於更不利的位置。並需要充分地對協商，參與以及其他發展權利進行規定。這些計畫必須受到審視，捐助者必須承擔責任且需有公平之程序(Hunt 2008)。援助不僅是指經濟援助，也包含貿易、投資政策。同時也必須強調，這些基於捐助國而產生的援助與合作計畫，仍具有一項附帶義務，其必須對自身之人民負起最基本的責任。

委員會，以及尤其重要地，關於健康權的特別報告員，同樣必須重視這些義務國作為國際金融體系成員的角色。再次強調，這些義務乃是在保障公約中的各項權利，因此當在這些條約機構中參與決策制定或提出方案時，條約機構中的成員國必須同樣地注重前面所列的所有需求。有一份由特別報告員所書寫的文件，其乃是關於瑞典在烏干達的作為，十分完整地呈現出這些義務，作為世界銀行與IMF的成員，其同時也評估瑞典作為成員國之應盡責任。。

在其他地區，委員會與特別報告員同樣地注重關於貿易與投資的國際組織，其成員國之責任。舉例來說，在加拿大的觀察結論中，委員會建議該國應該重視「在貿易與投資協定中確保公約中各項權利的優先性，特別是在『北美自由貿易協定』(NAFTA)第六章所規定之關於投資者與國家間糾紛之裁定上。」(Hunt 2004)其再次強調公約下的責任，像是健康權，WTO的成員國必須在圍繞著「與貿易

有關之智慧財產權協定」(TRIPS)和「關稅暨貿易總協定」(GATT)的各項談判中，特別注重其決策對於開發中國家之健康權的影響。

國際性的經貿組織、WTO 與跨國公司同樣地作為被審議的主體。在所有案例中，仍持續摸索著，是否該對各種實體課以人權上之責任？而又如何納入？以及納入哪些層面？直到今時今日，是否將這些責任**直接**施加於任一個案例中，仍是個具爭議性的問題。

總而言之，直到現在，國家在各種角色中作為捐助者而行動時，國家義務的性質與範圍仍是個正在開展中問題。同時還有更大更具爭議性的問題：是否「國際社會」有義務對發展中國家的要求提供援助與合作？還是其應繫之於某些特定國家或實體，比方說聯合國及其相關機構、國際經貿組織與區域性組織？

換句話說，實際上到底誰具有這些義務，誰是義務的「承擔者」？就像康德被沈恩所沿用的概念：「不完全責任」。究竟是誰必須伸出援手，而又必須作到什麼地步？(Sen 2009)究竟是所有有錢的國家亦或是少數特定富國？既使在此一脈絡下，即這篇文章所提及的發展脈絡，對各國來說，援助有一個較為明確之目標，像是 GDP 的 0.7%。(千禧年發展目標 8，第 32 號目標)，此一指標仍然僅有建議性質。委員會也在若干觀察結論中承認這一點。(Carmona 2009; Hunt 2008)但既使委員會不再將之視為是種**義務**。然而某些國家仍然準備接受將此一目標作為自身之義務，比方說加拿大(cited in Carmona 2009, note 57)跟德國。但有些國家，像是瑞典雖然已達成此一標準，但仍不願意將之視為義務。最可行的或許就是，將**必須採取步驟往此一目標邁進視為一種義務**。

柒、結論

最後一段或許聽起來只是理論，同時十分複雜。但我的目的是在於展示我們如何能在全球脈絡中去發展、應用現存的理論與法律架構去促進經社文權利之實現。這需要國家與其他實體為其所扮演的各種角色負起某些特殊的政治承諾，無論是在貿易談判中、在金融磋商中、在援助方案的設計與施行中。這項政治承諾尚未被滿足，尤其是在這經濟衰退之時。但我們也必須記住對於某些人或某些群體來說，這個時機並非他們所經歷最惡劣的時刻。同時我們在維護人權上的努力必須直接地去對此一處境，力求改變。

但我們不應該忘記，這些在國內層次或許可以更容易達成-但這仍需面對政治上的抗拒與種種急迫的需求。如同本文一開始所提到的，有太多的事情要做了：要透過憲法來保障經社文權利？或至少透過法律？法院是否願意正視這些浮現中的議題？任何方案，像是健康照顧或教育，是否平等的開放給被邊緣化的社會群體，例如原住民或是新移民？這不只是不平等的世界也是貧富不均的社會，唯有承認與實現這些在 ICESCR 的經社文權利才可能產生改變。

經濟、社會與文化權利

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作為人權之一環，經濟與社會權利之理念如同一種道德直覺。在這資源充足且人類知識盈滿之世界，任何人應被保證享有不虞匱乏之生活。同時，被排拒在不虞匱乏生活之外者，乃是不正義的受害者。

D.Beetham, *What Future for Economic and Social Rights?* 43 Political Studies Special Issue, 1995

壹、社會、經濟和文化權利之源頭

任何形式的差別待遇—提倡反對奴役以及女性運動。

勞動人權：工業革命、工廠法（the Factories Acts）與聯合國國際勞工組織（ILO）

公共衛生與福利國家：“醫療照顧權利”之起源

貳、國際法中的框架

聯合國憲章（1945）

世界人權宣言（UDHR，1948）

人權世界會議之維也納宣言與行動綱領（1993 年 6 月 14-25 日制訂，1993 年 7 月 2 日施行）

所有人權皆是普世、不可分割且交相支撐並互相關連的（維也納宣言第五條）

參、社會經濟與文化權利是「第二階段」嗎？綜觀 1948 到 1990 年間的發展

經濟、社會與文化權利國際公約(ICESCR, 1966)

第二條第一款：

每一締約國家承擔盡最大能力個別採取步驟或經由國際援助和合作，特別是經濟和技術方面的援助和合作，採取步驟，以使用一切適當方法，

尤其包括用立法方法，逐漸達到本公約中所承認的權利的充分實現。(斜體為作者自行加入)

【cf：經濟、社會與文化權利國際公約(ICESCR, 1966)第二條第一款】

某些關於社會經濟與文化權利的迷思

不是真正的權利，僅是法律上的權利

「第 X 代人權」的說法表示其居於次要地位

‘Positive’ as opposed to ‘negative’ rights.

相對於消極權利的積極權利。

歷史因緣造成其在發展歷程與結果上有所不同

並沒有被納入大憲章與權利法案，故相關法律見解較少。

缺乏個人申訴的機制。

在各個層級，可援引的資源均較少。

肆、重新宣告社會經濟與文化權利乃是一種「真正的權利」

一、定義何謂權利

聯合國社會、經濟與文化權利委員會

過程：第 3 號一般性意見：遞約國義務

相關權利的例子：一般性意見 14 號-健康權

一般性意見 15 號-水權

一般性意見 18 號-工作權

一般性意見 20 號-禁止歧視

消除對婦女一切形式歧視公約(1979)

兒童權利公約(1989)

身心障礙者權利公約(2006)

原住民族權利宣言(2007)

社會經濟與文化權利正在發展中的法律見解

(1)不可分割的概念

(2)最低核心義務見第 3 號一般性意見

- (3)有層次地達成：尊重、保障與落實
- (4)指標與基準
- (5)行為上的義務與其結果
- (6)裁量餘地原則（審慎斟酌）
- (7)侵權分析法
- (8)預算分析

在經濟、社會與文化權利國際中公約中的林堡原則

（見 <http://www2.law.uu.n/enlish/sim/instr/limburg/asp>）

關於侵犯經濟、社會、文化權利行為的馬斯特里赫特準則（1997）

非國家行為者的責任

舉例來說：跨國公司、國際經融機構（世界銀行與國際貨幣基金組織）；世界貿易組織（WTO）、武裝叛亂團體

聯合國網站：www.un.org; www.ohchr.org; <www2.ohchr.org/English/bodies/cescr>

國際勞工組織：www.ilo.int

國際特赦組織：<http://www.amnesty.org/>

居住與遷徙權利中心(COHRE) www.cohre.org

商業人權資源中心 <http://www.business-humanrights.org>

二、經濟社會與文化權利的可訟性

社會經濟與文化權利國際公約任擇議定書。 聯合國大會決議，A/RES/63/117, 2008

南非政府等訴 *Grootboom* 等人案

南非憲法法庭，案件 Case CCT 11/00, (2001)1 SA 46（可見於 online at www.concourt.gov.za/）

南非衛生署等訴治療行動運動等案，南非憲法法庭案件，CCT8/02, Judgment of 5 July 2002.

Mazibuko 等訴約翰尼斯堡市案（Phiri 地區的水權案）

南非憲法法庭案件 CCT 39/09, 2009（可見於南非憲法法庭與 *Occupiers of 51*

佔領 51 Olivia Road 訴約翰尼斯堡[2008] ZACC 1 – see (2008) 8 HRLR 703

Joe Slovo 社區居民訴 *Thubelisha Homes* 等(2010) – see (2010) 10 HRLR 360

哥倫比亞憲法法庭裁定，T-760/2008, 31/7/2008

居住與遷徙權利中訴義大利政府，No. 58/2009 申訴，社會權歐洲委員會 25/06/2010 裁定

SERAC and CESR 訴奈及利亞國家人權委員會(Comm. No 155/96, 2001)

居住與牽徙人類中心訴蘇丹政府（9/7/2010, 非洲人權委員會）（可見於居住與牽徙人類中心網站）

布朗訴托皮卡教育委員會案(1954)347 U.S 483: (1955)349 U.S 294

居住與牽徙人類中心（2003）”經濟、社會與文化權利訴訟：成果、挑戰與策略”
可訟性的經驗比較 ICJ, 2008

伍、經濟、社會與文化權利，貧窮與發展

聯合國憲章(1945)：前言

聯合國憲章第一條第三款，三、促進國際合作，以解決國際間屬於經濟、社會、文化、及人類福利性質之國際問題，且不分種族、性別、語言、或宗教，增進並激勵對於全體人類之權及基本自由之尊重。

發展權宣言（1986）

聯合國千禧年目標（並見於 2000 年聯合國千禧年會議之千禧年宣言）可見於 [http:// www.undp.org/mdg/](http://www.undp.org/mdg/)

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處於更多自由中：讓全人類人朝向發展安全與人權

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A.Chapman and S.Russell (eds.) *Core Obligations: Building a framework for economic, social and cultural rights* (Intersentia 2002)

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Progress and Politics in the Fulfillment of Economic, Social and Cultural Rights

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I. Introduction

My brief for today was to discuss the International Covenant on Economic, Social and Cultural Rights (ICESCR), one of the two Covenants deriving from the Universal Declaration of Human Rights (UDHR), and the one which deals with economic, social and cultural (ESC) rights. I want to begin however by placing the Covenant and the rights it protects in a wider context, in addressing questions of social and economic injustice, both at home in a domestic jurisdiction and globally in the international family of nations. Let me illustrate what I mean here.

II. Social and economic justice

This past year, both in my native New Zealand and elsewhere, in Japan or, if we go further back, in Haiti, events have occurred which have brought into sharp relief the rockbottom importance of basic human needs – to food, water, shelter, sanitation, as well as the ongoing effects which lack of these can mean for work, education and family life. In times of crisis and confusion such as these, we recognize and respond instinctively to such needs – and in all these cases people all over the world have rushed to help. (A newspaper article after the Japan quake described this as one of the most attractive features of our being human, our common humanity).

But in societies all around the world there are people suffering the neglect of these basic needs on a daily basis. The idea of social and economic justice begins from the premise that this situation - the scandal of poverty, deprivation, exclusion which we see all around us – that this situation is unacceptable; that the *oikumene*, the ordering of the household of the state, economics in its broadest sense, should be such that all have access to these basic needs and thus to a life of human dignity; that all should have the chance to develop, each to their own potential. This is only possible

in a community working together for the common good, whether it be a local group, a state or the international community of nations.

Amartya Sen, the Nobel prize winning economist, in his recent book *The Idea of Justice*, argues that we can all instinctively recognize instances of injustice, either to ourselves or to others, when we are faced with them, and, moreover, recognize instances where such injustice can be seen to be remediable. Sen then develops a theory, or perhaps an idea, of justice, which can lead to constructing both immediate but also long term solutions to remedy such injustices. For such solutions to be acceptable and durable, Sen argues, these signals of injustice must then be critically and objectively examined: genuine public discussion is needed, even though, as he acknowledges, in the end, there may turn out to be more than one way in which such injustices may be resolved. Such assessment and discussion must include a consideration of the importance of both institutional shortcomings and behavioural transgressions (that is,...).

It can be argued that it was precisely in such a watershed moment of identifying and then seeking to remedy perceived injustice, that the modern human rights movement was born. Both the Charter of the United Nations in 1945 and the following 1948 UDHR were a response to the atrocities, the ultimate fundamental injustices, revealed at the end of WWII. But the Charter and the UDHR were also an example of Sen's next stage, the result of reasoned reflection from a plurality of voices. They were not intended to remedy the past – that could not be done – but to set up structures and guide behaviour so that such injustices should not occur again (as noted in the Preamble to the Charter).

The same is true of the raft of subsequent developments of human rights theory and practice in the six decades since, right through to the recent Convention on the Rights of Persons with Disabilities (2006 CRPD) and the Declaration on the Rights of Indigenous peoples (2007 DRIP), in what has been called “the rights revolution”, within which I will focus on social and economic justice and the role that ESC rights can play to bring that about.

The links I have been seeking to make here are nicely brought together by political philosopher, David Beetham:

The idea of economic and social rights as human rights expresses the moral intuition that, in a world rich in resources and the accumulation of human knowledge, everyone ought to be guaranteed the basic means for sustaining life, and that those denied these are the victims of a fundamental injustice. (Beetham 1995)

III. A word about rights

But first, just a word or two about rights in general. And this only because there are so many odd ideas around about human rights (that may not be the case here, of course, but it is good to make it clear at the outset what I am talking about). When human rights advocates and academics and practitioners speak of human rights they are using shorthand: “human rights” stands for a nexus of human rights and obligations, within a web of community commitment and concern. The picture of human rights as totally individualistic, pursued at all costs and everyone else’s expense through the courts, would be recognized by most people as a caricature – but some such model seems to be still what many believe. We will look at some other myths about ESC rights specifically in a moment.

IV. Reclaiming Economic, Social and Cultural Rights

Already by the time of their inclusion in the UDHR, ESC rights had a long history, at least in the West: in the anti-discrimination campaigns against slavery and for women’s rights; in labour laws, both nationally, such as in the Factories Acts, and internationally, through the International Labour organization (ILO); in public health initiatives which lead to recognition of the need for health care for all.

But despite this history, despite their inclusion in the UDHR, ESC rights have had a rocky road to acceptance as ‘real rights’, as equally recognizable and important as civil and political (CP) rights. Hear the complaint of the UN Committee on Economic, Social and Cultural Rights to the Vienna World Conference on Human Rights in 1993:

[t]he shocking reality [is]...that states and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights, which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights...

There are a number of reasons for this reluctance: West/East ideological differences reflected in the Cold War, leading to the drawing up of two binding Covenants from the UDHR, rather than the one which was originally intended, and the identification of ESC rights with the Soviet Bloc; the different language of these

two Covenants, as regards obligations (see ICESCR, Art. 2(1)), with the language of the ICESCR giving rise to the perception that ESC rights need not be implemented immediately; the use of terms like “first and second generation”, which suggest a priority for CP rights ; the perception that ESC rights are not ‘real’ rights, not ‘legal’ rights, they being less familiar to Western lawyers. All of these reasons led to less resources being devoted to ESC rights at any level, to their exclusion from Constitutions or Bills of Rights and so to there being a less well developed jurisprudence on ESC rights; and to the lack of a complaint mechanism at the international level (an Optional Protocol process) such as has long been available for breach of CP rights.

In the last two decades this position of lower status (if any status at all) has been gradually improving. Books are written and courses taught, devoted entirely to ESC rights. But still scepticism remains, amongst lawyers, policy makers and the public generally. So I want to concentrate today on three areas where in particular I think that the removal of such skepticism, the exposing of the falseness of the underlying arguments, might help to make a difference. Those three areas are: the definition of ESC rights and obligations; the justiciability of ESC rights; and the fulfillment of ESC rights in the wider global development context, where theory now offers solutions but practice continues to prevent their realization

1. Defining Rights

One of the criticisms leveled against ESC rights has been that they are too ‘vague’, not able to be clarified sufficiently to be enforced through the courts or to ground policy initiatives. Nor, it is argued, is it at all clear how these rights can be held or exercised by individuals (who are the ‘rights-holders’) nor on whom the corresponding obligations would lie, that is who the ‘duty-bearers’ would be.

But this is to ignore the considerable work which has been done to resolve these difficulties, by academics, by practitioners, latterly by the courts themselves. Especially in this, as in other matters concerning ESC rights, a leading role has been taken by the UN committee appointed to oversee the ICESCR, the CESCR. Since 1990 this Committee has worked diligently through the two main methods available to it, Concluding Observations on State party reports and a series of more broadly based General Comments (GCs). None of these, I should add in deference to the lawyers present, is binding law; but as the views of an expert body charged with the oversight and promotion of this Covenant, the GCs in particular are highly persuasive.

Some are procedural, such as the important GC 3 (1990), on the nature of states parties’ obligations under the Covenant, including non-regression, action for the most

vulnerable, ‘core obligations’, the three - fold obligation to respect, protect, fulfill. Others are devoted to a detailed analysis of a particular right. Thus a typical GC, for example GC 14 on the right to health, includes such matters as a detailed definition of the right in various circumstances; topics such as non-discrimination, and the right as applicable to particular groups; the obligations of states, including their international obligations; what constitutes a violation of the right; implementation measures at the local level; the obligations of actors other than states – pretty comprehensive as you can see. Through these the Committee has built up a ‘jurisprudence’ of its own, which has been taken up and elaborated by academics (see Limburg, Maastricht), practitioners and NGOs (e.g. COHRE, AI) and latterly by the courts.

In this globalised and less state- centric world, considerable attention is now also being paid to identifying those entities, besides the state, which might also have obligations to respect, protect or fulfill an ESC right: that is what other duty-bearers there might be. Besides the State, these might include armed groups, which are sometimes effectively alternative governments, international organizations, such as international financial and trade organizations, and MNEs. A lot of work has also been done on considering what might be meant by “available resources” which can be devoted to ESC rights. In connection with this last point, advances have also been made in developing ways of monitoring, evaluating and measuring progress in the promotion and protection of ESC rights, through indicators, benchmarks and budget analyses.

All this work has laid the foundations for disabusing another bogey or myth associated with ESC rights, the insistence that they are not justiciable, that is able to be argued in and enforced through the proceedings of a court or other tribunal. It is to this issue that I now turn.

2. Justiciability

While no-one would seriously argue that the law is enough on its own to advance the cause of human rights, it nevertheless remains a very important tool. For many, and not just for lawyers, it is closely tied to the identification of a ‘right’. Of course, it is true that human rights are now firmly recognized in international law through the treaties which states have ratified and the processes described above.

But the argument has been, and is still commonly made, that ESC rights are not really rights because they cannot be clearly articulated and thus enforced in a domestic court of law. A second reason given is that ESC rights are concerned with questions of social policy and resource allocation and that these are the domain of the executive and the policy makers and budget setters who advise them. That for judges

to involve themselves in these decisions would cross the line which demarcates the constitutional separation of powers.

The historical background has been important here too: as mentioned earlier, Western lawyers, while long familiar with arguing for CP rights in the courts (from Magna Carta to the Judges' Rules), have been wary of less familiar territory. As both consequence and cause, ESC rights have not, until recently, been enshrined in Constitutions or Bills of Rights; nor, again until recently, has there been an individual complaint mechanism attached to the ICESCR, an Optional Protocol, such as has been available for CP rights since 1966. The monitoring body of the ICCPR, the Human Rights Committee (HRC), has built up a body of jurisprudence around those rights. The same is true of the various regional mechanisms. But not for ESC rights. But in the last two decades this has all gradually changed.

At the international level, more recent human rights instruments, such as the CRPD and the DRIP, have included all rights without distinction, civil, cultural, economic, political and social. The indivisibility and interdependence reflected in the UDHR and the Vienna Declaration are thus re-affirmed and with them, of course, the equal standing of ESC rights. In 2008 the UN General Assembly adopted an Optional Protocol (OP) to the ICESCR, which allows an individual complaint for breach of ESC rights to the CESC. This OP, though not yet in force, likewise makes a statement about the reality of these rights. It also strengthens the status and justiciability of ESC rights, and the obligations which are their corollary, both at the international and consequently at the domestic level as well. And the careful work of the CESC, described in the previous section, has been taken up by practitioners and activists, particularly in larger NGOs, by advocates and lawyers, by policy makers and by academics.

At the local level, ESC rights are now commonly – though perhaps not yet routinely – included in Constitutions and in Bills of Rights. There was an early example as a precedent in the Indian Constitution of 1948, where ESC rights were included, but only as Directive Principles. In more recent constitutions, ESC rights are included as fully-fledged rights. Thus, for example the South African Constitution of 1996 protects a number of ESC rights, including those to housing and healthcare. (There are now numerous other examples). Such direct incorporation has encouraged courts, such as the South African Constitutional Court, to be willing to adjudicate ESC rights, such as housing, healthcare and, more recently, access to water. (*Refer to cases here*).

The same willingness is apparent in other jurisdictions. For example, the Colombian Constitutional Court has delivered a comprehensive judgment on the right

to healthcare. A similar willingness is apparent in regional forums: for example, *COHRE v Italy* in the European Committee on Social Rights and *SERAC and CESR v Nigeria* and *COHRE v Sudan*, both from the African Commission on Human and Peoples' Rights. (*Recent Kenyan case*).

What is interesting is that, when we come to look at the record, cases concerning some economic and social rights, such as work rights, tenancy rights or the right to education, have long been the subject of court determinations. We could go right back to the US seminal case of *Brown v Board of Education* in 1954/5, although many of these earlier cases approach the violation of ESC rights through the lens of discrimination. You can now go to books (ICJ) and websites (COHRE) and find there documented hundreds of cases in which ESC rights are adjudicated.

So, the question is no longer whether ESC rights are or can be justiciable. They clearly are and can. As many of these cases I have mentioned attest, the question now is rather how we nut out the contours and limits of that justiciability: where does the work of the judge end and that of the policy maker and the administrator – or the legislator - take over? How far should a court retain oversight of any programme or instruction which it may have specified? How detailed should the court's recommendations be as to the allocation of resources? (*Outline examples here: Grootboom, the TAC case, the “engagement” cases*).

And to those anxious counsel and judges who are hesitant to even begin to move in this direction I would offer the advice of Lord Denning from a case some 70 years ago:

“And what is the argument for the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before we shall never get anywhere. The law will stand still while the rest of the world goes on and that will be bad for both”.

(*Packer v Packer* [1953] 2AllER 127, 129).

V. ESC rights in the wider global context

I would like now to take us back to the beginning of this presentation and to the broader global context of inequality and deprivation. For example, Haiti is still trying to even begin to re-build after the earthquake there: here we have an example of a society where many are mired in extreme poverty, caught in a poverty cycle of deprivation and marginalization. A similar situation can be found in many

‘developing’ countries. How might social and economic justice be achieved in this wider forum and how might the idea of ESC rights be of assistance in this broader context? Here we are concerned with the intersection of human rights with the discourse and methods of development. Obviously there are books – libraries – written here too on a complex and fast moving subject. But today I want to pick up just one aspect of it, the concept of ‘international cooperation and assistance’.

This concept of international cooperation and assistance is now well established in both the standard-setting and work of the United Nations. It had been recognized as a necessary component in earlier documents which acknowledged the links between peace-making, social justice, human rights (even if not then so named) and economic development, for example in the Constitution of the International Labour Organisation (ILO 1919). It is crucially embedded in the Charter of the United Nations in Article 1(3), where the purposes of the United Nations include

“[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character,” (see also articles 13, 55 and 56).

This articulation is followed by its incorporation into various human rights documents: from the UDHR, in Articles 22 and 28; the ICESCR, in Articles 1(2), 11 and 12; the Convention on the Rights of the Child (1989), in Articles 4 and 24(4) in relation to the right to health; to very fully in Article 32 of the Convention on the Rights of Persons with Disabilities (2006). It reappears in the writings of the Treaty Bodies, as for example of the Human Rights Committee, of the UN Special Rapporteurs, especially those on health, housing and violence against women, and in the records of UN meetings, such as the Vienna Declaration and Programme of Action (1993), in the Preamble and Article 1.

The importance of ‘international cooperation and assistance’ is also recognized in the crossover between human rights and development, beginning with the controversial Declaration on the Right to Development (1986), where it is a major theme (see Salomon 2007; Hunt 2008). It is in fact one of the concepts which drives the development enterprise, demonstrated in many ways, both multilaterally and bilaterally: by the UN and other international bodies, in aid and development programmes, by States themselves directly and by their membership of other international organisations and by other entities/actors, such as international financial and trade institutions, multinational corporations (MNEs) and non-governmental organizations (NGOs). And it underpins the most recent commitment of many of these players to the task of mutual global support, the 2000 Millenium Development Goals (MDGs), particularly Goal 8, which calls for the “creation of a global

partnership for development”.

But as the example of Haiti makes clear, there are states which are simply not in a position without assistance to plan for these goals, let alone achieve them. This is where the CESCR has utilized the concept of international assistance and cooperation, recognizing these as part of the ‘available resources’ of that state. The obligations created by Article 2(1) thus include that of seeking such assistance from other states or from the ‘international community’ as a whole, when it is needed. Thus, for example in a number of its Concluding Observations and General Comments, the Committee has encouraged states to seek such assistance and to identify such needs in their reports (see Hunt 2008; Carmona 2009).

Meanwhile, more developed states are seen to have different roles and responsibilities as part of the network of the international community. As noted above, most of these states have recognized a role of international assistance in the development context, particularly in their signing on to the MDGs, which in general have a dual domestic/international focus, especially when MDG 8 is factored in. But the MDGs make no pretence to create legally binding obligations, which no doubt was a factor in their enthusiastic take –up. It has been disappointing and the subject of much adverse academic comment that there was for a long while an almost total lack of co-ordination between work towards the MDGs and the human rights framework, despite a considerable amount of commonality in substance. For it can be argued that the work of both can be greatly advanced by any linkage.

But in fact more recently there have been more efforts to recognize and implement a complementary agenda (Carmona 2009).

Developed states play a number of roles within this development framework: they can be direct donors, in a bilateral or a multilateral context; they are also members of international bodies, financial (IFIs), such as the World Bank and the International Monetary Fund (IMF), and trade-related, such as the World Trade Organisation (WTO); they are also often the host (that is, the registration) state for multinational enterprises (MNEs). Gradually, especially through its increasingly elaborate General Comments on health, water, work, social security (mentioned earlier), the Committee has grafted on to these roles the requirement of upholding the rights set out in the Covenant in each of those international contexts, through the mechanism of Article 2(1).

Thus if a state is already fulfilling a role as a donor and has ratified the Covenant, it has certain obligations. In its programmes with receiving states, whether alone or with other donors, it is required to see that, at the very least, rights are not infringed, either by itself or by third parties (duties to respect and protect) and that identified

‘core obligations’ are upheld; that programmes are administered without discrimination and vulnerable groups not disadvantaged; that there is ample provision for consultation, participation and other ‘development’ rights; that programmes are monitored, donors accountable and rules of procedural fairness observed (see Hunt 2008). The assistance provided should not be limited to financial assistance but include, for example, trade and investment policies. It should be stressed that the obligation of assistance and cooperation resting on donor states remains a subsidiary obligation, with the primary duty to its people remaining with the state itself (see GCs 1, 2 and 3, 1990 and Hunt 2008).

The Committee, and especially the first Special Rapporteur on the Right to Health, have also considered the obligations of states in their role as members of international financial institutions. Here again these obligations are to uphold Covenant rights and therefore state representatives on those bodies must likewise observe all the requirements listed above, when contributing to decision-making in the planning and carrying out of the programmes of those bodies. One of the fullest expressions of these duties in this context is documented in the Special Rapporteur’s report where, in relation to the aid programmes which Sweden has undertaken in Uganda, he also undertook a mission to the World Bank and the IMF to assess Sweden’s responsibilities as a member of those bodies (Hunt 2008).

Another area where both the Committee and the Special Rapporteur have again drawn attention to the responsibilities of states as members of international organisations is that of international trade and investment. For example, in its Concluding Observations on Canada, the Committee recommended that the state party consider “ways in which the primacy of Covenant rights may be ensured in trade and investment agreements, and in particular in the adjudication of investor-State disputes under chapter XI of the North American Free Trade Agreement (NAFTA). The Special Rapporteur in 2003 undertook a mission to the World Trade Organisation. In his report on this mission (Hunt 2004), he highlighted again the duties under the Covenant, as regards the right to health, of WTO member states, stressing especially their responsibility to consider the effects of their decisions on the right to health in developing states in negotiations around the TRIPS and GATT agreements.

The roles and human rights responsibilities of other actors in these processes, the IFIs, the WTO and MNEs, have also been subject to scrutiny. In all these cases, there is a continuing exploration of whether, how and to what extent these various entities might incur human rights responsibilities. In each of these cases, however, at the present time, the attaching of such responsibilities **directly** is still problematic and

contested.

In summary then, at present, the question of the nature and extent of a State's obligations when it is acting as a donor in any of these various roles is still developing. Even more problematic is this broader question: if the 'international community' has an obligation to provide international assistance and cooperation at the request of a developing state, just how is that to be sheeted home to particular states or other entities, such as the UN and its agencies, the IFIs or regional groupings?

In other words, just who has these obligations, who are the 'duty bearers', in concrete terms? They are, as Amartya Sen describes, following Kant, "imperfect obligations", addressed to anyone who is in a position to help and to which a certain amount of ambiguity will necessarily be attached (Sen 2009). Do they rest then on all rich countries, or any particular rich country? Even in a context, in this case a development context, where a specific target of aid assistance is recommended for each state, as for example a target of 0.7% of GDP (MDG 8, target 32), such a target is seen only as a recommended guide. The Committee has so recognized it in a number of its Concluding Observations (see Carmona 2009; Hunt 2008). But even the Committee has stopped short of seeing this as an **obligation**. There are some indications that some states, Canada (cited in Carmona 2009, note 57) and Germany, for example, might be prepared to accept this target as obligatory. But even a state such as Sweden, which is already in fact meeting this figure, is reluctant to accept an obligation here. The most that can probably be claimed is that there is **an obligation to take steps towards** such a target.

VI. Conclusion

This last section in particular may all sound very theoretical and complicated. But my purpose here has been to show that there are now theoretical, legal structures which can be developed and implemented to advance ESC rights in the global context. What is now required is some real political commitment by states, in all their various roles, and by other entities, in trade talks, in financial dealings, in aid design and delivery. It is this political commitment which is lacking, especially in difficult recessionary times like now. But we might remember that for some people and some groups, these times are no worse than those they experience all the time. And it is to working to change those circumstances that our human rights efforts must be directed.

But we should not forget either where that can be perhaps more easily done – but where it is also politically resisted and urgently required – on the domestic level. As the first part of this presentation suggests, there is much to be done here as well: are

ESC rights constitutionally protected or at least by legislation? Are the courts knowledgeable about the issues raised? Are any protections which are available, equally available to marginalized groups in society, such as indigenous people or migrants, as regards, for example, health-care or education? For it is not only in an unequal world but in prosperous but unequal societies, that the full recognition and fulfillment of the rights enshrined in the ICESCR can effect change.

Economic, Social and Cultural (ESC) Rights

Margaret Ann Bedggood

(Honorary Professor of Law, Univeristy of Waikato &
FormerChair, New Zealand Human Rights Commission)

The idea of economic and social rights as human rights expresses the moral intuition that, in a world rich in resources and the accumulation of human knowledge, everyone ought to be guaranteed the basic means for sustaining life, and that those denied these are the victims of a fundamental injustice.

D.Beetham, *What Future for Economic and Social Rights?* 43 Political Studies Special Issue, 1995

I. The Origins of ESC Rights

Early approaches to discrimination – campaigns against slavery, the ‘women’s movement.

Labour rights: the industrial revolution, the Factories Acts, the International Labour Organization (ILO)

Public health and the welfare state: the origins of a ‘right to healthcare’

II. The International Legal Framework

Charter of the United Nations (1945)

Universal Declaration of Human Rights (UDHR, 1948)

Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, Adopted12 July 1993

All human rights are universal, indivisible and interdependent and interrelated (Vienna Article 5)

III. Are ESC rights “second class”? an overview from 1948 to 1990

International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)

Article 2(1):

Each state party to the present Covenant undertakes *to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively* the full realization of the rights recognized in the present Covenant, by all appropriate means, including particularly the adoption of legislative measures (italics added).

[Cf. International Covenant on Civil and Political Rights (1966), Article 2(1)]

Some myths about esc rights

Not ‘real’, that is legal rights

‘Generations’ language suggests inferiority;

‘Positive’ as opposed to ‘negative’ rights.

Consequential historical differences in approach and outcome

Not included in Constitutions or Bills of Rights and so less jurisprudence

No individual complaint mechanism

Less resources at all levels

IV. Reclaiming ESC rights as “real rights”

1. Defining Rights

UN Committee on Economic, Social and Cultural Rights (CESCR)

Process: General Comment 3 – on the Nature of State Parties’ Obligations

Examples of Rights: General Comment 14 – on the right to health

General Comment 15 – on the right to water

General Comment 18 - on the right to work

General Comment 20 – on non-discrimination

Convention on the Elimination of all Forms of Discrimination against Women (1979)

Convention on the Rights of the Child (1989)

Convention on the Rights of Persons with Disabilities (2006)

Declaration on the Rights of Indigenous Peoples (2007)

The developing jurisprudence on esc rights

- (1) the concept of indivisibility
- (2) the concept of the ‘minimum core content’ (see GC 3)
- (3) the multi-layered approach – to respect, protect, fulfil
- (4) indicators and benchmarks
- (5) obligations of conduct and result
- (6) the ‘margin of appreciation’ (discretion)
- (7) a ‘violations approach’
- (8) budget analyses

Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986) (see <http://www2.law.uu.nl/english/sim/instr/limburg/asp>)

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) (see <http://www1.umn.edu/humanrts/instrec/Maastrichtguidelines.html>)

The liability of non-state actors

For example: MNEs; IFIs (The World Bank and the IMF); the WTO : armed opposition groups

UN sites: www.un.org; www.ohchr.org; <www2.ohchr.org/English/bodies/cescr>

International Labour Organisation www.ilo.int

Amnesty International <http://www.amnesty.org/>

Centre on Housing Rights and Evictions (COHRE) www.cohre.org

Business and Human Rights Resource Centre <http://www.business-humanrights.org>

2. The Justiciability of ESC Rights

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, GA Resolution, A/RES/63/117, 2008

Government of the Republic of South Africa et al v Grootboom and Others, Constitutional Court of South Africa, Case CCT 11/00, (2001)1 SA 46 (available online at www.concourt.gov.za/)

Minister for Health et al v Treatment Action Campaign et al, Constitutional Court of South Africa, Case CCT8/02, Judgment of 5 July 2002.

Mazibuko and others v City of Johannesburg (the Phiri right to water case):

Case CCT 39/09, 2009 (in the Constitutional Court see site above and the COHRE site)

Occupiers of 51 Olivia Road v City of Johannesburg [2008] ZACC 1 – see (2008) 8 HRLR 703

Residents of Joe Slovo Community v Thubelisha Homes et al (2010) – see (2010) 10 HRLR 360

Colombian Constitutional Court, Decision T-760/2008, 31/7/2008

COHRE v Italy Complaint No. 58/2009, Decision 25/06/2010, European Committee on Social Rights

SERAC and CESR v Nigeria, African Commission on Human and Peoples' Rights (Comm. No 155/96, 2001)

COHRE v Sudan (29/7/2010, African Commission on Human and Peoples' Rights (see COHRE website)

Brown v Board of Education (1954)347 U.S 483: (1955)349 U.S 294

COHRE (2003) “*Litigating economic, social and cultural rights: achievements, challenges and strategies*”

Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative experiences of justiciability, ICJ, 2008

V. ESC Rights, Poverty and Development

Charter of the United Nations (1945) Preamble

Article 1(3): to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character

Declaration on the Right to Development (1986)

The Millennium Development Goals [and see Millennium Declaration, Millennium Assembly of the UN, 2000]. See [http:// www.undp.org/mdg/](http://www.undp.org/mdg/)

UNDP, *Human Development Report 2000: Human Rights and Human Development* (UNDP 2000)

“In Larger Freedom: towards development security and human rights for all”,

Report of the Secretary General, UNDoc.A/59/2005

Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, Paul Hunt; Addendum: Missions to the World Bank and the International Monetary Fund in Washington D.C. (20 October 2006) and Uganda (4 -7 February 2007), A/HRC/7/11/Add.2, 5 March 2008.

A.Sen, *Development as Freedom*, (Oxford, 1999); *The Idea of Justice*, (Oxford, 2009)

T.W.Pogge (ed.), *Freedom from poverty as a human right; who owes what to the poor?* (OUP, 2007)

M.Salomon, *Global Responsibility for Human Rights* (OUP, 2007)

M.S Carmona, “The Obligations of ‘international assistance and cooperation’ under the International Covenant on Economic, Social and Cultural Rights: A possible entry point to a human-rights based approach to Millenium Development Goal 8”, *Int. J. of HR.* 13(1), 2009

Further reading

M.A.Baderin and R.McCorquodale (eds.) *Economic, Social and Cultural Rights in Action* (OUP 2007).

A.Chapman and S.Russell (eds.) *Core Obligations: Building a framework for economic, social and cultural rights* (Intersentia 2002)

M.Ssenyonjo *Economic, Social and Cultural Rights in International Law* (OUP 2009)

M.Langford (ed.) *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (CUP 2008)

場次四：人權公約教育培訓

Panel IV: Education and Training of
Government Officials on the Two Human
Rights Covenants

主持人/Moderator：尤美女 理事長
(President Mei-Nu Yu)

發表人/Presenters：陳俊宏 副教授
(Associate Professor Chung-Hung Chen)

林佳範 教授
(Professor Chia-Fan Lin)

與談人/Discussants：Dr. Jefferson Plantilla

陳明堂 次長
(Vice Minister Ming-Tang Chen)

人權意識、教育與培訓： 「人權大步走計畫」的初步檢視

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摘要

2009 年 3 月 31 日我國立法院審議通過《公民與政治權利國際公約》與《經濟社會文化權利國際公約》，以及《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》（以下簡稱兩公約施行法）。馬英九總統隨即於 2009 年 4 月 22 日公佈《兩公約施行法》，並於 2009 年 12 月 10 日正式施行。兩公約施行法第二條明定，兩公約「具有國內法律之效力」。自此，兩公約的內容成為我國國內法的一部分。這不僅對我國提升人權意識，深化民主具有指標意義，也為我國重返國際人權體系，履行國際人權義務，跨出重要的一步¹（馬英九，2009）。然而簽署兩公約是一回事，能否落實又是一回事，兩公約的簽署能否確實使我國政府朝向「人權治國」的理念邁進，讓執法公務員的作為能符合人權的基本要求，使人權理念與價值得以在日常生活中具體實踐，仍需要從多面向加以檢視與評估。自兩公約施行法通過以來，關於兩公約的簽署對於我國的影響，國內學術界與民間組織已有許多重要的研究著作²，主要集中於對於國際人權公約內國法後的法律效力、以及如何因應兩公約之後的種種機構配套設施的分析，然而對公務人員的人權教育與培訓的研究則較少提及，本文試圖彌補此一面向的不足。本文針對自 2009 年法務部所負責統籌的「人權大步走計畫」中，有關公務人員人權教育「種子講師培訓」的推動及成效，進行檢視與評估³。本文認為，人權培訓應該有明確的目標與方法，才能達致具體成效。藉由檢視 2011 年 3 月聯合國所通過

¹ 請參見馬英九總統於法務部「人權大步走種子培訓營」開幕式致詞全文。

² 例如黃昭元，2010「憲法」臺大法學論叢 39(2): 6-30。廖福特，2010，〈法院應否及如何適用公民與政治權利國際公約〉，《臺灣法學雜誌》，163, 45-65。廖福特，2009，〈批准聯合國兩個人權公約及制訂施行法之評論〉，《月旦法學》，第 174 期，頁 223-229。朱楠，2010/2，推動「廢除死刑」之新契機--立法院通過兩國際人權公約施行法之實務分析，法學新論。孫友聯，2010/3，兩公約對國內勞動法制的影響，全國律師雜誌。林佳範，2010/3，論兩公約對憲法人權保障的補充 -- 一個初步架構的探討，全國律師雜誌。王自維，2010/11/15，人權兩公約之國內法化暨其施行法之實施--從國際法的內化與人權在我國憲政體制下之法律地位論起，臺灣法學雜誌。彭坤業，2010/12/10，人權大步走，政府推動兩公約之實踐，百年人權之省思與展望國際研討會。而民間組織的研究包括由臺灣人權促進會所出版的 2010 年三月號《TAHR 報》也收錄了許多精采文章。民間兩公約施行監督聯盟也於 2010 年出版了《一年又七個月來政府落實兩公約及其施行法之檢討》的報告書，對政府的政策與作為提出檢視與批評。

³ 本文部分訪談內容取自於作者主持由研考會委託之「落實兩公約施行法之研究」。感謝協同主持人黃默教授與黃秀端教授，以及施逸翔、陳博文、王瑩芬、魏培軒、葉亭君、邱博詩同學的協助，特此致謝。

的《聯合國人權教育和培訓宣言》以及正在積極推動的《世界人權教育方案》第二期的規劃方針中，針對公務人員培訓所提出的目標與方法，以及透過分析行政機關中十一個已經成立人權工作小組的部會所獲得的訪談資料，本文發現，「人權大步走」的種子講師培訓計畫，不論在培訓的策略，抑或培訓的方式與內容上，仍有很大改進的空間，政府相關部門應盡速調整作法，參考聯合國相關準則與教案，盡速解決成效不佳的問題。本文最後提出幾點建議，以作為未來我國進行公務人員人權教育與培訓的參考。

關鍵字

人權大步走、人權教育、人權培訓、兩公約

壹、國際人權公約與臺灣民主化

2009 年 3 月 31 日我國立法院審議通過《公民與政治權利國際公約》與《經濟社會文化權利國際公約》，以及《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》(以下簡稱兩公約施行法)¹。馬英九總統隨即於 2009 年 4 月 22 日公佈《兩公約施行法》，5 月 14 日正式簽署「兩公約」中英文版批准書，並於 2009 年 12 月 10 日正式施行。兩公約施行法第二條明定，兩公約「具有國內法律之效力」。自此，兩公約的內容成為我國國內法的一部分。回顧自 2000 年民進黨執政時期陳水扁總統以「人權立國」為號召，承諾與國際人權標準接軌，並進而在總統府及行政院建立人權相關的機構，以推動一系列人權政策；至 2008 年馬英九總統在競選期間發表「2008 年新世紀人權宣言」，主張上任後將批准兩公約，以期國內人權保障制度與國際接軌，並進而在其當選後批准具有國際人權規範綱領性的兩公約，以及通過兩公約施行法，強調以「人權治國」作為施政方針，皆充分展現過去十年來在兩個不同政黨執政時期，我國政府表達對於國際人權規範的認同與承諾。

事實上，中華民國早已於 1967 年由常駐聯合國代表劉鎔簽署兩公約，並同時簽署《公民與政治權利國際公約》第一任擇議定書。但在 1971 年 10 月 25 日聯合國大會通過第 2758 號決議，使得中華民國失去代表權之後，我國就一直未就此三份文件進行批准的程序，因此關於國際人權的重要性以及締約程序所涉及相關國際法的議題，在臺灣社會也一直未能受到應有的重視。

如同許多亞洲國家，臺灣歷經長期殖民與威權體制的統治。從 1949-1987 年，臺灣經歷長達 38 年戒嚴令的統治，在當代歷史中，從未有一個國家像臺灣一樣，經歷這麼久的戒嚴統治。在威權統治時期，人權被視為禁忌，更遑論國際人權規範的實踐，在這樣的環境之下，很難想像人權文化或傳統有任何成長的空間。而自 1987 年解嚴以來，人權議題已不再是禁忌，臺灣的人權狀況已有相當的進展。和威權體制下的過去相比，這些誠然是可觀的進步。但是從比較寬廣、踏實的角

¹ 「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」，共計九條，分述如下：第一條、為實施聯合國一九六六年公民與政治權利國際公約（International Covenant on Civil and Political Rights）及經濟社會文化權利國際公約（International Covenant on Economic Social and Cultural Rights）（以下合稱兩公約），健全我國人權保障體系，特制定本法。第二條、兩公約所揭示保障人權之規定，具有國內法律之效力。第三條、適用兩公約規定，應參照其立法意旨及兩公約人權事務委員會之解釋。第四條、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。第五條、各級政府機關應確實依現行法令規定之業務職掌，負責籌劃、推動及執行兩公約規定事項；其涉及不同機關業務職掌者，相互間應協調連繫辦理。政府應與各國政府、國際間非政府組織及人權機構共同合作，以保護及促進兩公約所保障各項人權之實現。第六條、政府應依兩公約規定，建立人權報告制度。第七條、各級政府機關執行兩公約保障各項人權規定所需之經費，應依財政狀況，優先編列，逐步實施。第八條、各級政府機關應依兩公約規定之內容，檢討所主管之法令及行政措施，有不符兩公約規定者，應於本法施行後二年內，完成法令之制（訂）定、修正或廢止及行政措施之改進。第九條、本法施行日期，由行政院定之。

度去看，臺灣人權保障的缺陷仍然是十分明顯的。臺灣過去二十多年的經驗證明，民主化並不必然帶來人權價值與規範的深化與拓展。主要原因即在於經歷了長期威權的統治及國際孤立之下，我們缺乏人權進展的基本條件。而這些基礎建設的缺乏，造成人權價值的促進與落實，出現了相當的阻力，也造就當前選舉式民主(Electoral Democracy)的弊端(Chen, 2001)。在許多第三波民主化的新興民主國家，都極為注意人權保護的制度設計，但是在臺灣，歷經幾次的修憲，只有零星點綴式的強調，但大都未以人權保障為重點，同時朝野菁英對人權觀念缺乏應有的重視，而一般公民人權意識仍普遍低落。因此批准兩公約之後，所帶來的對於法規、制度、政策的全面性檢視與改進，不僅有助於基本人權的保障，落實「人權治國」的理念，更透過對於公約的承諾與落實，試圖與國際人權建制接軌，將中華民國重新納入國際人權體系。因此，兩公約以及兩公約施行法的通過與施行，對於未來我國國民人權意識能否提升，以及人權保障制度能否建立，具有開創性的指標意義。

另一方面，由於我國特殊的外交處境，自 1971 年退出聯合國時，也同時退出了以聯合國為主軸的國際人權體系，這一個國際孤立的結構性因素使臺灣缺少人權進展所不可缺的國際參與及壓力(人權政策白皮書,2002:16)。無疑地，長期的孤立否定了臺灣參與國際人權機制，運用資源以及面對不同的刺激，(例如來自於官方進行人權報告的過程所面對的種種壓力與刺激)，同時也降低了許多與其他國家互動的機會。這種國際的互動，通常可以提供許多場域，讓各種不同的團體進行對大眾的動員與教育，同時也可以提供誘因，讓國家，學術界，法學界以及 NGOs，發展出落實公約所需的專業與技能。威權體制的過去，本來就已導致人權文化無由生根成長，而長期的國際孤立，更使臺灣缺少人權進展所不可缺的國際參與、交流、刺激與壓力。在這樣的環境之下，臺灣社會長期對於人權觀念感到陌生，與對人權事務缺乏經驗，實是不難理解。因此批准兩公約之後，所帶來的對於法規、制度、政策的全面性檢視與改進，倘若切實貫徹執行，不僅有助於基本人權的保障，落實「人權治國」的理念，更可透過對於公約的承諾與落實，進一步與國際人權建制接軌，將中華民國重新納入國際人權體系。

我們可以從國內層次以及國際層次兩個面向來說明批准兩公約的重要意義：

一、從國內而言：兩公約的批准以及施行法的通過，可以加速我國國內人權保障的落實與提升。一般而言，人權的改善與進步有賴兩個主要因素的互動：人權意識的生根和保障機制的建立。然而，臺灣有關人權知識和資訊仍有待提升；政府機關目前仍尚未存在符合聯合國標準專司人權事務的機構。在目前這種狀況下，臺灣的人權狀況如果要有更上層樓的進展，顯然在這些基礎建設上進行大規模的改革與創建，實為刻不容緩的課題。因此透過兩公約的批准，一方面藉由批准程序以及適當的配套立法，讓兩公約的國際規範在我國國內具有法律效力，另一方面藉由兩公約的內容，進一步對於當前我國法令中與兩公約內容不一致、或未能加以規定者，進行必要的修訂與規定。此外，藉由兩公約的落實，有計畫地

推廣、進而普及人權理念，讓執法公務員的作為能符合人權的基本要求，並提升公民的人權意識，將使人權理念與價值得以在日常生活中具體實踐。

二、從國際方面而言：馬英九總統在競選期間發表「2008 年新世紀人權宣言」，主張上任後將批准兩公約，以期國內人權保障制度與國際接軌，並將「全面檢討國內相關法令，徹底落實我國對國際人權憲章的承諾，使臺灣成為人權保障的國際楷模。」如今批准具有國際人權規範綱領性的兩公約，以及通過兩公約施行法，正是具體展現我國對於國際人權規範的認同與承諾。儘管我國因為當前險峻孤立的外交處境無法完成存放的程序²，然而批准兩公約並完成施行法的具體作為，仍有重要的國際宣示意義(馬英九: 2009)。

貳、人權保障的基礎建設：人權教育與培訓

如上所言，人權的促進與保障有賴兩個主要因素的互動：人權意識的生根和人權保障機制的建立。具體而言，透過人權價值的宣揚，和有關人權知識的傳播，以及培養由價值與知識所構成的人權意識，同時輔以保障與促進人權機制的設計與運作，才能有效促進人權價值的具體落實。因此，人權的教育與研究，可以稱為人權基本建設的關鍵成分(人權政策白皮書:2002;51)。而數十年來，人權教育作為國際社會試圖建立人權文化的一項基礎工程，受到不同國家的高度重視，而成為遍及全球(world-wide)的國際運動(Ramire, Suarez and Meyer,2007; Tibbitts, 2008)。而在聯合國成員以及國際非政府組織多年的努力之下，聯合國人權理事會³終於在 2011 年 3 月 23 日第 16/1 號決議，通過《聯合國人權教育和培訓宣言》。

《宣言》中明確指出人權教育和培訓⁴，是促進人人享有的所有人權和基本自由，得到普遍尊重和遵守的關鍵⁵。所謂人權教育⁶，儘管在聯合國的文件或民間組織

² 2009 年 6 月 15 日聯合國秘書處退回我國送交的批准書，我國最終無法完成存放的程序。

³ 值得一提的是，當聯合國大會第 60/251 號決議決定成立人權理事會時，便一再重申人權教育和培訓的重要性。在第五(a)段主張人權理事會的任務之一，為「促進人權教育和學習以及諮詢服務、技術援助和能力建設。」

⁴ 從聯合國所通過的文件中一直呈現出對人權教育的重視。《世界人權宣言》第二十六條第一款即表明「人人都有受教育的權利」，並在第二款規定「教育的目的在於充分發展人的個性並加強對人權和基本自由的尊重」；《經濟、社會、文化權利國際公約》也規定，所有國家均須保證教育的目的在於加強對人權和基本自由的尊重。1968 年德黑蘭第一屆世界人權大會進一步通過議案，敦促所有國家使用「所有的教育方法」來提供年輕人一個在尊重個人尊嚴與平等權利的環境中成長的機會。而在 1993 年世界人權會議通過的《維也納宣言和行動綱領》更呼籲「所有國家和機構將人權、人道主義法、民主和法治……納入所有……教學機構的課程」，同時指出，「人權教育應包括各項國際和區域人權文件所載的和平、民主、發展和社會正義，以便達成共識和瞭解，從而增強對人權的普遍承諾。」而在《2005 年世界首腦會議成果文件》中，各國元首也強調「促進各級人權教育和學習，包括酌情實施《人權教育世界方案》。」

⁵ A/HRC/RES/16/1 第一條第二款

⁶ 從聯合國所通過的文件中長期以來呈現對人權教育的重視。一般而言，聯合國文件所提到的人權教育含有廣狹二義。廣義的人權教育泛指「尊重人權的教育活動」(如，國民受教權的落實)，狹義的人權教育則是指「以人權為活動重點的教育」。例如在《世界人權宣言》第二十六條第一款即表明「人人都有受教育的權利」，並在第二款規定「教育的目的在於充分發展人的個性並加

的實務操作上，存在許多不同的定義⁷，但在《宣言》中將其定義為「旨在建立普遍的人權文化的任何學習、教育、培訓和資訊交流的努力」，具體的面向包括：(a) 了解人權(about human rights)，包括對人權規範和原則的知識和了解、這些規範和原則所依據的基本價值觀，以及保護人權的相關機制；(b) 藉由教學過程實踐人權(through human rights)，包括採用尊重施教者和學生雙方權利的教學方法；(c) 實現人權(for human rights)，包括使人們能夠享有和行使他們的權利，尊重 and 維護他人的權利⁸。《宣言》第二條指出，藉由人權教育與培訓提供知識與技能，幫助人們理解並形成正確的態度與行為，不僅有助於防止侵犯和踐踏人權的行為，同時也能為營造與增進人權文化的建立有所貢獻。因此《宣言》第七條特別強調，國家、民間社會與企業負有增進人權教育與培訓的責任，而國家更應該確保對政府官員、公務員、法官、執法人員與軍事人員進行適當的人權培訓⁹。《宣言》第八條更主張，各國應當基於國家具體需求與優先事項，制定開展人權教育與培訓的戰略與政策，必要時制定行動計畫與方案，以及執行與評估和後續跟進(follow-up)的具體進程¹⁰。《宣言》第九條則再次重申遵照「巴黎原則」所建立的國家人權機構，在積極開展人權教育與培訓方面所能發揮的重要作用¹¹。《宣言》第十三條更鼓勵各國應將他們在人權教育和培訓的具體作為，收入他們提交相關人權機制的人權報告中，以成為未來人權理事會進行普遍定期審議

強對人權和基本自由的尊重」；《經濟、社會、文化權利國際公約》也規定，所有國家均須保證教育的目的在於加強對人權和基本自由的尊重。此處的「教育」可擴大解釋為廣義的人權教育。一九六八年德黑蘭第一屆世界人權大會進一步通過議案，敦促所有國家使用「所有的教育方法」來提供年輕人一個在尊重個人尊嚴與平等權利的環境中成長的機會。而在1993年世界人權會議通過的《維也納宣言和行動綱領》更針對人權教育作出符合狹義的定義，呼籲「所有國家和機構將人權、人道主義法、民主和法治……納入所有……教學機構的課程」，同時指出，「人權教育應包括各項國際和區域人權文件所載的和平、民主、發展和社會正義，以便達成共識和瞭解，從而增強對人權的普遍承諾。」而在《2005年世界首腦會議成果文件》中，各國元首也強調「促進各級人權教育和學習，包括酌情實施《人權教育世界方案》。」。

⁷然而對於人權教育的性質與內容，在國際社會已逐漸形成一個共識：一、人權教育必須同時包括「內容」與「過程」，同時特別強調參與式的教學方法有助於人權教學，二：人權教育的目標應該包括三個面向：認知、情意，以及行動取向的元素。參見 Monisha Bajaj, Human Rights Education: Ideology, Location, and Approaches, in *Human Rights Quarterly*, Vol 33, May 2011: 481-508. Anja Mihr, Human Rights Education, Methods, Institutions, Culture and Evaluation, Discussion Papers Series, Magdeburg: Institut fuer Politikwissenschaft at the University of Magdeburg (2004).

⁸ 在《世界人權教育方案》第一階段行動計畫中，則將人權教育的面向分為：(a) 知識和技能—瞭解人權和各種機制，並掌握在日常生活中實際運用的技能；(b) 價值、態度和行為—發揚擁護人權的價值觀並強化這種態度和行為；以及 (c) 行動—採取行動保護和促進人權。參見 <http://unesdoc.unesco.org/images/0014/001478/147853e.pdf>, p 16.

⁹換言之，國家不僅有義務尊重公民接受人權教育和培訓的權利，而且有義務以一切適當手段，例如通過種種立法措施，逐步落實這項權利，另一方面國家有義務積極推行政策，確保公部門的執法人員受到適當的人權培訓。

¹⁰ A/HRC/RES/16/1 第八條

¹¹ 巴黎原則特別指出，國家人權委員會可以「協助制定人權問題教學方案和研究方案，並參加這些方案在學校、大學和專業團體中的執行」；以及「宣傳人權和反對各種形式的歧視，特別是種族歧視的工作，並透過宣傳和教育來提高公眾認識。」參見 A/RES/48/134 有關國家機構的地位與原則的說明：
<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/116/24/PDF/N9411624.pdf?OpenElement>

(*universal periodic review*) 的重要內容。

除了藉由通過《宣言》展現聯合國重申人權教育與培訓，乃作為人權基礎建設的重要性之外，事實上，為了有效落實人權教育，早在 1994 年 12 月 23 日，聯合國於第 49 屆大會第 94 次全體會議中通過的第 49/184 號決議，即宣佈自 1995 年 1 月 1 日至 2004 年 12 月 31 日為「聯合國人權教育十年」(*United Nations Decade for Human Rights Education*)，具體展現聯合國推動人權教育的決心¹²。兩年以後，聯合國第 51 屆大會通過《1995-2004 年「聯合國人權教育十年」行動計畫》¹³，鼓勵各國擬定和實施在全國進行人權教育的全面、有效和永續戰略的聯合國人權教育十年及其行動計畫。而為了有效落實人權教育十年所擬定的預期目標，聯合國大會於 2004 年 12 月 10 日第 59/113 A 號決議宣佈分階段進行的《世界人權教育方案》，則是試圖在各會員國推動實施人權教育方案的一項全球舉動¹⁴。

《世界人權教育方案》第一階段期間為 2005-2009 年¹⁵，主要重點目標是將人權教育納入小學和中學教育制度。聯合國大會並於 2005 年 7 月 14 日第 59/113 B 號決議，通過了《世界人權教育方案》第一階段的行動計畫，以作為締約國執行人權教育時可供參考的具體戰略。而《世界人權教育方案》第二階段(2010-2014)行動計畫，在人權理事會第 12/4 號決議中已經通過，並開始啟動¹⁶，除了持續進行中小學人權教育的推動之外，重點將針對高等教育¹⁷中的人權教育和對教師、教育工作者、公務員¹⁸、執法人員¹⁹和軍人，進行一系列的人權培訓行動計畫。此一行動計畫的具體目標，除了提供各國在促進高等教育以及對公務人員、執法人員與軍人的培訓方案應納入人權教育之外，並就高等教育及對公務員、執法人員和軍人的人權教育培訓方案中的關鍵要素，提供指導原則，並針對培訓應有的戰略方針、培訓內容以及教學的方式，提出綱領性的建議。基於篇幅，以下即針對行動計畫以及聯合國相關文件中，與本文有關之公務人員與執法人員培訓部分，進行簡要分析。

¹² *United Nations Decade for Human Rights Education*, U.N. Doc. A/RES/49/184 (1994). <http://www.un.org/ga/49/r184.pdf>

¹³除了鼓勵詳細擬定和實施在全國進行人權教育的全面、有效和永續戰略的聯合國人權教育十年(1995-2004)及其行動計畫之外，聯合國其他與人權教育相關的行動包括：著重撰寫和傳播人權宣傳資料的世界人權宣傳運動(1988 年至今)、世界兒童和平非暴力文化國際十年(2001-2010)、聯合國教育促進永續發展十年(2005-2014)、國際人權學習年(2008-2009)及國際文化和睦年(2010)等。

¹⁴ 參見 A/Re/59/113B, <http://www.worldlii.org/int/other/UNGARsn/2005/44.pdf>

¹⁵ 第一階段行動計畫原定為 2005 至 2007 年，後來執行延長至 2009 年。

¹⁶ 參見 A/HRC/REs/12/4 決議：<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G09/174/42/PDF/G0917442.pdf?OpenElement>

¹⁷ 「高等教育」是指「由大學或由國家主管當局批准為高等教育機構的其它教育機構提供的各類學習、培訓，或為高中後研究進行的培訓」。高等教育部門可以包括各級教師、社會工作者及醫療和法律專業人員的培訓和認證機構。

¹⁸公務員指的是「根據國家法律和政府結構，可能包括政府部門的官員和決策者、外交官、地方政府和市政府及財政和經濟機構的雇員、公共衛生專業人員和社會工作者。」

¹⁹執法人員指的是包括「員警、監獄工作人員和邊防員警，以及被賦予治安權力的安全部隊和軍隊等人員。」

一、策略方針

針對公務員、執法人員和軍人的人權教育培訓，行動計畫指出，若要使培訓計畫對受訓者的行為和職業表現產生預期效果，培訓必須與學員所在組織或機構目前執行的相關政策規定產生具體聯繫。因此在培訓政策的制定上應該採取下列策略：(a) 審查職前和在職訓練政策，確定其包括人權培訓，並將針對受訓者的人權課程作為職前培訓的必修課程；(b) 鼓勵實行有關職前和在職培訓的綜合人權培訓政策，將此類培訓作為執業資格和晉升的強制性標準；(c) 招聘與培訓適合與弱勢群體打交道的官員；(d) 不應該僅為個別官員開設一次性的培訓課程，而應鼓勵設立一個健全的國家培訓結構，將人權培訓制度化，使有關部門及其應當服務的社會各部門都參與其中；同時應該根據各國的制度，建立對制度化人權培訓的評估機制²⁰，針對培訓的效果進行分析與評價。

二、教學方式

而在培訓程序與工具方面，該行動計畫特別引用了聯合國「高級專員辦公室」所出版之《人權培訓-人權培訓方法手冊》(Human Rights Training: A Manual on Human Rights Training Methodology)²¹的幾項策略：

(一) 聽眾針對性(Audience specificity)

必須直接針對具體聽眾的情況，並按照他們的需求來安排培訓，無論他們是員警、衛生工作者、外交人員、軍人還是研究發展問題的專家。同時必須訂立具體的學習目標（培訓後學員在知識、態度、行為和技能方面的預期變化）；並應設計評估策略，特別是如何衡量學習目標的實現程度。

(二) 相關並實用的內容(Relevant and practical content)

培訓材料應圍繞與學員日常生活直接相關的人權標準和實踐。學員不僅需要瞭解人權是什麼，而且需要知道如何在現實生活中加以運用。因此，教學過程中必須避免照本宣科地講述人權文件，而是應該讓學員們更深刻地瞭解，促進與保障人權對他們的工作能帶來哪些好處，並實際傳授對學員從事實際工作切實有用的技巧²²。畢竟僅僅知道人權標準，並無法使學員將這些規則轉變為適當的職業行為。因此，人權意識的培養，應該被看作是一個透過實踐和應用而不斷完善的過程，培訓內容的設計應該圍繞學員的工作職能，以及如何在實際工作業務中運

²⁰因此理想的執行步驟應為（1）分析受訓學員人權培訓的現狀。步驟（2）確定優先事項，並擬定國家執行戰略，確定目標和優先事項，並計畫執行活動。步驟（3）執行和監測 步驟（4）評價。見《世界人權教育方案》第二階段行動計畫：<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/151/48/PDF/G1015148.pdf?OpenElement>: p24-26

²¹例如，對於執法人員、移民官員、檢察官的培養訓練方案，應著重在如何使他們更敏感地注意到種族主義、種族歧視、仇外心理和相關的不容忍現象；而處理移徙問題工作或接觸移徙工人及其家庭成員的官員，則更需要了解《保護所有移徙工人及其家庭成員權利國際公約》的內容。

²²《人權培訓—人權培訓方法手冊》，p7。

用人權，尤其重點應放在具體可能遭遇的人權問題之上²³。

（三）參與式和敏感察覺的培養訓練技巧（Participatory and sensitizing training techniques）

為保證學員的積極參與，培訓方案應採用各種創造性的參與式培訓技巧，包括自由討論會、角色扮演、小組學習、案例研究、專題小組討論和實地訪問等。採取參與式培訓的方法，是因為人權如何落實，是每個人生活經驗的一部份，因此必須從真實生活中，關注人權的存在、被侵犯以及如何被保障，同時從真實的生活經驗中分享不同觀點以及發展分析技術，去理解、運用以及提倡人權²⁴。倘若藉由設計良好的實作，可以使學員認識到，自己有可能導致侵犯人權的行為（例如，加強學員對自身態度或行為中的性別或種族偏見的認識），也能有效促進並捍衛人權。而聯合國人權事務高級專員辦公室所出版的《人權培訓-人權培訓方法手冊》更明確指出：「僅僅講述空洞的一般性原則對特定學員的實際行為不會產生多大影響。要使培訓和教學富有成效，讓人確實感到不枉費時間，必須直接針對具體學員的情況，按照他們的需求安排培訓，無論他們是員警、保健工作者、律師、學生、還是研究發展問題的專家。²⁵」

（四）同儕學習(Peer learning)

透過同儕學習，例如，令員警和軍人接受同行的培訓，而不採用師生培訓的模式，可以取得更大的效果。例如由業務性質相近的學員，例如警察與執法人員之間彼此討論與交流，比起單調的講授方式能夠達致更好的成效。因此講師最好不完全是由教授和人權理論家擔任，還應該包括具有實際經驗的人權工作者。這種模式確保講師接觸並體認到不同類別的受訓者，所處的獨特職業文化或氛圍。

（五）自尊的作用(The role of self-esteem)

在重視學員學習過程的自尊維護方面，應鼓勵受訓學員將他們的專業知識和實際經驗帶到培訓課程，這將對培訓活動有所助益。培訓講師應該設法創造一種氛圍，便利於彼此交流知識和經驗，並承認學員的專業知識。由於學員都是實務工作者，因此任何有意義、有成效的培訓活動都應該鼓勵他們把豐富的經驗帶到培訓班，並在學習過程中積極汲取這些經驗，讓學員體認他們既可以學到東西，也可以作出貢獻²⁶。

²³ 例如《消除對婦女歧視委員會》在其關於對婦女的暴力行為的第 19 號(1992)一般性建議第 24(b)段中便指出，向司法和執法人員及其他公務官員提供對性別問題敏感的培養訓練，對於有效執行《消除對婦女歧視公約》是根本必要的。

²⁴ 有關參與式培訓的方法論，請參見 Dave Donahue, “Why a Participatory Method for Human Rights Education?” in *Training for Human Rights Trainers, Book 1: Facilitator's Manual* (Montreal, Canadian Human Rights Foundation (Equitas), 2001); Felisa Tibbitts, Transformative Learning and Human Rights Education: Taking a Closer Look, in *Intercultural Education*, 107-113 (2005).

²⁵ 參見《人權培訓-人權培訓方法手冊》，P8

²⁶ 《人權培訓-人權培訓方法手冊》，P9

三、培訓內容：

在有關培訓內容方面，行動方案中明確指出，基於「聽眾針對性」的要求，應針對公務員、執法人員和軍人的職業屬性，開發不同的教材內容。例如，當國家為公共利益而採取的行動可能威脅到弱勢群體的人權時（如兒童、女性、老年人、殘疾人士、囚犯、難民和移徙者），社會工作者需要保障對其人權的保護。因此對社會工作者的人權培訓應該著重於對弱勢群體的認識與保護。而對員警的人權培訓，應包括涉及各種員警職能的人權標準，例如：警察調查方法、搜查和扣押、逮捕和審前拘留、武器的使用、在內亂、緊急狀態時維持治安、合法的人群控制措施等。對員警的人權培訓也應著重於需要特殊保護的群體，如青少年、婦女、移徙者、難民和殘疾人等。而對監獄官員的人權培訓應該使學員熟悉監獄工作中的國際人權標準，促進對監獄官員工作中執行較具人道的檢查手段，並使學員能夠將此內容納入日常工作。至於軍人的人權培訓，則需要接受相關國際人權準則和標準的培訓，涉及到與衝突有關的任務，以及現代職業軍人作戰之外的職責。這些職責越來越多地包括民事治安責任、在緊急狀態下維持秩序和公共安全、參與國際維和行動等。因此軍人需要瞭解並意識到各項人權標準，以及培養如何將其運用在軍隊日常工作中的技能。²⁷

參、他山之石：英國經驗

關於人權教育與培訓的努力，英國的經驗值得參考。自從 1998 年人權法通過之來，英國政府便持續關注如何在公部門之間將人權原則融入於立法過程、政策制定與公共服務之中。英國《人權法》在 2000 年正式生效前，英國政府設定一個兩年準備期（1998 年 11 月至 2000 年 10 月）。在這兩年的準備期，一方面主要對公務人員進行教育訓練，另一方面則透過對行政、立法、司法三權的積極把關，檢視新法案與舊有法律是否有任何違反人權法之公約權利。其中英國法務部（Ministry of Justice），主要負責針對司法人員提供法庭訓練及相關司法培訓，一方面對於新進司法人員提供初階基礎訓練，另一方面也持續對在職的司法人員提供專業性的訓練。2000 年 1 月至 10 月，司法研究委員會（Judicial Studies Board, JSB）主掌了《人權法》所有面向的法官培訓。培訓內容包括介紹性講座、個案研究和全體法官開庭等，並由資深的法官來訓練新進的法官。而自 1999 年 9 月以來，司法院也針對治安法官的法律顧問（Magistrates' legal advisers）²⁸——提供了類似培訓。之後由訓練完成的法律顧問（Legal advisers）針對治安法官

²⁷ A/HRC/15/28, p 23.

²⁸ 在英國的刑事程序有一個特色，即在刑事法院最底層者，即審理輕罪案件之治安法院（magistrates courts），其所屬法官是由非法律人之業餘裁判官（lay magistrates）所組成，約有 3 萬人左右。治安法院由三名非專業法官（Lay Magistrates）和一名法律顧問（Legal Advisor）組成，非專業法官是受過法庭訓練無給職之工作，主要負責審理較不嚴重的案件，如竊盜、危害公共安全、刑事毀壞、道路安全等。

(Magistrates) 舉辦培訓，訓練的規模浩大，在 1998 年英格蘭和威爾斯有超過三萬名非專業法官 (Lay Magistrates)，每一位都需要受訓，除此之外，所有和法庭運作相關的公務人員也都必須接受訓練。

除了法務部的培訓計畫之外，各部門也都有自己的人權培訓計畫。在 1998 年與 2000 年之間，每一個政府部門都開始了該部門的人權訓練計畫，依各部門以及下屬部門機關不同的功能，設計不同性質與難易程度的課程，提供訓練的講師由不同領域、背景的律師、學者和非政府組織共同參與。例如由衛生部所推動的「保健中的人權計畫」(Human Rights in Healthcare Project)，也透過撰寫指導手冊、個案研究以及操作工具，以及人權線上學習資訊等，以提供該部會公務員一個以人權為本(rights-based approach)的衛生保健途徑應該如何落實的人權教育方案²⁹。而在對於英格蘭以及威爾斯獄政人員的人權訓練上，英國政府也有所作為。所有的新進獄政人員需要完成一年的基礎訓練課程，其中許多的課程要求將《人權法》的基本精神融入於教學過程中，特別是有關溝通技巧(包括語彙的使用、肢體語言以及傾聽的態度與技巧)，在面對衝突情境時該如何行使武力、以及針對包括身心障礙、種族、年齡以及性別等特徵，獄政人員在行使公權力過程如何妥善應對，以切實尊重差異(diversity)。

此外，英國皇家檢察局 (The Crown Prosecution Service) 針對所有檢察官及行政人員舉辦培訓，以確保所有人員都能在執勤過程中切實理解並應用《人權法》，特別針對第六條有關公平審判權的規定，列舉所有相關的歐洲案例，以確保所有檢察官在職權行使過程中，能確保當事人的權利與自由的保障，能夠符合歐洲人權公約的規定。檢察局並定期更新法律實例，每兩周提供一次關於新判例法的最新法律情報，同時定期審閱政策的語彙使用上，是否違反《人權法》的精神。

而為了檢視人權法施行成效，並設計一套讓公務人員更加瞭解《人權法》與其實務工作，英國法務部於 2006 年 7 月提出的《落實人權法的評估報告》(Review of the Implementation of the Human Rights Act) 中指出，即使在 1998 年施行人權法之前與之後，英國已經進行不同程度的人權培訓，但英國政府檢討培訓的成果後發現，公務人員對人權法的熟習還是明顯不足。因此法務部於 2006 年 10 月設計了包括 Human Rights, Human Lives 手冊 (以下稱為 2006 英國法務部手冊) 等培訓教材，專門提供給公務人員參考³⁰，並且也與獨立的人權教育組織 British Institute for Human Rights (以下簡稱為 BIHR) 合作，繼續提供公務人員關於人權法的訓練。該手冊開宗明義即強調，手冊盡可能就常民素樸的語彙來陳述與分

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參

見

<http://www.dh.gov.uk/en/Managingyourorganisation/Equalityandhumanrights/Humanrights/index.htm>

³⁰ 教材包括: Human Rights: Human Lives- a Handbook for Public Authorities; Making Sense of Human Rights: A Short Introduction, 以及 DVD 教材: Human Rights-Human Lives: How the Human Rights Act Impacts on the Public Sector. 請參見 <http://www.justice.gov.uk/guidance/docs/human-rights-handbook-for-public-authorities.pdf>

析，以便讓最大多數的公務人員的作為找到遵循的入門基礎。這些資料與訓練有幾個特點：

一、顧慮到第一線實務人員，使其能加以應用

這些資料與訓練，是要讓第一線的實務工作人員可以應用，改善他們日常服務的品質，使其更符合人權公約的規範。而 BIHR 所提供的訓練，也非常明確是針對各式公務人員的業務性質所需而打造，包括對警察、對移民業務承辦人員、對地方政府的社福業務人員等。每一個培訓計畫都會明確指出該次培訓的目標團體(target group)、課程難度是屬於初階或進階、以及預期的目標等。而 BIHR 所提供的公務人員培訓，典型的課程設計是依循「觀念(the ideas)→ 法律現狀(the law)→ 實務處理(the practices)」³¹三個層次來進行。在介紹完人權與《人權法》的概念之後，就會安排案例探討、並進行團體討論，確認如何在個別工作中落實人權規範。

二、對人權法及人權概念作提綱挈領的說明，而非講課式的解釋條文

2006 英國法務部手冊的前言，開宗明義說：「你不會在這本手冊裡看到一堆法律專業術語(jargons)。」但是並不表示這本手冊只提供簡單的人權 ABC。該手冊簡要但完整說明了《人權法》、《歐洲人權公約》裡所涵蓋的 15 種權利類型，同時包括人權案例與申請救濟的流程圖；且說明「絕對的權利」(absolute rights)、「可被限制的權利」(limited rights)、「可被保留的權利」(qualified rights)等類型及其判斷標準；也談到權利的「比例原則」，以建立對人權的正確認知，並提出人權流程圖(human rights flowchart)，提供第一線的公務人員在執行公務時，如何應用《人權法》的精神於實際的案例之中，避免「人權就是把一切權利擴大解釋」的迷思。而這些內容，該手冊強調，都是以庶民可以理解、簡單扼要、切入實務需求的方式來呈現。

三、提供案例、討論實務需求

在手冊中，對於《歐洲人權公約》每一條文及其規範權利的說明之後，都有附上「案例探討(case study)」，提供 1 則至 2 則實際在法庭上、或在行政申訴機制裡發生的案例，並分析該案例是否適用《人權法》。除了「案例探討」，手冊還有提供「執行範例(best practice example)」，明示怎樣的處理方式最妥當。

除了提供公務人員的人權教育與培訓之外，法務部也同時進行一般大眾的人權教育工作，為建立人權文化而努力。因此法務部出版了許多適合一般大眾閱讀的指導文件，例如 *A Guide to the Human Rights Act 1998*; *The Human Rights Act: An Introduction*; *Human Rights: Fact and Fiction*; 以及特別針對身心障礙人士所編寫的: *A Guide to the Human Rights Act: a Booklet for People with Learning*

³¹ <http://www.bihhr.org.uk/training-and-consultancy/public-service-providers-training>

Disabilities³²。

藉由上述對於《人權教育與培訓宣言》以及《人權教育方案》第二階段行動計畫的內容分析，大致呈現了聯合國當前對於人權教育與培訓的思考方針與執行步驟。同時藉由英國落實人權法的經驗，也可以理解他國的落實經驗與遭遇的困境。以下即基於聯合國所提出的戰略方針與內容以及英國的落實經驗，針對我國當前為促進《兩公約施行法》的落實，對於公務人員所進行的人權教育與培訓，進行初步的檢視。

肆、人權大步走計畫

為因應兩公約的具體落實，2009 年 4 月 24 日在馬英九總統聽取「『兩公約』暨『兩公約施行法草案』推動進度報告簡報」後作出以下六點裁示：

1. 「兩公約」之內容因涉及各機關，所以法務部宜按部就班推動，辦理種子講師培訓營之講義教材，編纂為總論部分，各論部分可由各機關自行依權責編纂。
2. 法務部辦理種子講師培訓營之講義編纂，應包括「兩公約」與我國現行法規之比較及各機關檢討因應之建議，因牽涉各部會之權責，宜將「兩公約」之內容，相對應各條分別函請各機關權責，由法務部作一對照表（清單），某一條文涉及國內哪一有關機關的法律，該相關機關，提供該機關符合「兩公約」相對應權責內容之內涵與其主管之相關法規及檢討因應之作法。
3. 法務部於彙整各相關機關意見後，應擬具講義教材初稿及題綱，並組成教材委員會審查，再邀請專家，召開座談會研議教材的編寫，綜整各界意見。
4. 法務部應考慮架設網站，做為推動人權基石，才能永續推動。將推動「兩公約」、「兩公約施行法」及相關人權之經過及訊息在網站上公布。
5. 有關國際公約在我國法律體系上之定位、效力及國內法化之方式，法務部可委託學者、專家針對哪些國際公約可以國內法化（如：制定施行法方式或對已簽約之公約得否包裹立法方式）之方式，及哪些公約對我國司法實務有可能適用等進行研究。
6. 另請法務部於法官及檢察官之職前訓練，加強對於國際公法之相關訓練，未來國家考試應加考國際法³³。

在聽取馬英九總統的裁示後，法務部隨即研擬完成「人權大步走計畫—落實執行《公民與政治權利國際公約》及《經濟社會文化權利國際公約》」（簡稱人權大步走計畫），並由行政院於 2009 年 5 月 7 日核定。法務部「人權大步走」計畫

³² link: <http://www.justice.gov.uk/guidance/humanrights.htm> .

³³ 參見人權大步走計畫總說明 <http://163.30.117.129/peowalk.htm>.

主要著重於三大面向：1、檢討本國法規是否違反兩個國際公約；2、對公務人員進行人權的教育訓練；3、研究國際公約取得內國法效力之方式，以及我國當前參加國際公約之困境及效力³⁴(彭坤業，2010)。法務部一方面著手推動教育培訓的活動以及進行因應內國法之後相關的法案研究，同時也負責彙整各部會進行法規檢視的執行成效。因此法務部不僅為「人權大步走計畫」的「宣導統籌」機關，也是落實各部會執行成果之「彙整」機關。目前的執行成效可分為下列幾個面向：

一、講義的編纂：依循馬總統所裁示之 1-3 點，法務部負責編撰兩公約種子培訓的「總論」講義。總論的核心部分³⁵主要著重在對兩公約的每一條文進行背景說明以及逐條釋義。而自 2010 年 10 月 27 日起，法務部著手推動中階種子培訓營，同時編撰中階培訓講義，而與總論講義的性質相同，中階培訓講義內容仍是由專家、學者針對《兩公約》各條所表彰的人權理念與背景進行逐條釋義。

二、種子講師培訓：種子講師培訓營的目的在於訓練種子講師，藉以受訓完畢之後可以訓練其他人員，並協助法令與行政措施的檢討。種子講師培訓的目的，在於培育每一個部會中除了專業職能之外，兼具人權知識與技能的講師。倘若每個參與培訓的學員，都能在種子培訓營中獲得基本的知識與技能，日後回到各部會進行人權的宣導與講習時，他們將是最能理解與探究該部會業務中涉及相關人權議題的專家。種子講師培訓自 2009 年 9 月及 10 月共分 6 個梯次進行，主要對象為各級政府機關人員。受訓的人員共有近 2400 人。講師主要是以法務部所建構之「人權專家名單」為主³⁶，主要教材為法務部所編撰之「總論」，課程規劃共四堂課 12 小時。

三、中階種子培訓：在進行六個梯次的初階種子培訓營之後，法務部進一步研擬「《兩公約》學習地圖」計畫，規劃自民國 2010 年至 2013 年舉辦「《兩公約》

³⁴具體而言，此計畫的工作項目，基本上可區分為四大項：(一)、宣導：1、總論講義之編撰、審查與印製：法務部負責編撰兩公約培訓「總論」講義以及「各論」講義，並協助國家文官培訓所撰寫人權課程大綱及講義。2、培訓種子人員。3、製作宣導品及託播。4、洽請各機關、學校、部隊辦理宣導、講習會。(二)、敦促各級機關檢討修正與兩公約不合之法規及行政措施；同時函請各級政府機關依「兩公約施行法」第八條預為因應，檢討所主管之法令及行政措施，有無符合「兩公約」規定。此外，要求各級政府機關依「兩公約施行法」第八條檢討所主管之法令及行政措施，有無不符「兩公約」規定，應邀請學者、專家及相關人權團體召開會議審議，並綜合整理各界意見。(三)、在法務部全球資訊網設置「人權大步走」專區：架設「人權大步走資訊網」專區。(四)、委託學者研究「國際公約國內法化的實踐」：研究內容包括公約取得內國法效力之方式、重要民主先進國家內國法化情形及作法、我國當前參加國際公約之困境及效力面臨之疑義暨解決方式、我國當前公約內國法化可採取之作法及其優缺點研析等。見彭坤業,2010,人權大步走政府推動兩公約之實踐,發表於「百年人權之省思與展望國際研討會」。

³⁵總論共分為六大部分，分別為(一)序言，(二)總統裁示，(三)《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》總說明及逐條說明，(四)序文及逐條釋義：針對兩公約的條文進行背景說明以及逐條的釋義，(五)問題例示：針對各部會所彙整的相關法令政策可能不符兩公約的條文，以例示的方式呈現，以及(六)附錄：兩個公約原條文。

³⁶「人權專家名單」究竟以何種方式加以認定與建構並不清楚，但成員既包括具學術背景的學者，也包括專業的人權工作者，有些則屬於人權團體的理監事，然具備何種人權專業，從該名單中無法得知，導致許多受訪部會在面臨尋找符合該部會議題的講師的過程中，出現許多困難。不過從目前所進行的種子培訓講師名單看來，大部分是委由法律學者及律師擔任。

中階種子培訓營」。自 2010 年 10 月 27 日起，已舉辦七場中階培訓營，目前共有 2,565 位公務員參與³⁷。培訓內容依場次性質分別為《公民及政治權利國際公約》第 1 條至第 5 條逐條釋義、《公民與政治權利國際公約》第 6 條至第 15 條逐條釋義，與《經濟社會文化權利國際公約》第 1 條至第 5 條以及《經濟社會文化權利國際公約》第 6 條至第 8 條逐條釋義；講義內容主要是由專家、學者針對《兩公約》各條所表彰的人權理念所撰寫，並由專家擔任講座，以逐條宣導的方式進行。兩公約其他各條文之培訓將分三年舉辦，預計至民國 2013 年完成所有條文的講授與宣導。

四、講習：自 2009 年 10 月開始，法務部即開始督導各機關辦理公務人員的講習，教材仍為「總論」講義，並輔以各機關依權責編撰的各論講義³⁸。講習會以演講的方式進行。而自 2009 年 10 月至 2010 年 12 月，總共有 66 個部會機關已辦理過 4,256 場講習會。

五、宣導：法務部藉由出版兩公約學習光碟、宣傳海報、插播卡以及報紙廣告等方式，向社會大眾進行宣導的工作，並將這些資料與「《兩公約》學習地圖」計畫中「《兩公約》中階種子培訓營」講義資料，放置於法務部全球資訊網「人權大步走專區」，供各界作為辦理《兩公約》宣導之教材。

表一、兩公約之公務員培訓及宣導講習會人數與場次統計表

項目	兩公約種子培訓營	法務部所屬機關各論講習會	兩公約宣導 ³⁹ 與講習會	兩公約中階培訓營
時間	2009/09/10	2009/12	2009/10-2010/12	2010/10-2011/05
人數/場次	2400 人	297 人	4,256 場	2,565 人

伍、人權教育與培訓：初步檢視

從上述種種培訓與講習的場次與參與人數，可以看出過去二年來，法務部統籌之《人權大步走計畫》推動的方向與規模，以及試圖藉由培訓與宣導，加速公部門落實兩公約的決心。然而人權培訓應該有明確的目標與方法，才能達致具體成效。從法務部的觀點而言，培訓的成效是可以預期的，儘管如何呈現成效的具體數據有其困難性。然而，若從其他接受培訓的各部會成員而言，參與種子培訓

³⁷ 參見人權大步走網站：<http://163.30.117.129/peowalk.htm>

³⁸ 依據馬英九總統在「『兩公約』暨『兩公約施行法草案』推動進度報告簡報」後作出的六點裁示中，特別要求各機關自進行種子講師培訓過程中必須依各機關權責編撰各論講義。然而各機關在此部分的成效非常有限，除了法務部與國防部之外，並未依職權編撰各論講義，若干部會僅有邀請的專家學者進行講授時的講綱或投影片，但未做有系統的編撰。其中法務部已於 2010 年 11 月針對所屬機關舉辦各論的講習會共 297 人參與。

³⁹ 至於各部會進行宣導的方式，較不拘形式，可能是以書面或是其它的方式來宣傳兩公約的相關資訊。

的成效卻與法務部的觀察有所落差，同時不論從各部會訪談資料，或是人權教育方案的戰略綱領而言，各部會有關公務人員的訓練仍有很大改善的空間：

一、缺少公約正式上路之前的準備期，導致培訓品質大打折扣

如上節所述，在人權教育方案的執行步驟中，建議各國應針對人權教育與培訓的現狀進行評估，找出既有的方案及其缺點與障礙，以及可能影響人權教育和培訓的歷史和文化背景，才能在既有的環境下確定目標以及優先事項。而國際非政府組織《國際特赦組織》(Amnesty International)所出版的《對政府官員進行人權培訓和教育的良好執業規範的 12 點指南》(*A 12-point guide for good practice in the training and education for human rights of government officials*)中也明確指出，進行培訓之前評估人權現況的重要性⁴⁰。關於此一事前評估步驟對於執行成效的影響，可以英國落實《人權法》經驗為例。如上所言，英國《人權法》在正式生效前，英國政府設定一個兩年準備期(1998 年 11 月至 2000 年 10 月)。在這兩年的準備期，一方面主要對公務人員進行教育訓練，另一方面則透過對行政、立法、司法三權的積極把關，檢視新法案與舊有法律是否有任何違反人權法之公約權利。其中就教育訓練而言，對象極為廣泛，包括中央及地方政府機關、法人與公民社會團體，從法官到公務員、法人機關成員，皆在其內。在 1998 年英國和威爾斯有超過 3 萬名非專業法官⁴¹(lay magistrates)，每一位都需要訓練，可見其訓練的規模。除此之外，所有支持法院運作的公務人員也都必須接受訓練，所以即使是提供給政府各別部會的訓練，規模都相當浩大⁴²。而每一個政府部門皆依照機關職權的性質，設計各部會的人權訓練計畫。然而 2000 年訓練期限屆滿之前，英國政府認為，由於法院尚未在審判實務上正式運用人權法案，無法預測法庭如何妥適地在個別案例中使用人權法，有必要將實際案例也列入訓練內容，因此立即啟動第二階段的訓練計畫，直至 2003 年才進入總結經驗的收尾階段⁴³。反觀臺灣在兩公約施行法正式生效前，並未進行充分的培訓準備，培訓的規模也僅止於少部分的公務人員，而每梯次種子講師僅上 12 小時四堂課，即完成講師訓練，在質與量的要求上，明顯不足，因此種子教師在受訓完畢後，能否切實訓練其他同仁，並協助法令與行政措施的檢討，不無疑義⁴⁴。如上所述，種子教師培訓營的目的，就是希望透過訓練種子講師，藉以受訓完畢之後，可以訓練其他人員，並協助法令與行政措施的檢討。倘若每個參與培訓的學員，都能在種子培訓營中獲得基本的知識與技能，日後回到各部會進行人權的宣導與講習時，他們將是最能理解與探究該部會業務與相關人權議題的專家。然而由於種子

⁴⁰ 十二點指南第一點指出：在開始人權培訓計劃前，不可或缺的步驟是根據特定國家的人權狀況確定培訓計劃是否可行。還應進行需求評估，以確定優先目標，並確定計劃的範圍和實施方法。

⁴¹ 意指法院最低層的人員

⁴² Eric Metcalf, 〈英國之人權法及位其施行所作的人權訓練〉, TAHR 報, 2010 春季號：p64.

⁴³ Eric Metcalf, 〈英國之人權法及位其施行所作的人權訓練〉, TAHR 報, 2010 春季號：p65., 兩公約施行監督聯盟, 〈一年又七個月來政府落實兩公約及其施行法之檢討〉, 2010, p9.

⁴⁴ 亦有部會出現受訓的人員，與真正負責人權相關業務辦理的人員不同，抑或受訓人員被調離部會的情況，導致這些受訓人員是否能發揮傳授及宣導之功效，許多部會皆有所質疑。

培訓的成效不佳，這些種子講師無法擔任知識傳播的角色，導致種子培訓的目標無法具體實現。

二 教材不易理解

從教材而言，根據「人權大步走計畫」，教材分為「總論講義」，以及各機關「依權責編纂之各論講義」。以總論的內容而言，除了序文以及緒論之外，主要的內容是針對兩公約的條文進行逐條釋義。儘管這樣的教材內容可以提供受訓者對於兩公約內容一個初步的輪廓，但與上述聯合國人權教育方案所建議，抑或國際上進行人權訓練時所常用之「教案」的訓練教材，有明顯的差異，導致許多受訪部會認為，教材內容過於形式與抽象，不易理解⁴⁵。其中主要的原因在於法務部的培訓教材的撰寫，主要是從兩公約的概念與一般性介紹，進而對各條文進行逐條釋義，然而在理解條文之後，究竟如何在實務上進行操作，出現轉譯過程的困難，導致培訓的內容與各部會的專責業務的關聯，產生嚴重的斷層⁴⁶。

三、從種子培訓而言，培訓內容仍採取專家演講的方式進行，缺乏對具體案例與實務的探討，同時缺乏活用的、針對不同實務需求、不同對象的培訓教材，導致所學內容無法應用於實務操作。

除了培訓的教材呈現抽象艱澀的問題之外，以專家演講的方式進行培訓，也是導致成效不佳的主因之一。一方面由於在未有準備期的前提之下匆促上路，大部分部會皆缺乏人權培訓所需的經費與能力，另一方面也缺乏同時熟悉各部會職責範圍及人權專業之培訓講師，使得《人權大步走》種子培訓的內容，仍借重法學教授與律師講述抽象的法條概念、歷史發展等理論部分，缺乏個案或教案的模式，引導學員在操作面上與其工作業務產生實質關連，並進而思索如何才能達致消極地不侵害人權或是積極地保障人權，導致本來就對人權議題及兩公約不熟悉的官員，在自認自己並未具備法律專業背景的情形下，不僅對兩公約內容的理解產生怯步，更無法輕易的將理論運用於實務層次⁴⁷。依照法務部原初的規畫，希望各部會在進行種子培訓之後，可以進一步針對各部會的業務性質，撰寫各論並執行進階的專業培訓。然而除法務部與國防部已編有各論之外⁴⁸，其它的部會並

⁴⁵ 在十一個受訪的部會中，有八個部會工作小組成員有此一反應。

⁴⁶ 正如一位受訪者 B 所言：

「...如果說舉的例子都是跟我們業務相關的東西，我覺得大家會比較進入那個情境，如果單純只是講法條的話，我會覺得那個東西比較枯燥，相對的在業務擴展這方面就會有一點限制。」

⁴⁷ 對部分學員來說，對公約進行逐條釋義之外的講授內容，反而引發更高的學習動機。一位受訪者 c 認為：

「.....有的老師真的不錯，他不一定會照那個東西講，可是反而他講得讓你能夠吸收，...，不舉一些生活上的實例，我覺得其實蠻抽象的，如果說逐條照文字在闡釋，我是覺得既枯燥也很難理解。」

⁴⁸ 國防部的各論教材內容是由軍法司提供素材和方向，並請北部地方軍事法院邀集軍法官，針對目前國軍裡的主要案例，用判例的方式呈現，以活潑簡約的方式進行編撰。

未依其機關權責編撰各論講義，導致在提升各部會人權意識的努力大打折扣⁴⁹。另一方面，由於在種子培訓中對於總論的內容，大部分學員已經出現無法瞭解與轉化的情形下，期待種子講師在自己的業務單位上進行進階的人權培訓，難度著實很高。

另一方面，當前法務部所研擬之「《兩公約》學習地圖」計畫，實與上述的聯合國的教學建議有很大的差距。如上所言，在目前所規劃並已完成的七場「《兩公約》中階種子培訓營」，講義內容主要是由專家、學者針對《兩公約》各條所表彰的人權理念所撰寫，仍採取初階訓練時的論文形式，而非「教案」式的訓練教材，並由專家擔任講座進行逐條宣導，預計 2013 年才會完成所有條文的講解，具體成效如何，仍待後續的評估，但以當前初階種子培訓的成效來看，前景恐不樂觀。

除了上述英國的具體經驗之外，聯合國人權事務高級專員辦公室(OHCHR)，也針對特定對象包括社工人員、法官、警察、獄政人員的人權訓練，出版許多教案。除了本文一再提及的《人權培訓——人權培訓方法手冊》之外，尚包括：社工人員的部分有《人權與社會工作：社會工作專科學校和社會工作專業手冊》，警察的部分有《人權與執法：員警人權培訓手冊》；《人權與執法：員警人權培訓教員指南》；和《員警人權標準與實踐：員警使用的人權袖珍手冊增訂本》。監獄官員培訓教材則包括：《人權和監獄：監獄官員人權培訓手冊》；《人權和監獄：有關司法的國際人權文件彙編》；《人權和監獄：監獄官員人權培訓員指南》；和《人權和監獄：監獄官員國際人權標準手冊》。然在目前的培訓過程中，仍未見採用，實屬可惜。

陸、幾點建議

從各部會訪談的資料可以得知，不論是「人權大步走」的初階培訓，或是目前正在進行的中階培訓課程，在培訓的內容方法與目標上，都出現許多問題。本文建議法務部應針對目前種子培訓執行成效進行評估，同時政府相關部門應盡速調整作法，參考聯合國相關準則與教案，以解決成效不佳的問題。同時各相關機關之訓練中心，應採納上述作法進行各論的編撰，並將兩公約納入訓練課程，以盡速達成各機關自行依權責編撰各論的要求。除此之外，本文建議可以採取以下幾點作法，以作為未來政府部門落實公務人員人權教育與培訓的參考。

一、立即擬定「國家促進及保障人權行動計畫」

有鑑於目前兩公約施行法落實的狀況，亟需一個整體性的規劃，才能全面性地解決包括機制、政策與教育培訓等問題，本文建議應由總統府人權諮詢委員會

⁴⁹有六個部會工作小組強調內部培訓的教材，主要依據法務部的總論講義，並輔以外部邀請的專家自行編寫講綱的方式呈現。

立即研擬一個「國家促進及保障人權行動計畫」。所謂「國家促進及保障人權行動計畫」(National Plan of Action for the Protection and Promotion of Human Rights, 以下簡稱「國家人權行動計畫」)乃是一九九三年維也納世界人權會議的產物。根據《維也納宣言和行動綱領》(Vienna Declaration and Program of Action, VDPA)第二部分第71條規定:「世界人權會議建議每個會員國考慮是否可以擬定國家行動計畫,認明該國促進和保護人權所應採取的步驟。」

因此,國家人權行動計畫是國際上促進與保障人權的重要機制,其目的在於透過國家的策動與社會的參與,為一國的人權落實,制定短、中、長期的全面計畫,以及持續評估、修正之機制。而在聯合國2002年出版之《國家人權行動計畫手冊》更闡明,若要成功促成對於人權的尊重,並以人權考量作為公共政策的一項要素,必須考慮許多的因素,包括在社會規劃方面要進行全面性的需求分析、提出廣泛的和漸進式的方案建議、資源配置以及有效的評估。另外,還需要態度上的改變、教育和培訓、健全和獨立的法律和司法體系、以及尊重法治等⁵⁰。同時也需要資源和政治意願來讓這套政策和計畫可以落實。因此透過國家人權行動計畫的啟動,將有助於對於未來人權落實狀況,進行全面性檢視,持續的評估、修正現有機制並找出具體的行動策略。經過〈維也納宣言及行動綱領〉之呼籲,截至目前為止已有29個國家推動37個「國家人權行動計畫」,以落實對人權的保護與促進的任務⁵¹。

因此,本文建議,總統府人權諮詢委員會可以根據《維也納宣言和行動綱領》與《國家人權行動計畫手冊》擬定「國家人權行動計畫」,針對當前我國必須處理的人權保障與促進事項,包括:如何強化國家促進及保障人權之能力、設立或強化人權專責機構的可行性、對於其他國際人權公約批准的問題、建構可以確保改善弱勢群體處境之有效救濟程序、加強及促進政府各部門、地方政府與非政府組織及其他民間代表間之合作計畫,推動各部會進行撰寫報告所需的基礎培訓計畫等。其中在人權教育與培訓部分,藉由行動計畫的啟動,提出落實人權教育的具體方案,訂定明確的優先順序與重點,同時列出執行步驟與時程,以及必須完成的短、中、長期「目標」、「戰略方案」和確定「經費」來源,以達至有效落實《兩公約》及《兩公約施行法》的相關要求。

二、儘速加強新進與在職法官對於兩公約所保障之人權的教育培訓

以防止法官由於對國際人權法不甚了解,下意識的避免引用兩公約之規定作為裁判之依據。因此除了馬總統所要求對法官及檢察官之職前訓練,加強對於國際公法之相關訓練之外,本文建議不論是司法官訓練所亦或司法人員研習所,在

⁵⁰ 參見聯合國《國家人權行動計畫手冊》
<http://www.ohchr.org/Documents/Publications/training10en.pdf>.

⁵¹http://www2.ohchr.org/english/issues/plan_actions/。中國政府於2009年四月制定了《國家人權行動計畫2009-2110年》,中國官方宣稱,該人權行動計畫的內容係參照聯合國大會1993年通過的維也納宣言和行動綱領,以及聯合國人權事務高級專員辦公室2002年頒布的人權行動計畫綱領指南。

培訓課程的規劃上，應持續進行人權教育的培訓，特別是有關國際人權法的訓練，同時針對不同對象應有不同層級的培訓課程。

三、補助法扶或律師公會進行律師的人權培訓

司法審判實務促成的法治發展，有時才是實質引領國際人權公約內國法化的主要動力，然而如何落實此一發展，不單是法官的責任，更是檢辯雙方等當事人在法庭中必須扮演重要的角色。由於法院只能被動受理訴訟後作成裁判，因此律師不僅是單純辯護或諮詢角色，而是必須嘗試引用兩公約提起人權訴訟，或是在既有個案中發揮兩公約的保護力量（翁國彥，2010;61）。因此除了各級法院在人權的司法審查上扮演前所未有的重要功能之外，律師界對於兩公約的認識與引用，也將是未來兩公約是否落實的重要關鍵。藉由補助法律扶助基金會與律師公會，舉辦律師的人權教育和在職的訓練，將有助於兩公約的具體落實。

四、研擬將人權培訓，作為公務員職業資格和晉升之強制性標準的可行性

「人權大步走計畫」中建議，考試院、行政院人事行政局應將「兩公約」納入公務人員訓練課程、並規劃未來國家考試加考國際法的可行性。日前考試院已經在院內根據「考試院及所屬部會人權保障工作小組設置要點」，成立人權保障工作小組，接續人權保障業務，值得高度肯定。然為了更有效培養並檢視公務人員的人權意識，本文建議考試院可以將人權工作小組提升為人權委員會層級，負責研擬公務人員的人權培訓計畫，包括職前和在職培訓的綜合人權培訓政策，並研擬將此類培訓作為職業資格和晉升之強制性標準的可行性。

五、增進與非政府組織在人權教育活動與培訓的合作

不論從聯合國的建議綱領，或是其他國家的經驗，非政府組織在培訓計劃的規劃與進行，均發揮相當重要作用。而根據兩公約施行法第五條第二項規定：「政府應與各國政府、國際間非政府組織及人權機構共同合作，以保護及促進兩公約所保障各項人權之實現。」為增進民間社會對於政府推動兩公約具體作為的理解，或可考慮藉由專案補助**人權團體的方式**，到臺灣各地以工作坊的模式，進行種子教師的培訓。

六、設立國家人權資源和培訓中心

從長遠的規劃而言，應審慎考慮設立一個健全的國家培訓結構的可行性，將人權培訓制度化，並建立對制度化人權培訓的評估機制，針對培訓的效果進行分析與評價。儘管臺灣有相對豐富的法律、人文與社會科學的人才，然而知識界對人權研究的忽略，卻是一個明顯的事實。此一「知識赤字」的問題，已經成為人權進一步發展的瓶頸。因此未來可以考慮在國家教育研究院之下設立一個人權資源中心，或是仿效國家衛生研究院的模式以財團法人的形式成立。這些中心負責以下幾項任務：(a)人權研究；(b)人權教材的編撰、翻譯與收集；(c)國際人權文

件的收集與彙編；(d)人權培訓；(e)協助執行國際上舉辦的人權教育合作項目；(f)人權教育的推廣服務等，以補強目前我國在國際人權領域中，因為知識、經驗與人才三者嚴重短缺所造成的問題。

柒、結論

《聯合國人權教育和培訓宣言》明確指出，人權教育和培訓，是促進人人享有的所有人權和基本自由，得到普遍尊重和遵守的關鍵。而公務人員的人權意識的培養，更是國家能否落實人權義務的重要依據。我們說公務人員在執法或執勤時，都有一定的心證裁量空間，則人權的價值和規範，不論是否法規化，都應在其中有一席之地。然而人權培訓應該有明確的目標與方法，才能達致具體成效。倘若政府部門重新思考如何針對第一線的執法人員，司法官、警察、監獄人員以及其他公務人員的人權培訓，重視種子講師的培訓以及人權教材的編纂，讓執法公務員的作為能切實符合人權的基本要求，並提升公民的人權意識，將使人權理念與價值的實踐，不再只是空中樓閣。

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(二) 聯合國文件

聯 合 國 人 權 教 育 與 培 訓 宣 言：
<http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/124/78/PDF/G1112478.pdf?OpenElement>

聯 合 國 《 世 界 人 權 教 育 方 案 》 第 一 階 段 行 動 計 畫：
<http://www2.ohchr.org/english/issues/education/docs/A.59.525.Rev.1.pdf>

聯 合 國 《 世 界 人 權 教 育 方 案 》 第 二 階 段 行 動 計 畫：
<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/151/48/PDF/G1015148.pdf?OpenElement>

Human rights Consciousness, Education, and Training: An Analysis of the Training of Trainers Program

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Abstract

In March 2009, Taiwan ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In December, the president Ma Ying-Jeou announced an implementation act which gives these covenants the force of domestic law in the Republic of China (ROC). It means that domestic laws will now have to come into compliance with the two covenants. The ROC government will amend all laws, regulations, directions and administrative measures to ensure they are aligned to the Covenants within two years. This is a milestone in the development of human rights in Taiwan, and brings the nation more into line with the international community. However, do international human rights treaties make a difference in state's behavior? By studying the training of trainers program initiated by the Ministry of Justice, which was given the responsibility for leading and coordinating the implementation of the covenants, this paper is an attempt to make an overview of what we have achieved so far, and to suggest to which directions we need to move ahead in the near future.

Keywords

Project Great Stride, Human Rights Education, Human Rights Training, the Two Covenants

I. The International Human rights Covenants and Democratization in Taiwan.

The R.O.C. Legislative Yuan has passed the International Covenant on Civil and Political Right, International Covenant on Economic, Social and Cultural Right, and the Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights(Act to Implement the Two Covenants) on 31 March 2009.¹ The Act to Implement the Two Covenants has announced by President Ma Ying-Jeou on 22 April 2009, and implemented on 10 December 2009. According to the Article 2 of the Act to Implement the Two Covenants, the Two Covenants “ have domestic legal statutes ”, which means the contents of the Two Covenants have become part of our domestic law. By looking back to the Democratic Progressive Party (DPP) ruling period from the year 2000 to 2008, President Chen Shui-Bien used the slogan “building of a human rights state.”(人權立國) to call for, and promise to let the human rights standard in Taiwan to connect with the international human rights norms, also, the DPP administration has established institutions which related to human rights issue in the Office of President and Executive Yuan in order to promote a series of human rights policies. By the time in 2008 when President Ma Ying-Jeou was running the

¹ Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights has nine articles, which mentioned below: Article 1 :This Act is made to implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (hereafter the two Covenants), which were both adopted by the United Nations in 1966, and to strengthen our country's human rights protection system. Article 2: Human rights protection provisions in the two Covenants have domestic legal status. Article 3: Applications of the two Covenants should make reference to their legislative purposes and interpretations by the Human Rights Committee. Article 4: 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. Article 5: All levels of governmental institutions and agencies should take the responsibility for preparing, promoting and implementing human rights protection provisions in the two Covenants within their functions that are governed by existing laws and regulations. When multi functions are involved distinct governmental institutions and agencies should contact and coordinate themselves to carry out their responsibilities. The government should cooperate with other national governments and international non-governmental organizations and human rights institutions to realize promotion and protection of human rights provisions in the two Covenants. Article 6: The government should set up human rights reports system in accordance with the two Covenants. Article 7: 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. Article 8: All levels of governmental institutions and agencies should review laws , regulations, directions and administrative measures within their functions according to the two Covenants. All laws, regulations, directions and administrative measures incompatible to the two Covenants should be amended within two years after the Act enters into force by new laws, law amendments, law abolitions and improved administrative measures. Article 9: The date of coming into force of the Act shall be decided by the Executive Yuan.

election, he announced the “ New Century Declaration of Human rights 2008 ”, which mentioned that after taking up an official post, the government will adopt the Two Covenants in order to connect the domestic human rights safeguard institution with the international human rights standard. After the Kuomintang (KMT) won the election, President Ma Ying-Jeou adopted the Two Covenants, which both contain the international human rights norms and guiding principles, also, by adopting the Act to Implement the Two Covenants, the KMT administration has focused on “governing on the basis of human rights ” (人權治國) as a guiding principle for ruling. We can see that in this decade, our government has expressed the identification and promise to the international human rights norms, even we have been ruled by two different parties.

In fact, the R.O.C. delegate in the UN, Liu Kai(劉鍇), had signed the Two Covenants in 1967, and also signed the International Covenant on Civil and Political Right Operational Protocol 1. However, the UN General Assembly (UNGA) passed the Resolution 2758 on 25 October 1971, which made the R.O.C. lose the representation in the UN. Since then, Taiwan was deprived of the international interactions that normally accompany a state's adoption of international human rights law and the potential positive effects that normally come with such interactions. After that, the R.O.C. government did not fulfill the procedure of the adoption to these three documents. Therefore, the Taiwan society does not respect the importance of international human rights and the issue of international law which related to the procedure of signing a treaty.

Like most Asian countries, Taiwan had long been under the yoke of colonial and authoritarian regimes hostile to democracy and human rights. From 1947 to 1987, Taiwan was under the Martial Law rule of Nationalist party (KMT thereafter) for 38 years. There has never been a country as long under martial law as Taiwan in modern history. In this situation, we can hardly imagine the human rights culture and tradition can have a space to grow. The human rights issue has become taboo in that period, and international human rights standards were plainly a luxury that the authoritarian regime did not feel it could afford. After martial-Law rule came to an end in 1987, Taiwan entered the process of liberalization and became part of the so-called “ Third Wave of democratization”. However, there are still many obvious disadvantages in the Taiwanese human rights protection. Although the profile of Taiwan’s human rights conditions in the process of democratization has improved greatly ,it does not bring the deepening and broaden human rights value and norms. The reason is Taiwan has faced a long period of authoritarian governance and isolation in the international community, so we are lack of the basic terms of human rights improvement. The scanty of these human rights infrastructures has become the obstacles of the

promotion and practice to the human rights value in Taiwan, and also result in the abuses of the electoral democracy which we lived currently. In many “Third Wave of democratization countries, the government pay a great attention to the design of the institution to the human rights protection. But in Taiwan, after a few times of amending the constitution, we still do not have a main point to the human rights protection in the constitution. Also, the politician of the ruling party and the opposition do not sincerely respect the human rights, and the citizen has low human rights conscious. Therefore, after adopting the Two Covenants, we may bring the examination and improvement to the law, institutions, and policies in a comprehensive way, it will encourage the basic human rights protection, carry out the “Human rights Governance ” idea, and connect ourselves with the international human rights regime and bring the R.O.C. back to the international human rights system. By adopting and implementing the Two Covenants and the Act to Implement the Two Covenants, the R.O.C. has an innovative meaning in raising the citizen’s human rights conscious and the creation of the human rights protection institution.

After the R.O.C. withdrew from the UN in 1971, we also withdrew from the international human rights system which the spindle is the UN. This structural element made Taiwan lack of international participation and stress, which are the essential element for human rights improvement. There’s no doubt that the long time isolation had negated the participation of Taiwan in the international human rights institution, to use the resources and face stimulus (Like the pressure and stimulus from the official human rights report.), also, the R.O.C. has less chance in interact with other countries. These international interactions can provide many spaces to let the human rights organizations to mobilize and educate the people. Also it can provide inducements to let the states, academia, jurisprudence academia, and NGOs to create the profession and skills to carry out the Covenants. The authoritarian governance has bring about the lack of nutrition of the raising of human rights culture, and the long tome international isolation made Taiwan lack of the international participation, communicate, stimulus, and pressure, which are all essential to the human rights improvement. No wonder that the Taiwanese society is unfamiliar about the idea of human rights over a long period of time, and lack of experience of human rights issue. After adopting the Two Covenants, we may bring the overall examination and correction to the law, institution, and policies, if we can carry out this adoption certainty, it’s will not only have advantages in the protection of basic human rights, carry out the idea of “governing on the basis of human rights, and connect ourselves with the international human rights regimes in order to bring the R.O.C. back to the international human rights regime.

We can explain the importance of adopting the Two Covenants by the domestic

and international level:

1. The Domestic Level

By adopting the Two Covenants and the Act to Implement the Two Covenants, the R.O.C. government can speed up the implementation and promotion of the domestic human rights protection. Generally speaking, in order to improve the human rights, two elements need to interact: the establishment of human rights conscious and the creation of the human rights protection institutions. However, the human rights knowledge and information in Taiwan still need to be improved. The governmental institutions still do not have a special agency which tally with the UN standard to deal with the human rights issue. Therefore, by adopting the Two Covenants, we can use the appropriate legislation to let the international norms which contain in the Two Covenants to be domestic legalized; also, by examining the contents in the Two Covenants, we can fix the domestic law which do not suitable and inconsistent with the contents in the Two Covenants. Also, by carrying out and promoting the Two Covenant, we can popularize the human rights ideas and let the actions of the civil servants to fulfill the human rights. These actions will promote citizen's human rights conscious and make the human rights ideas and value to be carried out in our daily life.

2. The International Level

When President Ma Ying-Jeou was running the election, he announced the “ New Century Declaration of Human rights 2008 ”, which mentioned that after taking up an official post, the government will ratify the Two Covenants in order to connect the domestic human rights safeguard institution with the international human rights standard, and will “ overhaul the related domestic law, carry out the promises which the R.O.C. made to the International Bill of Human rights, in order to make Taiwan becomes a good example of the human rights protection. ”. By adopting the Two Covenants and the Act to Implement the Two Covenants, it's a concrete expression of the identification and promise to the international human rights norms to the R.O.C. government. Although the R.O.C. government still facing the problem of an isolated situation,² and cannot fulfill the process of depositing the instrument of ratification in the archives of the UN, adopting the Two Covenants and the Act to Implement the Two Covenants still have important meanings.(Ma Ying-Jeou: 2009)

² The UN Secretariat has sent back the instrument of ratification of the R.O.C. government on 15 June 2009, we cannot fulfill the process of leaving in the document of UN.

II. The Infrastructure of Human rights Protection: The Education and Training of Human rights.

As mentioned above, the promotion and protection of human rights may need two elements to interact: the establishment of human rights conscious and the creation of human rights protection institutions. More specifically, by advocating the human rights value, spreading the human rights knowledge, and bring up the human rights conscious which constructed by the value and knowledge, with the support of the protection and promotion of the design and operation of the human rights institutions, so that we can carry out the promotion of the human rights value. Therefore, the human rights education and research are the key elements of the construction of the human rights infrastructure.(2002 Human Rights Policy White Paper of the Republic of China (Taiwan): 2002;51) In decades, human rights education has become an infrastructure which the international community tries to build up the human rights culture, many countries place a high value on, and become a world-wide international activities. (Ramire, Suarez and Meyer,2007; Tibbitts, 2008) Also, by the efforts of the UN member states and NGOs, the United Nations Human rights Council³ adopted the Resolution 16/1 on 23 March 2011, which adopted the United Nations Declaration on Human Rights Education and Training (The Declaration). The Declaration has mentioned human rights education and training⁴ is essential for the universal respect for and observance of all human rights and fundamental freedoms for all.⁵ The human rights education,⁶ although it has different meanings⁷ in the documents of

³ When the UNGC pass the Resolution 60/251 and decide to establish the UN Human Rights Council, it has reaffirmed the importance of human rights education and training. In the 5 (a) there has mentioned that one of the missions of the Human Rights Council is to “Promote human rights education and learning as well as advisory services, technical assistance and capacity-building, to be provided in consultation with and with the consent of Member States concerned ”

⁴ We can see the respect of the human rights education from the documents that the UN adopted. The Article 26 (1)of The Universal Declaration of Human Rights has mentioned that “ Everyone has the rights to education ” and the Article 26 (2) has talked that “Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. ” The International Covenant on Economic, Social, and Cultural Rights also mentioned that all the countries should guarantee the purpose of education is to enforce the respect to human rights and basic freedom. In 1968 the First World Conference on Human Rights hold in Teheran has urged every country to use “ all the ways of education ” to provide teenagers can live in a environment which can respect individual’s dignity and equal rights. And in 1993, the World Human Rights Conference had adopted “ Vienna Declaration and Programme for Action ” has urged that “ All countries and institutions should include the human rights, humanitarian law, democracy and law and order into all courses in the educational institutions ”. It also mentioned that “ Human Rights education should include the peace, democracy, development, and social justice which contain in the international and regional documents, in order to get the consensus and understand, and enforce the general promise to the human rights. ”. And in the “2005 World Summit Outcome”, the leaders in the countries are emphasize to “ promote the human rights teaching and learning in levels, include carrying out the World Program for Human Rights Education. ”.

⁵ Article 1 (2) in A/HRC/RES/16/1

⁶ From the documents which the UN adopted, we can see the respect to the human rights. Generally speaking, the education trainings which mentioned in the UN documents has talked about that the

the UN or the operation of NGOs. In The Declaration, it “comprises all educational, training, information, awareness-raising, and learning activities aimed at promoting universal respect for and observance of all human rights. ”. The specific aspects include: (a) About human rights, which includes providing knowledge and understanding of human rights norms and principles, the values that underpin them and the mechanisms for their protection; (b) Through human rights, which includes learning and teaching in a way that respects the rights of both educators and learners; (c) For human rights, which includes empowering persons to enjoy and exercise their rights, and to respect and uphold the rights of others.⁸ According to the Article 2 of The Declaration, Human rights education and training comprises all educational, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of all human rights and fundamental freedoms and thus contributing to, inter alia, the prevention of human rights violations and abuses by providing persons with knowledge, skills and understanding and developing their attitudes and behaviors, to empower them to contribute to the building and promotion of a universal culture of human rights. Therefore, the Article

human rights have broad and narrow meanings, The broad meaning means “ educate others to respect human rights ”, like carry out the right to educate. The narrow meaning means “ The education that the main point is human rights. ”, like in the Article 26 (1) of The Universal Declaration of Human Rights has mentioned that “ Everyone has the rights to education. ” and in the Article (2) it has mentioned that “Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. ”. The International Covenants on Economic, Social, and Cultural Rights has ordered that all the countries should guarantee that the purpose of education is to enforce the respect to the human rights, this “ education ” can be broaden explained that it means “ human rights education ”. In 1968 the First World Conference on Human Rights hold in Teheran adopted the motion to urge the countries to use “ all the ways of education ” to provide teenagers can live in a environment which can respect individual’s dignity and equal rights. And in 1993, the World Human Rights Conference had adopted “ Vienna Declaration and Programme for Action ” has urged that “ All countries and institutions should include the human rights, humanitarian law, democracy and law and order into all courses in the educational institutions ”. It also mentioned that “ Human Rights education should include the peace, democracy, development, and social justice which contain in the international and regional documents, in order to get the consensus and understand, and enforce the general promise to the human rights. ”. And in the “2005 World Summit Outcome”, the leaders in the countries are emphasize to “ promote the human rights teaching and learning in levels, include carrying out the World Program for Human Rights Education. ”.

⁷ We have a consensus for the nature and content to human rights education in the international community: 1. The human rights education should include both “ content ” and “ process ”, and specialize the participation type of education style can be positive in human rights education; 2. The purpose of human rights should include three directions: cognition, affection, and action orientation. See Monisha Bajaj, “Human Rights Education: Ideology, Location, and Approaches”, in *Human Rights Quarterly*, Vol 33, May 2011: 481-508. Anja Mihr, Human Rights Education, Methods, Institutions, Culture and Evaluation, *Discussion Papers Series*, Magdeburg: Institut fuer Politikwissenschaft at the University of Magdeburg (2004).

⁸ According to the Plan of Action for the first phase in “ World Programme for Human Rights Education ”, the human rights education encompasses: (a) Knowledge and skills — learning about human rights and mechanisms for their protection, as well as acquiring skills to apply them in daily life; (b) Values, attitudes and behaviour — developing values and reinforcing attitudes and behaviour which uphold human rights; (c) Action — taking action to defend and promote human rights. See <http://unesdoc.unesco.org/images/0014/001478/147853e.pdf>, p 16.

7 of The Declaration has point out, states, civil society, private sector, and other stakeholders have the responsibility to promote and ensure human rights education and training, states should definitely ensure adequate training in human rights of State officials, civil servants, judges, law enforcement officials and military personnel.⁹ The Article 8 of The Declaration has claimed that states should develop, or promote the development of, at the appropriate level, strategies and policies and, where appropriate, action plans and programs to implement human rights education and training, and implementation and evaluation of and follow-up to such strategies and action plans.¹⁰ The Article 9 of The Declaration has showed that States should promote the establishment, development and strengthening of effective and independent national human rights institutions, in compliance with the Paris Principles, recognizing that national human rights institutions can play an important role.¹¹ The Article 13 of The Declaration has encouraged the states to include information on the measures that they have adopted in the field of human rights education and training in their reports to relevant human rights mechanisms, in order to become the important content of the universal periodic review of the Human Rights Council.

By adopting The Declaration, UN signifies the human rights education and training is very important to the human rights infrastructure. In fact, to carry out the human rights education effectively, on 23 December 1994, the UN adopted the Resolution 49/184 in the 94th plenary meeting of the 49th UNGA session, which declared the *United Nations Decade for Human Rights Education* from 1 January 1995 to 31 December 2004, to show the determination of the UN.¹² After two years, the 51th UNGA session adopted the World Programme for Human Rights Education (*Plan of Action*) to encourage the world to frame and implement the overall, effective, and sustainable human rights education,¹³ in accordance with the United Nations

⁹ In other words, the state should not only respect the right for the citizens to take human rights education and training, but also carry out this right step by step in legislating.. Also, a state needs to use any proper ways to ensure the law executers in the governmental institutions to have proper human rights trainings.

¹⁰ Article 8 in A/HRC/RES/16/1.

¹¹ The Paris Principles have mentioned that the National Human Rights Commissions can “ Assist to establish the human rights education questions plan, and participating in the implementation of the plan in schools, colleges, and other professional groups. ” and “ propagating the human rights and against every types of discrimination, especially the racial discrimination, and use propaganda and education to raise the public understanding. ”. See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/116/24/PDF/N9411624.pdf?OpenElement>

¹² *United Nations Decade for Human Rights Education*, U.N. Doc. A/RES/49/184 (1994). <http://www.un.org/qa/49/r184.pdf>

¹³ Except encouraging setting up the and implementing the comprehensiveness of human rights education, we should effectively and sustain using the UN strategy like *United Nations Decade for Human Rights Education* and the Plan of Action. The UN has some activities which relate to human rights include *World Public Information Campaign for Human Rights* (1988-), *International Decade for a Culture of Peace and Non-Violence for the Children of the World* (2001-2010), *UN Decade for*

Decade for Human Rights Education and the Plan of Action. Furthermore, in order to carry out the anticipated goals which drew up in the *United Nations Decade for Human Rights Education*, the UNGA declared to implement the World Programme for Human Rights Education, it's a worldwide movement to let the member states to carry out the human rights education implementation.¹⁴ In the first phase (2005-2009),¹⁵ the main point is to bring the human rights education into the primary and junior high school . The UNGA adopted this point in the Resolution 59/113B on 14 July 2005, in order to let the member states have a specific strategy to consult. The second phase (2010-2014) has adopted in the Resolution 12/4 of the Human Rights Council, and began since last year.¹⁶ Also, the program will aim at the human rights education to the staff of higher education,¹⁷ such as teachers, teaching staffs, civil servants,¹⁸ law executers,¹⁹ and soldiers, to provide them a series of human rights training action plan. The specific goal of the action plan is not only encourage countries to bring the training plan for the high educated people into the human rights education, but also provide the guideline of the training plan. Due to the space of this article, I will analysis briefly about the human rights training to the civil servants and law executers which contains in the UN documents and simultaneously relate in this article.

1. The Strategy

According to the Plan of Action, in order to let the training which focused on the civil servants, law executers, and soldiers have the anticipated effect that relate to the trainees' behavior, the training should communicate specifically with the related policies that executed by the organizations and institutions which the trainees work for. Therefore, we should adopt these strategies on establishing policies for training: (a) investigate the policies of before-the-job and on-the-job training that they have include the human rights training, and make the human rights courses as the require

Education for Sustainable Development (2005-2014), *International Year of Human Rights Learning* (2008-2009) and *International Year for the Rapprochement of Cultures* (2010).

¹⁴ See A/HRC/Res/12/4

¹⁵ The period of the action for the first phase is 2005-2007 in original, and extend to 2009.

¹⁶ See <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G09/174/42/PDF/G0917442.pdf?OpenElement>

¹⁷ “ High level educated ” means “ The education, training, or learning which carry out by the high level education institutions which are adopted by the relate national institutions and universities. ” The high level education institutions can be the training and authentication institutions for teachers, social workers, and medical and law professions.

¹⁸ The civil servants means “ According to the national law and governmental structure, it may include the governmental officials and decision makers, diplomats, employees from the local government, central governments, and other finance and economical ministries, public health professional and social workers. ”

¹⁹ Law executers means “ Police officers, prison officers, border police officers, and security forces and soldiers who have been given the authority to protect the public security. ”.

courses to the trainees' before-the- job training; (b) encourage implementing a mixed human rights training policies in the before-the-job and on-the-job training policies, and make it as a compulsory standard to the promotion qualifications of the job; (c) invite and train the officials which are suitable to communicate with the disadvantaged minority; (d) encourage to establish a well-formed state-managed training institution, institutionalized the human rights training, in order to let the relate ministries and the social organizations which they should help for to join in, instead of setting up training courses only for once. Also we should establish institutionalized human rights training and evaluation mechanism according to every countries' institutions,²⁰ in order to analysis and evaluate the effect of training.

2. Teaching Style

In terms of the training procedure and tools, the Plan of Action has recommended some strategies which include in the *Human Rights Training: A Manual on Human Rights Training Methodology*²¹ which was published by the High Commissioner for Human Rights:

(1) Audience specificity

Training and education efforts must be directly targeted and appropriately addressed to a particular audience, be they police, health-care workers, lawyers, students or development professionals. By the same time, we need to carry out the specific goals (the anticipated change of the trainees' knowledge attitude, action and skills), and design the evaluation strategy, especially on how to evaluate the levels of achieving the learning goal.

(2) Relevant and practical content

The training materials should relate to the human rights standards and implementations which connect to the trainees' daily life. The trainees not only need to understand what is human right, but also need to implement it in the daily life. Therefore, we should avoid only explaining the human rights documents, but to sensitize participants to their particular role in protecting and promoting human rights

²⁰ The ideal implement steps are: (1): Analysis the present human rights training's situation of the trainee; (2): Set up the prior agenda: Carry out the national implement strategy, confirm the goal and prior agenda, and plan to implement the actions; (3): Implementing and supervising; (4): Evaluate. See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/151/48/PDF/G1015148.pdf?OpenElement>: p24-26

²¹ For example, the training programs to the law executers, immigrants officials, and public procurators should focus on how to let them understand racism, racial discrimination, xenophobia, and other relate situations sensitively. The officers who deal with the immigrants, migrant workers, and their family should understand the content of " International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ".

and their own potential for affecting human rights in their daily work.²² After all, only understand the human rights standards cannot make the trainees to transform these norms to the practical actions. Therefore, we should view the cultivation of human rights conscious as a process which needs to be perfect by practice and application, so the designation of the content of training should relate to the trainees' daily life and the practice in their professional area, especially on the human rights problems which they would face.²³

(3) Participatory and sensitizing training techniques

To ensure the trainees' positive participation, the training programs should use multiple creative skills of participation, include free discussion, role play, cell learning, case study, seminar, and field works. The reasons to use these ways is to focus on the appearance of human rights in our daily life, how to protect it when being violated, sharing the different views in the daily life, and develop the analysis skills to understand, exercise, and advocate the human rights.²⁴ After all, to carry out the human right is a part of the daily experience of every single person. The trainees can understand that their movement may cause the action of violating human rights (For instance, strengthen the trainee's understanding for their prejudice in their action toward sexual and racial discrimination) and promote and defend the human rights by the well practice of the training programs. The Human Rights Training: A Manual on Human Rights Training Methodology has pointed out specifically that “ The mere recitation of vague principles of general applicability offers little hope of affecting the actual behavior of a given audience. To be effective—indeed, to be at all worthwhile—training and education efforts must be directly targeted and appropriately addressed to a particular audience, be they police, health-care workers, lawyers, students or development professionals. ²⁵”

(4) Peer learning

By peer learning, like training the police officers and the soldiers together, we can have a better effect. From training the trainees who have a similar business, we can have a better effect compare to just simply lecture. For instance, the police

²² *Human Rights Training: A Manual on Human Rights Training Methodology*. p. 7

²³ For example, the “ Committee on the Elimination of All Forms of Discrimination against Women ” has mentioned in its general recommendation No. 19 in 1992 which talk about violence against women that “Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention .” in 24 (b).

²⁴ The methodology of participative training can be seen in Dave Donahue, “Why a Participatory Method for Human Rights Education?” in *Training for Human Rights Trainers, Book 1: Facilitator's Manual* (Montreal, Canadian Human Rights Foundation (Equitas), 2001); Felisa Tibbitts, Transformative Learning and Human Rights Education: Taking a Closer Look, in *Intercultural Education*, 107-113 (2005).

²⁵ *Human Rights Training: A Manual on Human Rights Training Methodology*. p. 8

officers can have a better communication together. Therefore, the lecturers should not be complete the professors and human rights theoreticians, but need to include the human rights crew who has practical experiences. This model may let the lecturers can get in touch with the different professional culture atmosphere by knowing different kind trainees.

(5) The role of self-esteem

In respect to the preserve the self-esteem for the trainees' learning process, we should encourage the trainees to share their professional knowledge and practical experience in the training courses, and the lecturers should create an atmosphere in the class in order to make each other share their knowledge and experiences, and acknowledge the trainees' professional knowledge. Because the trainees are all professional, so we should encourage them to bring their practical experience to the training courses, and let other trainees derive these experiences, in order to let the trainees realize that they can learn new things and make contributions.²⁶

3. Training Contents

The Plan of Action has also mentioned that we should aim at the professional capacity of the civil servants, law executers, and soldiers to develop different teaching materials. For instance, if the states may sacrifice the human rights of the disadvantaged minorities because of the national interests (for example, children, female, elders, handicapped, prisoners, refugee and immigrants) , the social workers should protect these people's human rights. Therefore, the human rights training for the social workers should focus on the understanding and protection to the disadvantaged minorities. With regard to the police officers, it should include the human rights standards that involve various functions, like the ways of investigation, detainment, arrest and intern, the use of weapon, maintain the public security in the emergency period, and control the multitude of people legally. Also, the human rights training to the police officers should focus on the groups that need special help, like youth, female, immigrants, refugees, and handicapped. For the officials who work in the prison, it needs to let the trainees to familiar with the international human rights standards of the prison job in order to promote the officials use the humanitarian ways in the investigations to the prisoners, and put it in the daily work. For the soldiers, we should let them accept the training that relate to the international human rights norms and standards, which may involve the missions that relate to conflicts and other jobs that not relate to warfare. These jobs include the responsibility to the public order, maintaining the order and public security, and joining the international peacekeeping.

²⁶ *Human Rights Training: A Manual on Human Rights Training Methodology*. p. 9

So the soldiers need to understand the varieties of human rights standards, and bring up skills that can use these training in the daily work.²⁷

III. The British Experience

We can take the British Experience as a great example. By the Human Rights Act was adopted in 1998, the British government has been focused continuously on how to integrate the human rights standards into the legislating process, policy establishment, and public service between the government institutions. Before the Human Rights Act become effective in 2000, the British government set up a two-year preparation time (From November 1998 to October 2000). In this period, the British government had trained the civil servants and examined the old and new laws incompatible with the Human Rights Act. The Ministry of Justice was focused on the court training and other related trainings to the judicial officials. On the one hand, it supplied the basic trainings for the new employed judicial officers; on the other hand, it continuously supplied the professional training to the on-the-job judicial officers. On 10 January 2000, the Judicial Studies Board (JSB) took over all kinds of judge trainings the Human Rights Act contained. The contents of the training include introductive lectures, case studies, and mass judge court session opening, also, the senior judges will train the new employed judges. In addition, from September 1999, The Ministry of Justice has also supplied the magistrates' legal advisers similar trainings,²⁸ after that the well-trained legal advisers will hold a huge training for the magistrates. In 1998 there are more than 30,000 lay magistrates in England and Wales have been trained.

Besides the training plans that from The Ministry of Justice, other departments have their own human rights training plans. From 1998 to 2000, every department has started their own human rights training plans, design different kinds of courses in different difficulty level, supply lecturers that are lawyers, scholars from different backgrounds and NGOs. For example, the Human Rights in Healthcare Project which was promoted by the Ministry of Health has supplied their civil servants a rights-based approach healthcare ways to show how to carry out the human rights education program by introducing guidelines, case studies, implementing skills, and

²⁷ A/HRC/15/28, p. 23

²⁸ In The U.K., the penal procedure has a character that the lowest level of the criminal courts, which means the magistrates courts, have lay magistrates that are belong to courts, about 30,000 people. The magistrate courts are contained three Lay Magistrates and one Legal Advisor. The Lay Magistrates are received the court trainings and without remuneration. Their jobs are judging the cases that are not serious, like larcener, endanger public security, derogate, road security.....etc.

other human rights online information.²⁹ For the human rights trainings to the prison officials in England and Wales, the new employed prison officials should take one-year basic training courses, some of the courses are requested to integrate the spirit of the Human Rights Act into the teaching process, especially in the courses relate to communicate skills (including the using of words, body languages, and the listening attitudes and skills), some of the courses are on how to use force in the conflict situations, and on how to act appropriately when facing the prisoner's characteristics like physical and mental disability, races, age and sex, in order to respect diversity.

Furthermore, The Crown Prosecution Service will hold the trainings for all public procurators and executives in order to make sure that all the people will understand and use the Human Rights Act, especially through rules which mentioned in the Right to a Fair Trial in Article 6. The trainings list out the relate cases in Europe in order to make sure the protection to the rights and freedom of the person involved in the case can conform to the norms contain in the European Convention on Human Rights (ECHR) when the public procurators exercising the authority. Also, The Crown Prosecution Service will renew the judicial examples regularly, supply the new judicial information about the legal precedents every two weeks, and examine the words use in the policies regularly in order to understand that whether they have violated the spirit of the Human Rights Act.

In order to examine the implementation of the Human Rights Act, and design a work which may let the civil servants fully understand the Human Rights Act and its practical work, the Ministry of Justice published “Review of the Implementation of the Human Rights Act ” on July 2006. It mentioned that even The U.K. had implemented human rights trainings in different levels before and after the Human Rights Act was adopted, it was still not enough. Therefore, the Ministry of Justice had designed some training materials for the civil servants to consult,³⁰ include the *Human Rights, Human Lives* handbook. Also, it has cooperated with an independent human rights organization, *British Institute for Human Rights* (BIHR), in order to supply trainings about the Human Rights Acts to the civil servants. In the beginning of the handbook, it has emphasized that the handbook will express interpretation and analysis in general terms in order to let the civil servants can have basic knowledge about human rights. These information and trainings have some characteristic:

²⁹

See

<http://www.dh.gov.uk/en/Managingyourorganisation/Equalityandhumanrights/Humanrights/index.htm>

³⁰ The materials include Human Rights: Human Lives- a Handbook for Public Authorities; Making Sense of Human Rights: A Short Introduction, and DVD materials: Human Rights-Human Lives: How the Human Rights Act Impacts on the Public Sector. See <http://www.justice.gov.uk/guidance/docs/human-rights-handbook-for-public-authorities.pdf>

1. Practicability

These information and trainings are made to let civil servants can renew their quality of their daily service, and let it compatible with the norms of International Human Rights Covenants. The trainings that the BIHR provide focus on the different characteristics of the jobs of civil servants, include the police officers, immigrants affairs undertakers, and welfare affairs undertakers to the local governments. Every single training plan will clearly point out the target groups of the training course, the difficulty level of the courses, and the anticipated goals. In the training programs that the BIHR provide, the typical courses design are followed “the ideas→ the law→ the practices” three levels.³¹ By finishing the introduction of Human Rights Act, they will arrange case studies and group discussions to know how to carry out the human rights norms in every individual works.

2. Readability

In the forward of the *Human Rights, Human Lives*, it has mentioned that “ You will not find lots of legal jargons in this handbook. ”, but it does not mean that it only provides simple human rights knowledge. This handbook was easy to read but completely explained the fifteen types of human rights contained in the “ Human Rights Act ” and “ European Convention on Human Rights ”, also it includes human rights cases and the human rights flow charts. Also, it explained the human rights types such as absolute rights, limited rights, qualified rights and their judging standards, and the principle of proportionality. It also provided the human rights flowchart to provide the civil servants the appropriate way to practice “ Human Rights Act ” in the different situations.

3. Provide Case Studies

Furthermore, the handbook affixes the case studies to every article contain in the European Convention on Human Rights and their norms that guide the rights. These case studies are contained one or two cases which exist in the court and the administrative appeal, and there are analysis about whether the cases are suitable for using “ Human Rights Act ”. Except the case studies, the handbook also provides practice example to explain which is the best way to deal with the cases.

In addition to the human rights education and trainings that provide to the civil servants, the Ministry of Justice also proceeded the human rights education to the normal people in order to construct the human rights culture. To fulfill this work, the Ministry of Justice published some guidebooks that suitable for the public to read, like

³¹ <http://www.bihhr.org.uk/training-and-consultancy/public-service-providers-training>

A Guide to the Human Rights Act 1998; The Human Rights Act: An Introduction; Human Rights: Fact and Fiction, and A Guide to the Human Rights Act: a Booklet for People with Learning Disabilities which focused on the people with disabilities.³²

By analyzing the United Nations Declaration on Human rights Education and Training and the second phase action plan of the World Program for Human Rights Education, we can understand the planning and implementing steps of the UN human rights education and training. Also, by examining the British experience in carrying out the Human Rights Act, we can understand the lessons that how the other countries deal with the human rights education and training and the difficult position when implementing. Now I will focus on how to carry out the Act to Implement the Two Covenants to the R.O.C. government by consulting the UN strategies and the British experience, and examine primarily the human rights education and training to civil servants.

IV. The Training of Trainers Program: A Preliminary Review

To carry out the Two Covenants, President Ma Ying-Jeou announced after hearing the “Promotion Progress Reports of the Two Covenants and the Act to Implement the Two Covenants” :

1. The contents of the Two Covenants are relate to all departments, so the Ministry of Justice should promote them step by step, start compiling the introductory handbook of the teaching materials to the training camp for the seed personnel.
2. The compilation of the teaching materials to the training camp of the seed personnel should include the contrast of the Two Covenants with the present laws, and the suggestions of the all departments after reviewing laws, directions and administration measures within their functions according to the two covenants .
3. The Ministry of justice should draw up the draft of the teaching materials and invite the experts to discuss the contents of the teaching materials.
4. The Ministry of Justice should set up a website to promote the Two Covenants and the Act to Implement the Two Covenants.
5. The Ministry of Justice should invite the experts and scholars to discuss what kinds of international covenants can be legalized domestically and applicably to the judiciary practice.

³² Link: <http://www.justice.gov.uk/guidance/humanrights.htm>

6. The Ministry of Justice should stress the importance of the international law on the before-the-job training of the judge and the prosecutors.³³

After receiving the announcement from President Ma Ying-Jeou, the Ministry of Justice adopted “The Great Stride Project—Carry out the International Covenant on Civil and Political Right and International Covenant on Economic, Social and Cultural Right.”(Great Stride Project) and it was ratified by the Executive Yuan on 7 May 2009. This project focus on three directions: 1. reviews all of laws, directions and administration measures according to the two covenants; 2. initiates the human rights trainings program to the civil servants; 3. study the ways for the international covenants to be legalized domestically, and the difficulties and the effectiveness that the R.O.C. government participating in the international covenants.³⁴(Kun-Yeh Peng, 2010) Seen in this light, the Ministry of Justice, which was given the responsibility for leading and coordinating the implementation of the covenants, published educational materials and conducted training program for officials The current performances can be examined respectively:

1. The trainings of the seed personnel:

Following the President Ma’s announcement, the Ministry of Justice takes the responsibility of compiling the general handbook of the teaching materials to the training camp for the seed personnel. The core of the handbook focus on the background of every article and their explanation.³⁵ Moreover, the goal of the training camp is that, after finishing the training courses they can train other colleagues, and help review all problematic laws, regulations, directions and administrative measures back in the government institutions or agencies they came

³³ See the main explanation of the “ Project Great Stride ” in <http://163.30.117.129/peowalk.htm>.

³⁴ The working projects can be divided into four parts: 1. Guiding, which include: (1) Compiling, Examining, and Printing the teaching materials of general provisions. (2) Training seed lecturers. (3) Making propaganda. (4) Inviting every ministries, schools, and troops to held study groups. 2. Let the ministries to correct the laws and administrative measures that are not suitable for the Two Covenants, request the ministries to correct their laws and administrative measures according to the Article 8 of Act to Implement the Two Covenants, and invite scholars, experts, and human rights organizations to give opinions in the deliberation conferences. 3. Set the “Great Stride Project ” area in the website of the Ministry of Justice. (4) Entrust the scholars to study “ The Practice of Domestic Legalizing the International Covenants ” which may include the ways to domestic legalize the covenants, the examples of the important democratic countries, the difficulties of our country to join the international covenants and solutions. See Kun-Yeh Peng, 2010, “Great Stride Project—The Practice of the Government to Promote the Two Covenants ” in Centennial of Human Rights in Taiwan: Retrospect and Prospect.

³⁵ The general provision can be divided into six parts, which are : 1. Preface; 2. President’s reply; 3. The general explanation and on by one explanation of the Act to Implement the Two Covenants; 4. Preamble and on by one explanation: Explain the backgrounds of the articles of the Two Covenants and explain the meanings on by one; 5. Exemplify the questions: Use the style of exemplify to show the unsuitable laws of the ministries which relate to the Two Covenants; 6. Annex: The original of the Two Covenants.

from . In other words, the purpose is to train the lecturers that have both profession and human rights knowledge and skills. These people will be the one that may fully understand the human rights issues in their own office after being trained. The actual training took place in September and October and divided into different stages, and there are about 2400 of officials from all levels of governments have been trained. The lecturers are the experts in the “Human Rights Experts List”³⁶ which made by the Ministry of Justice. The teaching materials are the introductory handbook which compiled by the Ministry of Justice, and the trainees were given only four lectures in 12 hours.

2. Average-Level of the Seed Training

By finishing the six stages primary-level seed training camp, the Ministry of Justice planned the “Learning Map of the Two Covenants”. It planned to hold a “Average-Level Seed Training Camp of the Two Covenants ” from 2010 to 2013. From 27 October 2010, it has held seven Average-Level Training Camp, and 2,565 civil servants have joined in.³⁷ The contents of the trainings are the explanation of the Article 1 to 5 in the International Covenant on Civil and Political Right, the explanation of the Article 6 to 15 in the International Covenant on Civil and Political Right, and the explanation of the Article 6 to 8 in the International Covenant on Economic, Social and Cultural Right. The teaching materials are written by experts and scholars according to the human rights ideas contained in the Two Covenants. The training of the Two Covenants and other articles will be hold in the following three years, and expecting to be finished before 2013.

3. Lecture and Study

From October 2009, the Ministry of Justice started to ask for other departments to hold lecture and studies for the civil servants. The teaching materials are still the introductory handbook.³⁸ From October 2009 to December 2010, there are 4,256 lecture and study sessions which was held by 66 ministries.

³⁶ The members contain in the “ Human Rights Experts List ” are scholar in academia and professional human rights workers, some of them are directors of human rights groups. According to the list of the seed training lecturers, most of the lecturers are law scholars and lawyers.

³⁷ See the website of “ Project Great Stride ”. <http://163.30.117.129/peowalk.htm>

³⁸ According to the six reply of President Ma Ying-Jeou in Promotion Progress Reports of the ” Two Covenants and the Act to Implement the Two Covenant”, every ministries should compile the kind teaching materials in the process of seed lecturer training, but the achievements are limited. Except the Ministry of Justice and Ministry of Defense, other ministries do not compile the teaching materials, some of the ministries only have the power point and the syllabus that the lecturers use, but do not compile systematically. There are 297 people participating in the study group which held by Ministry of Justice.

5. Guidance:

In order to promote the human rights idea for the public, the Ministry of Justice published the learning disk of the Two Covenants, guiding posters, and newspaper advertisements, and put these information with the information of the teaching materials that contained in the “Seed Training Camp of the Two Covenants” which has included in the “Learning Map of the Two Covenants” on the website of the “Great Stride Project”.

**Table I: The Statistics of the Training and guiding conference
for the Civil Servants**

Types	Seed Training Camp of the Two Covenants	The Lecture and Study Session held by the ministries possess to the Ministry of Justice	The Guiding Session for the Two Covenants ³⁹	Average-Level Training Camp of the Two Covenants
Time	2009/09/10	2009/12	2009/10-2010/12	2010/10-2011/05
People/Sessions	2400 people	297 people	4,256 sessions	2,565 people

V. The Primary Examination to the Human Rights Education and Trainings

We can figure out the direction and magnitude of the “Human Rights Great Stride” by the sessions and people of the conference that mention above, and the determination that the Ministry of Justice wants to speed up the government institutions to carry out the Two Covenants by this training program. However, we need to have a specific goal and ways to fulfill the effectiveness. From the perspective of the trainees, the training of trainers program has got some serious problems.

1. Insufficient preparation

During the proceeding stage of the human rights education program, it is important to evaluate the present situation of the human rights education and training, and the background of history and culture that will affect the human rights education

³⁹ The guiding ways which the ministries use are not to stick to style. They may use the written form of other ways to propagate the information of Two Covenants.

and training, so that we can specify the goal and the prior agenda in the given environment. The INGO Amnesty International has mentioned in “*A 12-point guide for good practice in the training and education for human rights of government officials*” that the importance of evaluation the human rights situation before training.⁴⁰ We can use the experience of the British as an example. Before the Human Rights Act adopted, the British government set out a two-year preparation time (November 1998 to October 2000). In this period, the British government executed the training programs to the civil servants, and review all problematic laws, regulations, directions and administrative measures. the targets of training programs are very broad, including the members of central and local governmental institutions, civil groups, judges, civil servants.....etc. On 1998, there are more than 30,000 lay magistrates⁴¹ in Wales had been trained, and we can imagine the magnitude of the training.⁴² Also, every governmental institution would create their own human rights training plans according to the characteristics of every governmental institutions. However, before 2000, the British government thought the courts is not to apply yet the Human Rights Act in the practice, thus, it cannot anticipate whether the court use the Human Rights Act properly in individual cases, and the practical cases needed to be contained in the training program. Accordingly, the British government started the second stage of training plan, and completed until 2003.⁴³ In contrast with Taiwan, we do not have a fully preparation to the training, and the magnitude only focus on a small range of the civil servants, also, the trainees were given only four lectures in 12 hours, yet they were expected to help train others and help review all problematic laws, regulations, directions and administrative measures back in the government institutions or agencies they came from. Surely, this is hardly suitable for training novices.⁴⁴ If the seed personnel have got the basic skills and knowledge, they will be the one that can fully understand the relate human rights issues in their own institutions. However, due to the poor preparation of the seed training program, it is not difficult to imagine the performance when they start to conduct training program for their colleagues

⁴⁰ The 12 points guide has point out in the first point that : Before starting a human rights training program it is essential to determine whether it is feasible in light of the human rights situation in the particular country. A needs-assessment should also be carried out so as to identify priority objectives and determine the scope and approach of the program.

⁴¹ The lowest level of the members in the court.

⁴² Metcafe, Eric, 2010, “ British Human Rights Act and the Trainings to Implement it.”, TAHR, 2010 Spring: p. 64

⁴³ Metcafe, Eric, 2010, “ British Human Rights Act and the Trainings to Implement it.”, TAHR, 2010 Spring: p. 65; Covenants Watch, 2010, “ The Review of Carrying out the Two Covenants by Government in One and Seven Months. ”, 2010, p. 9

⁴⁴ There are different people between the trainees and the people that responsible to human rights affairs, and trainees may be transferred to other ministries, so it's a problem to the trainees that they can really bring the skills into full play or not, and other ministries also have questions about it.

2. The Teaching Materials are Hard to Understand

According to the “Great Stride Project”, the educational materials has divided into introductory handbook and the other kinds. The contents of the introductory handbook are mainly focused on the explanation of the Two Covenants. Although this kind of contents can provide a good outline to the trainees about the Two Covenants, there are still some obvious differences comparing to the suggestion of the UN Human Rights Education Programs and other human rights training materials that use in other countries. According to our intensive interview with trainees, the teaching materials and lectures are too abstract and abstruse to understand.⁴⁵ The main reason is that teaching materials and lesson plans did not appropriately adapted and modified for each target group, and it cannot provide useful guidance for the conceptualization, planning, implementation and evaluation. Therefore, it is very difficult for the trainees to translate and modify the abstract concept and principle into their own business.⁴⁶

3. Lack of Discussing to the Practical Cases and the Training Materials Suitable for Different Jobs and Different Targets

The training style which invites the experts to give a lecture also becomes a cause of poor performance. Most of the departments are lacking of funds and abilities for training, and also lacking of the training lecturers who are working in various professions in fields of human rights which touch on their particular field of competence.. So most of lecturers are professors of science of law and lawyers, and their lectures are mainly to explain the abstract concept of law and other theoretical parts. Accordingly, it is lack of case studies that can make students understand the relations between theory and practice. Therefore, the officials will daunting in realizing the contents of the Two Covenants, and cannot easily put the theory into practice.⁴⁷ Also, according to the plan of the Ministry of Justice, the other departments need to compile the kinds of advanced training programs and professional trainings in order to make the human rights education and training suitable for their own business. However, besides the Ministry of Justice and the Ministry of Defense,⁴⁸ the other ministries do not compile the kinds of hANDOuts.⁴⁹

⁴⁵ There are working groups in eight ministries have this problems in eleven interviewing ministries.

⁴⁶ A survey candidate has mentioned: “ If the examples can relate to our business, then we can be integrate into the atmosphere, if only explaining the articles, I guess it will be boring, and will have limitation on our business. ”.

⁴⁷ For parts of the trainees, they can have better learning motive without only explaining the articles, one survey candidate has mentioned: “ Some lectures can raise the interests of the trainees by talking in practice issues without only explaining the articles, and this can let us easy to understand. ”

⁴⁸ The resources and the directions of the teaching materials of the Ministry of Defense is from the Department of Military Justice, and invite the judges from the military tribunal from north, and focus on the main cases in the national military, use the way of legal precedents, and compile in lively styles.

By virtue of most of the trainees cannot suitably understand and translate the contents of the introductory handbook, it is hard to expect they are qualified to conduct training program for their colleagues.

Besides the British experience, the Office of High Commissioner for Human Rights (OHCHR) has published a lot of teaching materials and lesson plans which appropriately adapted and modified for each target group, which can provide useful guidance for the conceptualization, planning, implementation and evaluation of human rights training programs for adult professionals. In addition to the *Human Rights Training: A Manual on Human Rights Training Methodology* which has been mentioned in this article, the *Human Rights and Social Work. A Manual for Schools of Social Work and the Social Work Profession* which is for the social workers; *Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police*, *Human Rights and Law Enforcement: a Trainer's Guide on Human Rights for the Police*, and *Human Rights Standards and Practice for the Police: expanded Pocket Book on Human Rights for the Police*, which are for the police officers; the education materials for the prison officers are include *Human Rights and Prisons: Manual on Human Rights Training for Prison Officials*, *Human Rights and Prisons: a Compilation of International Human Rights Instruments concerning the Administration of Justice*, *Human Rights and Prisons: Trainer's Guide on Human Rights Training for Prison Officials*, and *Human Rights and Prisons - a Pocketbook of International Human Rights Standards for Prison Officials*. It is pity that the training program didn't make full use of these materials during the training process. It was exposed again how international isolation would hamper the efforts of carrying out international human rights norms.

VI. Some Advices

According to our intensive interview with trainees,, we found out that there are many problems not only appeared in the primary training of the “ Project ”, but also in the proceeding average-training courses. The Ministry of Justice needs to evaluate the performance of the training of trainers program, the governmental institutions or agencies should adjust their ways of human right education and training, adopting the UN standards and teaching plan, in order to solve the problems. Also, the respectively training center of the departments should accept the ideas mentioned above to compile the educational materials, and integrate the Two Covenants into the training courses. I

⁴⁹ There are six ministries that focus on the internal training materials, they may be based on the general provision that the Ministry of Justice compiled, and supply the outline of the experts who they invite from exterior.

will suggest some directions that we can move ahead in the near future.

1. Draw up the National Plan of Action for the Protection and Promotion of Human Rights

We should have a comprehensive plan for the Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights so that we can completely solve the problems exposed in the institutions, policies, and educational training programs. In this article, we suggest that The Presidential Office Human Rights Consultative Committee needs to draw up a National Plan of Action for the Protection and Promotion of Human Rights. It is a plan that delivered in the World Conference on Human Rights on 1993 in Vienna. According to the Article 71 in the Part II of the Vienna Declaration and Program of Action (VDPA), “The World Conference on Human Rights recommends that each State consider the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights. ”.

Therefore, the National Plan of Action for the Protection and Promotion of Human Rights is an important mechanism in promoting and protecting human rights in the international community. The purpose is to create short-term, medium-term, and long-term comprehensive plans to carry out human rights in one country by state’s planning and social participation, and establish an institution to evaluate and correct the plan. Also, in the *Handbook on National Human Rights Plan of Action* which was published on 2002 by the UN, it clearly point out that in addition to mechanism and resources, we need to change our attitude, and to have a sound but independent law and judiciary system, and rule of law, and so forth.⁵⁰ By starting the National Plan of Action for the Protection and Promotion of Human Rights, we can pursue the overall examination, evaluate continuously, fix the present mechanisms, and find out the concrete strategy in order to carry out the situation of human rights in the future. After the appeal of VDPA, there are 29 countries has promote 37 National Plan of Action for the Protection and Promotion of Human Rights so far.⁵¹

Therefore, we suggest that The Presidential Office Human Rights Consultative Committee can draw up the National Plan of Action for the Protection and Promotion of Human Rights according to VDPA and *Handbook on National Human Rights Plan of Action* to focus on the business of human rights protection and promotion, these

⁵⁰ See the *Handbook on National Human Rights Plan of Action*. <http://www.ohchr.org/Documents/Publications/training10en.pdf>.

⁵¹ See http://www2.ohchr.org/english/issues/plan_actions/. The Chinese government has established the “ National Plan of Action for the Protection and Promotion of Human Rights (2009-2010) ” in 2009. The Chinese official has declared that the plan of action was consult in the VDPA and the Handbook in National Human Rights Plan of Action which adopted in 2002 by OHCHR.

include how to strengthen the capability to promote and protect the human rights, figure out the feasibility of establishing or strengthening the authorizing institutions of human rights, the studies of ratifying the other international covenants, constructing the useful relief procedures that can improve the situation of the disadvantaged minorities, strengthening and improving the cooperation plans between the governmental institutions, local governments, NGOs. In terms of human rights education and training, we can carry out the specific plan to implement the human rights education and set up the priority and time schedule to carry out the Two Covenants and the Implement Act effectively.

2. Strengthen the Human Rights Education Training for the New Employed and the On-the-Job Judges about the Rights within the Two Covenants

By preventing the judges doing the verdict without understanding the International Human Rights Law and avoid using the norms in the Two Covenants subconsciously, it is necessary to strengthen the human rights education training for the new employed and the on-the-job Judges . Therefore, besides teaching the international law, we suggest that the Training Institute for Judges and Prosecutors and the Judicial Personnel Study Institute should do the training for the human rights education continuously, especially in the courses relate to the international human rights law in the planning of the courses.

3. Sponsor the human rights education for lawyers hosted by bar association and legal aid foundation.

The responsibility to implement the two covenants is not only from the judges, but also from the lawyers who play important roles in the court. So the lawyers need to understand and recommend the Two Covenants to implement the Two Covenants in the court. By financing the human rights education for lawyers hosted by bar association and legal aid foundation, it would be very helpful in carrying out the Two Covenants.

4. Study the Possibility to Put the Human Rights Trainings into the Compulsory Standards for the Civil Servants in the Professional Promotion

The “Project” has suggested the Examination Yuan and the Central Personnel Administration should adopt the Two Covenants into the training courses to the civil servants, and figure out the possibility to test civil servants the international law in the future national examinations. In order to bring up and examine the human rights conscious more effectively, this article suggested that the Examination Yuan can study the feasibility to put these trainings into the compulsory standard to the professional

qualification and promotion.

5. Invite domestic non-governmental organizations to assist the training of trainer program

Definitely, we can see the importance of the NGOs in planning the training plans in the UN suggestion programs and the experiences from other countries. According to the Article 5 of the Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, “The government should cooperate with other national governments and international non-governmental organizations and human rights institutions to realize promotion and protection of human rights provisions in the two Covenants.”. In order to achieve the implementation of the Two Covenants, we can consider to fund domestic non-governmental organizations to assist the training of trainer program.

6. Establish the National Human Rights Resources and Training Center

Moreover, we should consider the possibility to establish a well National Human Rights Resource and Training Center in the long run. We can consider to establish a human rights resource center in the National Academy for Educational Research. The center takes the responsibility of the missions below: A. Human Rights Research; B. Compiling, Translating, and Collecting the Human Rights Teaching Materials; C. Collecting and Compiling the International Human Rights Documents; D. Human Rights Trainings; E. Assist to Implement the International Human Rights Education Cooperation; F. Promote the Human Rights Educations in Order to solve the problems of lacking of human rights knowledge, experience, and expert in Our Country.

VII. Conclusion

As the “ United Nations Declaration on Human Rights Education and Training “ has point out, human rights education and training is the key to promote the human rights and basic freedom which everyone have can be respected generally. In principle, human rights values and norms, whether they have been legally codified or not, should be an important basis for judgment when civil servants perform their duties; however, this phenomenon is all too rare in Taiwan. In fact, this poor awareness of human rights has its roots in a long-term lack of human rights education. Our civil servants, police, military and intelligence officials are not taught about human rights in school or in on-job training. It provides a very good opportunity to train all levels of governmental officials by this training program. However, as mentioned, the training of trainers program has got some serious problems. These developments

described above demonstrate that, thus far, efforts to the implementation are insufficient. Therefore, apart from making fine-sounding promises and announcements, this paper suggests that the Ministry of Justice should evaluate the effect of the current training of trainer program, and make full use of the teaching materials from the UN and other International organizations in the following training process so that “governing on the basis of human rights” may not become a mere slogan.

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國際人權標準與臺灣國中小之人權教育— 從「友善校園」到「校園世界人權日活動」^{*}

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摘要

臺灣已將公民與政治權利公約和經濟社會文化權利公約國內法化，但在國中小校園之人權教育，在介紹權利主張的時，能否把所謂「國際規準和國際機構取向」的面向帶入，或能否擴張從憲法到人權公約之人權保障視野，將係本文之討論重點。換言之，被聯合國摒除於外之臺灣，當我們在談人權時，我們所講的權利，有無國際人權標準之視野，將會從普世性和人權公約引用等兩個角度來檢視。本文將分別從「友善校園政策」、「九年一貫課程綱要」、「人權教育教材」、「校園世界人權日活動」等，來討論我國國中小以下校園之人權教育之實施。國際人權標準，在提供人權的普世性觀念上，是不可或缺的重要資源，也挑戰臺灣的國中小校園在人權教育的實踐。

關鍵字

人權教育、兩公約、校園人權

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壹、前言：人權保障的視野，國內或國際？

世界人權宣言第一條明訂：「人生而自由，不論是在權利或是尊嚴上都處於平等的地位」，如此天賦人權的理念，強調其係跨越國界、地域、種族、性別、階級等的普世價值。然而，就其發展的歷史與理論基礎而言，以英國十七世紀的自然權利為例，如學者 Michael Freeman (2006: 22) 指出：「自然法與歷史爭論的混合產生了一些關於權利是英國人還是普世人權的不明確。Roshwald 認為實際上關注的是英國人的權利，但他們的邏輯是普世的」。在人權觀念的發展史，已存在著如此觀念的指攝範疇，是否超越國籍限制之緊張，既然講的是人權，邏輯上當然包括所有的人，就不會僅侷限國土的限制。可是，「革命時期，美國人的自然權利之觀念並不包含婦女權利，而一般認為可以與奴隸制度相容」(p24)。相對地，後來的法國大革命，用更多的普世性語言，如婦女權利之興起和奴隸制度的取消等，皆已被提及。不管是英國、美國、法國的歷史，在其憲法為首的國內法制下，普世人權的價值，不斷地挑戰其既有的性別、階級、種族、地域等各種社會的藩籬，甚者，其所帶領的關懷當然不會被侷限於一國的國境內。甚者，以聯合國為首所建立的國際人權標準，更已將抽象且哲學上有爭議的自然權利觀念，建立在國際人權公約之中，如 Michael Freeman (2002, 32) 所指出，「從歷史的角度來看，這是一個令人驚奇的發展。一個不久前還被懷疑的概念有了非凡的重生，普遍被認為是西方概念的人權已經全球化」。

雖然人權的理念，強調其普世性，但就法律保障的體系而言，不可否認地，其仍受限於不同的政治組成，其仍可區分為國內的憲法與或國際的人權公約層次。而我國憲法的第二章，明訂人民的權利與義務，但在其內容上並無清楚地區分所謂「人權」與「公民權」，前者指超越國籍的權利，而後者以國籍為前提之權利，換言之，非屬我國國籍者，即不得主張這些權利。有趣的是，在聯合國人權保障的國際公約體系中，透過兩個國際人權公約，更將人權區分為「公民與政治權利」和「經濟、社會、文化權利」，在此所謂的「公民權」或「公民自由」，實指作為一公民在民主社會，最基本之公民自由與政治參與權，如生命權、人身自由、思想信仰自由、意見表達之自由、集會結社之自由、營私人生活不受侵犯之自由等，實為超越國籍限制的普世人權。

臺灣因為在國際地位的特殊性，並非是聯合國的會員國，因此，以實際的人權保障機制而言，人民僅能訴諸國內憲法層次的法律體制，來主張人權保護。然而，在 2009 年 3 月 31 日立法院通過，(當我們仍是聯合國之會員國) 早在 1966 年 12 月 16 日所簽署之公民與政治權利公約和經濟社會文化權利公約(俗稱：「兩公約」)，且同時通過其施行法，並明訂於該年之 12 月 10 生效。換言之，我們已將此兩國際人權公約國內法化，而就人權教育之落實而言，若僅侷限於憲法的層次，而未能更擴及國際人權公約之層次，來介紹人權的理念，在視野上當然是有所不足。以非法移民的小孩，可否主張其受教權應受到保障為例？答案會有所不

同，端視我們如何看待受教權的保障，視其為人權或公民權結果會有所不同，前者會承認其權利但後者則否，蓋後者係以國籍為利益主張之前提。在美國即承認非法移民之小孩 (Cary,1997:20)，仍可主張其受教權，但在臺灣根據外國學生來台就學辦法第 19 條仍以「合法居留身分」，為其得以就學之前提。

人權教育學者 Betty A. Reardon (2002: 16-18) 提到「國際規準和國際機構取向」的重要，「人權是關於倫理道德的一種現世公約，它要求實現地球村的遠景，也同時形成世界和平的基礎」。臺灣的人權教育，在介紹權利主張的時，能否把所謂「國際規準和國際機構取向」的面向帶入，或能否擴張從憲法到人權公約之人權保障視野，將係本文之討論重點。換言之，被聯合國摒除於外之臺灣，當我們在談人權時，我們所講的權利，有無國際人權標準之視野，將會從普世性和人權公約引用等兩個角度來檢視。本文將分別從「友善校園政策」、「九年一貫課程綱要」、「人權教育教材」、「校園世界人權日活動」等，來討論我國國中小以下校園之人權教育之實施。

貳、國際人權標準與「友善校園政策」

教育部從 2004 年年底起發佈「友善校園總體營造計畫」（93 年 12 月 27 日台訓(二)字第 0930169777 號函發布），中間雖經過兩次的修正（96 年 11 月 29 日台訓(二)字第 0960185285 號函修正、100 年 3 月 18 日台訓(二)字第 1000032575 號函修正），仍是教育部在推動學生事務工作之整體性的政策主張，「乃立基於學校本位管理之觀點，強調學校教師及學生在進行教與學的歷程上，必須『如師如友，止於至善』，任何教育活動以及輔導管教措施均可建立在「友善校園」上發展，其主要內涵包括校園安全、人權法治教育、關懷弱勢、選替性教育、輔導偏差行為學生，建立系統輔導機制管道，和諧組織文化」（教育部，2011：1-2）。

人權教育亦屬友善校園之重要政策之一環，其不僅在計畫目標提到「營造尊重人權的法治校園」，並條列出八點的實施策略，如下：(一)推動人權教育(二)定期調查弱勢族群學生(三)推動校園正向管教(四)扶助高中職以上弱勢學生就學(五)輔助國中小弱勢學生學習(六)加強品德教育(七)強化公民意識(八)加強法治教育。進一步在具體執行項目與內容，則羅列：

- 1、規劃人權教育之研究發展，並輔導縣市政府督導學校進行校園人權環境指標自我檢核評估工作。
- 2、培訓人權教育師資，於師資職前教育專業課程中，將人權教育納入選修課程中，並規劃辦理人權教育教師在職進修研習活動。
- 3、發展人權教育課程及教材，推動國民中小學人權教育課程與教學，並鼓勵各大學及技專校院開設人權教育相關課程。
- 4、加強人權教育宣導，推動社區人權教育方案、補助民間團體辦理人權相關活

動。

- 5、改善學校人權措施，督導縣市政府於年度友善校園學生事務與輔導工作計畫規劃辦理人權教育相關研習及活動，並輔導各校將人權公民教育實踐議題納入學校年度行事曆並辦理相關活動。
- 6、依據「公民與政治權利國際公約」及「經濟社會文化權利國際公約」，檢視現行相關法規及行政措施是否符合前開兩公約事宜，並辦理相關宣導工作。

從以上有關友善校園之政策實施，從國際人權標準的使用而言，直接有關者係前揭「1、規劃人權教育之研究發展，並輔導縣市政府督導學校進行校園人權環境指標自我檢核評估工作」和「6、依據『公民與政治權利國際公約』及『經濟社會文化權利國際公約』，檢視現行相關法規及行政措施是否符合前開兩公約事宜，並辦理相關宣導工作。」針對「6」的工作，教育部要求學校必需檢視其校規和行政措施，是否符合公約之要求，係直接與國際人權的標準關連項目，惟公約的規範對象並非學校，其在適用上勢必需經過轉化，且未必每個公約之內容，與校園皆可直接的關連，再加上校園並非有法律特別是國際公法之專長，若未經過有效的配套措施協助，其政策成效恐堪虞。

相對地，有關「1」之工作項目，有關校園之人權環境指標自我檢核評估工作，這些人權環境指標，不若人權國際公約，係直接針對校園環境而設，係將許多國際人權標準融入校園之情境（馮朝霖，2004），以和公平的決定程序有關者，在公民與政治權利公約第14條第二項：「凡受刑事控告者，在未依法證實有罪之前，應有權被視為無罪」，在人權環境指標，則有類似「師生在被證實有過失之前都能被視為沒有過失，並尊重其應有權利」。其有經過轉化，自然比較容易在校園中施行，教育部實可以人權環境指標為主，在指標後可以羅列相關之國際人權標準，使校園在檢視指標時，瞭解到指標背後的價值，係源自國際的人權標準，甚或認知到其具有普世性。

在國外的人權教育教材，亦有以校園之情境為對象的「校園人權溫度計」（Shiman, 2011: 65-77），以世界人權宣言之內涵為核心，轉化為校園內之情境，共25題由學生來填寫，並由老師來帶領學生一同檢討結果。其重點在於透過學生一起的參與並共同來檢視所處的校園或教室環境，從人權的價值而言，還有哪些可以改進之地方，並順帶介紹每一題背後的國際人權標準。換言之，其比人權環境指標更進一步，將背後的國際人權價值，介紹給老師和同學，其不僅是一個環境指標，更重要地也是一種課程模式。這種轉化過之模式，實為教育部在引進國際人權標準進行入校園之參考。

參、國際人權標準與「九年一貫課程綱要」

我國的中小學課程，雖然在1998年實施九年一貫課程以前，不能說沒有提

到人權的價值，但直接在課綱中標示「人權教育」，正式成為國訂課程的一部份，則絕對是從其開始。與人權有關之能力指標，在九年一貫課程中，除在社會學習領域的主題軸「六、權力、規則與人權」和「九、全球關連」外，更在重大議題課程，亦規劃有完整人權教育指標，惟其並非如領域課程有明確的教學時數，但期待在不同的領域能採「融入式」的教學，即在適合的地方帶入人權教育。以下將分別檢視社會領域和人權教育重大議題之課綱能力指標與說明，是否有帶入普世性和國際人權標準。

在主題軸六，當其有提到權利者，如指標「6-2-2 舉例說明兒童權（包含學習權、隱私權及身體自主權等）與自己的關係，並知道維護自己的權利」、「6-4-3 舉例說明各種權利（如學習權、隱私權、財產權、生存權、自由權、機會均等權及環境權等）之間可能發生的衝突」，其並未特別區別法律或憲法層次的權利，更未提到國際公約的層次，此部份留給老師和教材空間，但所謂權利，最少需符合普遍性和合理性，才是受法律保障之利益，在強調普遍性時，即可強調「任何人」，在這種狀況下，都是合理正當地應受到保護，甚者，可以將憲法或國際人權公約帶入，來凸顯其「普世性」。相對地，在指標「6-3-4 列舉我國人民受到憲法所規範的權利與義務」，則明白地侷限在憲法層次的權利，除應區別人權與公民權之不同外，其仍可將國際人權標準帶入學生的學習，蓋有許多的憲法權利，可以被國際人權標準所補充，且如此來擴大學生的視野。

在主題軸九，其從全球關連的角度來提人權，如在指標「9-3-4 列舉當前全球共同面對與關心的課題（如環境保護、生物保育、勞工保護、飢餓、犯罪、疫病、基本人權、經貿與科技研究等）」和指標「9-4-5 探討當前全球共同面對與關心的課題（如環境保護、生物保育、勞工保護、飢餓、犯罪、疫病、基本人權、媒體、經貿與科技研究等）之間的關連性，以及問題可能的解決途徑」，這些指標皆提及基本人權為全球共同關心的議題之一。這些指標雖未直接提及國際的人權標準，但已清楚地提醒人權的議題，絕非僅是單一國家的問題，教師或教科書當可帶入國際人權標準與普世性的面向，來印證其係全球性的議題。

在人權教育的課程綱要，其區分為「人權的價值與實踐」和「人權的內容」兩個部份，在指標「2-3-2 瞭解兒童權利宣言的內涵及兒童權利公約對兒童基本需求的維護與支持」、「2-4-4 瞭解世界人權宣言對人權的維護與保障」、「2-4-5 認識聯合國及其他人權相關組織對人權保障的功能」，很明顯地來提國際人權標準和國際性組織，此外，如指標「2-4-7 探討人權議題對個人、社會及全球的影響」、「2-3-5 理解戰爭、和平對人類生活的影響」、「1-4-5 討論世界公民的責任，並提出一個富有公平、正義永續發展的社會藍圖」、「1-2-2 知道人權是普遍的、不容剝奪的，並能關心弱勢」，這些指標雖然沒有直接提到國際人權標準，但從「人類」、「世界」、「全球」、「普遍」等面向，其亦在強調人權的普世性。其他的指標，亦直接提及許多的權利觀念，但因其本身即在人權教育的課綱下，很清楚地絕非一般性的權利，而與其最大之差別，或許即在於更強調人權的「普世性」、「固

有性」、「不可分性」等面向。

肆、國際人權標準與「人權教育教材」

誠如前所揭，在九年一貫課程中，比較明顯和人權教育有關之課程，主要在於社會領域，另外有人權教育議題融入之課程。相應地，在教材的部分，我們可以檢視現有坊間的社會領域教科書。此外，針對所謂議題融入之課程，教育部在其中央與地方課程與教學輔導網絡下，亦成立所謂「人權教育輔導群」來協助地方的「人權教育輔導團」（林佳範，2009：144-145）。人權教育輔導群為推動校園的人權教育課程，亦會發展人權教育之教材，不僅作為師資的培育課程，亦可以進一步融入在相關之領域課程中。

我國坊間的教科書多集中在翰林、南一、康軒等三家出版公司，以國中的社會領域教科書，有提及國際人權公約者，如教科書有直接提到世界人權宣言的部分，一則在介紹「社會中的團體」，會引用世界人權宣言，來指出「結社自由」：「人人有和平集會結社之自由，並不得強迫加入任何集會」（南一，2010；翰林，2010）；另一則在有關「社會福利」，為強調社會正義，而引用世界人權宣言：「人人生而自由，在尊嚴及權利上一律平等」（康軒，2010；南一，2010）。可見我國的教科多僅片面地引用國際人權標準，並非直接或完整地介紹國際人權標準。且在「全球關連」的部分，本來應該可以介紹聯合國，順便帶出世界人權宣言，但並無任何的教科書有提到。

再者，若以公民自由的觀念為例來檢討，所有的教科書，均會在介紹憲法有關人民權利與義務，提到「自由權」，均已含括公民政治參與有關之基本自由，如人身自由、言論自由、集會結社之自由。然而，每本教科書的介紹，對個別自由權的觀念介紹，均相當簡短，且並未和實質公民參與政治生活之面向關連（南一，2010a；康軒，2010a；翰林，2010a）。如此形式地介紹自由權，並無法和實際的社會政治運作關連。在 2009 年我國國中二年級學生參與一項國際性公民資質的比較性研究（2009 International Civics and Citizenship Study，簡稱 2009ICCS），針對民主體制調查學生的態度與價值傾向，在回答是否同意「沒有公司或政府應被允許掌控國家中所有的媒體」和「人民可以抗議法律的不公」，這兩題我們學生的回答，在 38 個國家的比較中，是遠地低於平均值，頗值得我們警惕（Schulz et al，2010：89-90）。

然而，這兩個題目，正是和實施民主政治最重要的公民自由（即表現自由）有關。顯然我國的國二學生，對於公民自由的認識和認同，仍有許多進步的空間。公民與政治權利公約，所講的公民自由與政治權利，正是實施民主政治所不可或缺的重要人權。我國坊間的教科書，很形式地依憲法的規定來介紹，僅能提供所謂「自由權」的觀念，若能結合國際人權標準，而與「公民自由和政治權利」觀念相關連，如此不僅能與實際社會政治生活連結，更能擴大學生人權保障的視野。

除前揭社會領域之教科書外，在臺灣國中小校園的人權教育的教材，最主要的來自人權教育輔導群所翻譯國外的人權教育教材。他們翻譯聯合國在推動人權教育十年計畫時，所發展出來的教材：《人權教育 ABC—中小學基礎人權教學及活動演練手冊》(ABC: TEACHING HUMAN RIGHTS-Practical activities for primary and secondary schools)。這本書當然以聯合國的國際人權標準體系為核心的價值，將這些重要的國際人權標準，如世界人權宣言、兒童權利宣言、公民與政治權利公約、經濟社會文化權利公約等等，轉化為校園可以依不同的年齡階段，以具體的生活例子與活動，來介紹這些抽象的國際人權標準。

以衝突解決為例，這本教材更從低年的教室，將「衝突解決」的議題，帶到世界的「戰爭、和平、和人權」面向，此部分亦可以融入前揭九年一貫課程人權教育重大議題之能力指標「2-3-5 理解戰爭、和平對人類生活的影響」。此外，就拓展人權保障之國際視野而言，除強調聯合國體制之機構與公約以外，其更提及「企業和人權」的議題，更是國內教材較少提及的面向。企業不僅雇用許多的人，不僅在經濟上有其影響力，更在人權的侵犯或保障上皆可以檢討其角色。然而，如此和個人與社會密切的組織，不僅在課綱上沒有直接的指標，更在教材上雖有提到「民間的團體」，但多從人民團體法的區分為「職業團體」、「政治團體」、「社會團體」(南一，2010)(翰林，2010)(康軒，2010)，而非直接介紹與人民生活或許更密切的「企業」本身。

除這本基本的教材以外，人權教育輔導群，更翻譯美國明尼蘇達大學人權資源中心所出版的系列叢書共七本，其分別為《人權實踐在當下》(Foundation Volume: Human Rights Here and Now)、《從人權觀點和經濟和社會正義》(Topic Book 1: Economic and Social Justice: A Human Rights Perspective)、《教導兒童基本觀念、權利和責任》(Topic Book 2: Raising Children With Roots, Rights & Responsibilities: Celebrating the UN Convention on the Rights of the Child)、《女同性戀者、男同性戀者、雙性戀者和跨性別者的權利》(Topic Book 3: Lesbian, Gay, Bisexual, and Transgender Rights: A Human Rights Perspective)、《人權教育教學手冊—學習、活動與改變的有效方法》(Topic Book 4: The Human Rights Education Handbook: Effective Practices for Learning, Action, & Change)、《性靈提升—宗教信信仰之人權與自由》(Topic Book 5: Lifting the Spirit: Human Rights and the Freedom of Religion or Belief)、《身心障礙者人權的倡導與行動》(Topic Book 6: Human Rights. YES! Action and Advocacy on the Rights of Persons with Disabilities)。這套叢書有針對特定主題或對象，惟其亦包括介紹國際的人權標準，可作為前揭《人權教育 ABC—中小學基礎人權教學及活動演練手冊》的進階或補充。

從介紹普世性的觀念和國際人權標準的角度，以其中《從人權觀點和經濟和社會正義》(Shiman, 2011, 69-77)書中的一個活動：「馬丁路德金恩—從公民權到人權」為例，以著名的美國民權運動領袖的努力，讓學生理解其奮鬥不僅有

「公民權」的意涵，更可以延伸到「人權」的角度，帶進國際人權標準，如「世界人權宣言」、「公民與政治權利公約」、「經濟社會文化權利公約」等。此外，其更凸顯人權保障的不可分性，即公民與政治權利和經濟社會文化權利等，對任何社會中的個人，都是不可或缺且相互關連。這些都是我國的教科書所欠缺的面向。

伍、國際人權標準與「校園世界人權日活動」

2010 年 12 月 10 日，人權教育輔導群針對世界人權日，發展出一個簡單課程與教學活動：「兒童關心兒童、一人一信送愛到達弗」。非洲蘇丹南部的達弗地區，從 2003 年起被回教民兵和政府軍迫害，已造成六十萬人被屠殺，且有兩百萬人流離失所，已造成國際的關注，不僅聯合國介入，且其總統在 2010 年七月亦已被國際刑事法庭，以違反聯合國的殘害人群公約被起訴。在不到二十分鐘的課程，除讓學生認識蘇丹達弗的地理外，更希望學童能關心遠在非洲孩童的人權狀況，並以實際的行動來改善他們的人權狀況，以國際特赦組織常用的方式，即寄關心的明信片，來協助弱勢的孩童發聲。

人權意識的形成，或人權行動的踐行，都不可能被迫，必需是發自內心的理解而決定採取行動，才是真正的人權行動與教育。希望如此受注目的人權議題，來擴展臺灣學童的國際視野，並發展學生的人權意識與行動能力，甚至藉此認識國際的人權標準。任何的縣市人權教育輔導團、學校、或班級，只要認同如此的活動，即可以將如此的課程融入。它可以是在歷史與地理的課程，利用 google earth 或地球儀，讓小朋友認識蘇丹達弗的地理與人文歷史。或是國語的課程，讓學生練習書寫明信片的格式，甚至學習抗議或關心文字的使用。或是英語的課程，將學過的英文應用在撰寫關心兒童人權的語句表達。它可以是生活的課程，藉此使學生認識郵局與郵政。它可以是公民課，介紹國際的人權標準。甚者，也可以在非正式的課程，如班會或朝會，以主題的方式來介紹，特別是在像世界人權日這樣的日子。

人權教育輔導群蒐集到的訊息與資料，陸續從 11 月開始至 12 月 10 日，在全台已有十七個縣市的地方人權教育輔導團，和四十八個國中小響應如此的課程，或許仍有許多我們尚未獲悉但也有在進行的班級或學校。我們看到各地方團的創意與努力，如花蓮縣團聯絡郵局，實際將郵筒搬到學校，讓學生來投遞。台中縣團更讓學生在朝會，排列「H」和「R」的圖樣，來認識 Human Rights。有台北市輔導團的教師回饋，其實在課程的進行中，小朋友反應從來沒有機會，認識在世界的另一端，仍有小朋友過著如此皮包骨的境況，讓他們不禁為自己的生活感到慶幸，並對戰爭的恐怖，有深刻的印象。甚者，亦有老師反應，有學生會以激烈的言詞表達憤慨，但老師亦藉此機會提醒理性抗議文字的使用。這樣的課程，能帶給學生各種的學習層面。

人權的行動與課程，當然並不會止於這一次，亦不會侷限於人權日才可以進

行。世界、臺灣、各地方縣市、甚至學校或班級本身，仍有許多的人權議題，可以在各種的課程中融入。人權行動的方式，亦不限於寫明信片，報紙投書、畫一張海報、完成一項壯舉（以喚醒關注）、繫上黃絲帶等等，表達關心的方式，可以再發展，但最重要的是，能真正的關心與理解人權的價值，即對人性尊嚴的尊重。然而，選擇國際性的人權議題，不可否認地可以開拓學生的國際視野，且更符合人權的普世性理念。有趣的是，在這次的活動進行中，亦有老師們提出，寫好的明信片，是否真的要寄出去的問題。有「真」的寄到，或僅是讓學生「活動」一下，不必「真」的寄到，就教育的意義來講，有無差別？茲提供幾點看法，如後：

不要窄化學生的學習。有許多教師認為，讓學生參加活動，如聽老師講解並寫下明信片，即已達到教育的目的，如此實已窄化學生的學習目的。就像許多教師，在升學的考試壓力下，無形中也窄化自己的教學目的，限縮在使學生會會回答考試的題目即可。這樣的想法，忽略教育的最終目的，在使學生具備未來在社會中，解決問題的能力；社會中的問題，絕對比考試的題目複雜，必需使學生能考量真實生活中，更複雜變數的能力與視野，才是在培養其解決問題的能力。愈是能貼近真實情境的學習，才是好的教學。根據前揭 2009 ICCS 的調查研究，我們的學生在參與社會上人權的相關行動，是 38 國中次數最少者(Schulz et al, 2010: 132-133)。

第二、真正的社會行動，才能提升學生的政治效能(Meintjes, 1997)。以寫明信片為例，學習的目標，並非僅在於文字表達或寫信的技能，或地理知識上能知道蘇丹達弗的所在，或認識到人權的普世性（包括外國的小孩也有人權）；其實當他或她親自以實際的行動（寄明信片），給遠在他方的不相干的人，相信這樣的一封信，能為從未謀面的外國小孩，來真正影響他們的生活；從公民教育的角度，如此的行動，即在提升學生的政治效能，亦即培養其關心公共議題，並建立其能改變社會可能的意識。當然，學生或許也會質疑，如此行動的實際效能，但老師也不必誇大它，或許也可能不被重視，但更重要的是，就算是微不足道的心力，至少已採取行動。有行動才有改變的可能，若光說不練，根本不可能有改變。

第三、規範價值教育，必需在生活中實踐。人權不是存在於抽象的法律條文或教科書中，而是要落實在實際的人與人的相互對待上。九年一貫課程的社會領域，提到「全球關連」，一張接一張的明信片，如雪片般地送到蘇丹的總統府，遠在天邊的臺灣，居然有如此的多的小朋友，關心蘇丹小朋友的處境，希望和平與反對戰爭，我們不就是真的在「地球村」中嗎？在這樣的行動中，我們的小朋友，無形中已肯認，就算是不同的種族、膚色、語言的人，他們也一樣的應享有人權。

第四、「造假」的教育，違背專業倫理。學校的教育關係，必需建立在學生對老師的信任與信賴。雖然有些時候，在校園無法複製完全一樣的社會情境，我

們會以假設性的情況，來使學生認識和學習。然而，縱使如此，仍並非在「造假」，而當我們向同學說，我們可以行動來改變社會，卻未將明信片寄出，若被學生知道，不僅造成師生信賴關係的破壞，甚至使學生以後對社會行動的懷疑，甚至可能演變為日後犬儒的態度。老師或許僅是便宜行事，但卻可能對學生造成深遠的影響。

此外，在引用國際人權標準或關心國際的情勢上，亦會引發校園在政治或外交上的疑慮。在人權教育的推動上，許多人會以太過「政治」，而限制或剝奪學生認識爭議性的人權議題。然而，人權議題，很難不「政治」，不管是生活中或制度上（包括政府的強制力），其往往在對抗強權對弱勢的欺凌。甚者，有人認為，作為「教育部」的人權教育議題輔導團，我們僅能「遵照」教育部的「官方」立場嗎？以「政治敏感」為理由，而不去討論爭議性或針對性的人權議題嗎？或相反地，我們必需謹守「人權」與「教育」的專業的立場，引導學生來討論這些議題，才是盡到我們的職責？又如何引導學生的討論，才不會違反教育中立的原則？茲針對這些問題，幾點意見如下：

第一、維持教育中立，並不表示不可以討論政治。政治，是管理眾人之事。民主政治，係實施多黨政治，因此，不得要求行政中立、司法獨立、甚至是教育中立。然而，其所謂「中立」，強調是針對「政黨」與「宗教信仰」，換言之，不得為其宣傳或強迫老師與學生接受。民主的公民教育，更強調學生必需學習政治參與，且必需尊重多元意見的表達。只要不是對特定政黨或信仰宣傳，政治的討論或參與，不僅是被鼓勵，更被視為是必要的。

第二、不碰觸爭議性或針對性的議題，無法培養人權與民主素養。民主社會，本來就是意見多元的社會，且意見表現的自由，本身即是受憲法保障之重要基本人權。更重要的是，如此包容的人權與民主素養，更需從生活中，能和平與理性地討論各種爭議性、甚至針對性的人權議題，不斷地實踐與培養，甚至培養出解決衝突的能力（聯合國，2009：24-25）。人權教育的課程，若規避這些面向，不僅老師會教的心虛，學生亦無法在生活中印證與實踐，更無從形成人權意識。

第三、教師針對爭議性議題的立場的表達，不必然是為特定政黨做宣傳。基於教育中立原則，教師或學校本就不應為特定政黨或宗教，進行宣傳。其實針對爭議性議題的教學，重點不在結論，更在討論之過程，老師甚至必需扮演對立立場的發言者，以此帶出學生更深刻的思考與論辯。就算老師表達其立場，亦需允許學生得以保有其不同的立場，如此才是實踐民主與包容之教學，也才不會是為特定立場進行宣傳。再者，進行人權教育之教學，站在人權的立場，本來就是要超越黨派的立場，才是真正的人權主張。換言之，就算是政府（包括教育部）有侵犯人權之爭議，更應正視而非逃避，才是真正的站在人權的立場。

第四、人權教育的落實，是教育部或地方教育機關之職責，不是其專有之特權。人權是憲法的核心價值，教育基本法亦明訂培養學生的人權意識，是我國的重要教育目標，九年一貫課程綱要，更明列為正式課程的一部份。教育部或地方

教育機關本即應遵守法令，在各級學校進行人權教育。然而，此非謂教育部長或教育部，擁有人權教育之特權。沒錯教育部擁有許多的資源，但這些資源並非其專有，毋寧是全民納稅人所擁有。教師或任何人，來協助教育部推動人權教育，並非其下級公務員，係本於教育或人權之專業，共同來推動教育之事務。

第五、教育部以「政治敏感」為由，限制輔導群或輔導團討論爭議性議題或相關的課程與活動之進行，係侵犯其教育專業自主性。教育部或地方教育機關本身的作為，若傷害到教育或學生的權利，教師、輔導團、或輔導群，本即應本於人權、法律、教育等專業，提出改進的意見，才有盡到其職責。教育部或地方教育機關，若基於政治顧忌，不願意參與或出席輔導群或輔導團所辦之活動，也就罷了，那僅是其喪失其登高一揮引導與推動人權教育的機會。可是，甚至進一步限制輔導群或輔導團的活動辦理，則即在侵犯其專業自主性。

陸、結語

臺灣雖然不是聯合國的會員，而無法享受聯合國所建立的人權保障機制，但我們的民主當然不能自外於國際的人權標準。甚者，國際的人權標準，在鞏固臺灣的民主，或深化臺灣的人權教育，所不可或缺。本文從人權的普世性觀念和國際人權標準的角度，來檢視臺灣的國中小人權教育的實施。

首先，針對「友善校園之政策」，不管是在人權環境指標的運用，或學校校規與行政措施的檢討，本文指出國際人權標準，皆可以發揮其引導之作用，惟在校園中引用國際人權標準，必須經過轉化，以適合校園的脈絡情境，始能發揮其作用。

再者，針對「九年一貫課程綱要」，本文指出國際人權標準，可以補充與深化社會領域之「主題軸六、權力、規則與人權」和「主題軸九、全球關連」，特別在區別「公民權」和「人權」的不同，或在憲法和國際法層次對人權保障之異同上。

此外，針對「人權教育教材」，本文亦指出我國的國中社會領域教科書，在引用國際的人權標準上，仍僅止於條文之引用，而非完整與直接地介紹國際人權標準，甚至在全球關連的部分，本有機會藉由聯合國的介紹或全球性議題的介紹，來帶出較完整的國際人權標準，如世界人權宣言，但都闕如。國際人權標準，如以公民與政治權利的概念為例，可以彌補坊間教科書僅形式地介紹憲法的自由權，而無法與實際的公民與政治生活相關連。且在人權教育輔導群所翻譯的相關書籍上，正可補充坊間社會領域教科書，在「企業與人權」、「人權的不可分性」、「公民權與人權之不同」等面向之不足。

最後，針對「校園世界人權日活動」，根據人權教育輔導群所規劃「兒童關心兒童、一人一信送愛到達弗」活動，國際視野和國際人權標準更是此次活動的

主要目的，且透過信件是否實際寄達的議題討論，更讓老師們理解人權行動在人權教育所扮演不可或缺的角色。特別是透過實際的國際性關懷行動，人權的普世性和國際人權標準的重要性，才可能被真正的實現。惟在關懷人權的國際參與和行動上，行政官員仍以外交和政治疑慮來限制校園的課程活動進行，則是侵犯到教育的專業自主。國際的人權標準，絕對不僅有所謂「兩公約」，人權教育的落實，更不僅在介紹國際人權標準，這些全球化的人權標準，從我們前面所揭的檢討，仍是臺灣中小學校園所必須面對之挑戰。

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International Human Rights Standards and Human Rights Education at Primary and Secondary Schools in Taiwan - From Friendly Campus Campaign to Human Rights Day at Campus

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Abstract

Taiwan has legalized the ICCPR and ICESCR into its legal system, but it is questionable that the international human rights standards are used for teaching human rights education at Taiwan's primary and secondary schools. As we refer to rights, we usually mean legal and constitutional rights but hardly in terms of international human rights laws. Is it the same as we teach human rights education at primary and secondary schools? Human rights education in Taiwan are to be examined in terms of the concept of universal rights and the usage of international human rights standards with respects to 'the policy of friendly campuses', 'the national curriculum for primary and secondary school', 'the textbooks of human rights education, and 'the World Human Rights Day'. International human rights standards are important resources for human rights education, which are challenges for Taiwan's primary and secondary schools.

Keywords

Human Rights Education, the Two Covenants, Human Rights at Campus

I. Introduction: Are human rights protected domestically or internationally?

Article 1 of the Universal Declaration of Human Rights states that all human beings are born free and equal in dignity and rights. Human rights are thus conceived as universal values whereby everyone is equal without distinction of race, color, sex, national or social origin, birth or other status.

Historically and theoretically, however, the concept of universal human rights has had its fair share of debate and controversy. According to Michael Freeman (2006:22), “This mixture of natural law and historical argument created some ambiguity as to whether the rights claimed were those of Englishmen or universal human rights. Rosenthal suggests that their practical emphasis was on the rights of the Englishmen, but their logic was universalistic.” He also pointed out, “The American conception of natural rights at the time of the revolution did not include the rights of women, and was generally considered compatible with the institution of slavery” (24).

After the French Revolution, progress was made in the development of human rights with the abolishment of slavery and women gaining more rights. In Britain, the United States and France, attempts have been made to challenge barriers originating from sex, origin and race. The United Nations has even developed international human rights standards and adopted international covenants on human rights on the basis of the philosophical and controversial concept of natural rights. As Michael Freeman stated, “Seen in historical perspective, this is astonishing. A concept, not long ago discredited, has made a remarkable revival; furthermore, although widely perceived as Western, it has become global” (2002:32).

Despite having universal values, the protections of human rights are undeniably subject to various political systems. For legal protection, human rights are classified into two categories - national constitution and international covenants on human rights. The Chapter 2 of the R.O.C. constitution states the rights and duties of the people without dividing them into human rights, which are beyond national border, and civil rights, which are based on citizenship and thus cannot be claimed by non-R.O.C. citizens. According to the United Nations, human rights are categorized into civil and political rights enshrined in the ICCPR, and economic, social and cultural rights enshrined in the ICESCR. Civil rights refer to the rights of every citizen to freedom of thought, freedom of conscience, freedom of expression, freedom of movement, freedom to enjoy privacy and autonomy in the management of one's personal affairs, freedom of private individuals to associate voluntarily and to form

organizations for pursuing common purposes, and freedom to participate politically in ways that do not infringe upon the similar rights of others. In essence, these rights are tantamount to universal human rights not confined to national boundaries.

Due to Taiwan's special status as a non-UN member, people in Taiwan can only rely on its constitution for legal protection. However, the ICCPR and the ICESCR, signed on Dec. 16th, 1966 (when Taiwan was still a UN member.), were passed on March 31st, 2009 by the Legislative Yuan and took effect on Dec. 10th the same year, which means the two covenants have already been incorporated into Taiwan's domestic law. As a result, when implementing human rights education or introducing the concept of human rights at primary and secondary schools, we should broaden students' view on human rights from what is stated in the constitution to those covered by international covenants on human rights. The difference between viewing human rights from constitutional point of view and the perspective of international covenants on human rights will inevitably lead to different interpretations and decisions with respect to the rights to education for children of illegal immigrants. Whether children of illegal immigrants are entitled to educational rights depends on how these rights are defined. If they are regarded as human rights, the answer is yes. If we consider these rights to be civil rights, which are based on citizenship, the answer is no. In other words, no entitlement to educational rights will exist. Take the United States and Taiwan for example. In the U.S. children of illegal immigrants are entitled to educational rights (Cary, 1997:20), whereas in Taiwan such entitlement requires as a prerequisite the acquisition of legal permit of his or her immigrant status, as specified in Article 19 of the M.O.E. Regulations Regarding International Students Undertaking Studies in Taiwan.

Betty A. Reardon, one of the foremost scholars on human rights education, advocates an international standards and institutions approach, stating that human rights are a secular code of ethics and morality for the world community, and as such, form the fundamental basis for peace (2002 : 16-18). Given the fact that Taiwan is a non-U.N. member, our concept of human rights may seem narrow compared to international human rights standards and international covenants on human rights. To address this concern, this paper will discuss the implementation of human rights education at primary and secondary schools in Taiwan from various perspectives, including Friendly Campus Campaign, Grade 1-9 Curriculum Guidelines, selection of textbooks for human rights education and Human Rights Day on Campus.

II. International human rights standards and Friendly Campus Campaign

The Ministry of Education (M.O.E.) launched Friendly Campus Campaign on Dec. 27th, 2004 (promulgated in official document No. 0930169777). Though the campaign was later amended twice on Nov. 29th, 2007 and March 18th, 2011 (No. 0960185285 and 1000032575 respectively), it remains the underlying policy of the M.O.E. in promoting student affairs. Aimed at creating a harmonious relationship between teachers and students and encouraging the pursuit of moral excellence, Friendly Campus Campaign encompasses a wide range of issues: security on campus, education on human rights and that of law and order, care for minorities, alternative education, counseling students with deviant behaviors, and creating a harmonious environment (M.O.E., 2011: 1-2).

Human rights education is another key feature of Friendly Campus Campaign, with the aim of creating a campus culture of law and order where human rights are well respected. There are eight steps to be carried out for the implementation of human rights on campus: (1) enhance human rights education (2) monitor minority students regularly (3) promote positive discipline on campus (4) provide assistance to minority students in high schools and vocational schools who would like to continue their education (5) help minority students at primary and secondary schools with their learning (6) strengthen character education (7) raise civic consciousness (8) improve education on law and order. There are six specific measures:

1. Plan research projects on human rights education; ensure that with the help of county and city governments, self-evaluation of human rights environmental indicators conducted by local schools runs smoothly.
2. Train teachers in the field of human rights education; incorporate human rights education as part of pre-service elective courses; organize in-service training programs for teachers.
3. Design courses and textbooks for human rights education; promote human rights education at primary and secondary schools; encourage universities and technological and vocational colleges to open courses on human rights education.
4. Raise awareness of human rights education; promote human rights education programs on a community level; provide assistance to civil groups in organizing human rights events.
5. Improve human rights measures in schools; ensure that county and city governments organize events related to human rights education as part of the

annual Student Affairs and Counseling of Friendly Campus Campaign; provide assistance to schools in planning events related to human rights and civic education for their annual school calendars.

6. Evaluate existing laws and regulations to ensure they are consistent with the ICCPR and the ICESCR.

Of the above six measures, 1 and 6 are of particular relevance to the application of human rights international standards. With respect to the 6th measure, the M.O.E. requests that primary and secondary schools examine their existing regulations and administrative policies to make sure they meet the requirements laid out in the two covenants, or the ICCPR and the ICESCR. However, since the two covenants are not intended for application in a school setting, adjustments will have to be made to facilitate application of human rights standards on campus. Regarding the 1st measure, or self-evaluation of human rights environmental indicators, we can connect these indicators to the international covenants on human rights to highlight the fact that human rights environmental indicators are based on international human rights standards and reflect universal values of human rights. Similarities can be found between the indicators and the ICCPR. For example, Article 14(2) of the ICCPR states that everyone charged with a criminal offence shall have the right to be *presumed innocent* until proved guilty according to law. Similarly, human rights environmental indicators state that teachers and students shall have the right to be presumed innocent until proved wrong. Connecting the human rights environmental indicators to international human rights standards will help people understand the true meaning and universality of those indicators.

A similar approach to assess how human rights education is carried out on campus can be found outside Taiwan. Human Rights Thermometer on Campus applies the Universal Declaration of Human Rights to the school setting for the evaluation of human rights environment on campus. 25 questions were answered by students under the guidance of their teachers. Students examined and evaluated their learning environment and discussed what areas could be improved. During the process, they learned the true meaning of each of the 25 questions from the perspective of international human rights standards. This case demonstrates how the M.O.E. can incorporate international human rights standards into the education system in Taiwan.

III. International human rights and Grade 1-9 Curriculum Guidelines

Human rights education wasn't officially listed as part of school curriculum until 1998 when Grade 1-9 Curriculum Guidelines were created, despite the fact that the concept of human rights had never been entirely ignored in primary and secondary education. Two of the nine themes of competence indicators in social studies of the curriculum guidelines are related to human rights - Theme Six (Power, Rule and Human rights) and Theme Nine (Global Connections). In addition, human rights education is one of the six Primary Topics that are supposed to integrate into the social study curriculum. The following discussion will be focused on some of the indicators of those two themes and how they are related to international human rights standards.

Indicator 6-2-2 states children's rights, including their rights to learning and privacy. Indicator 6-4-3 exemplifies how different rights could potentially conflict each other, such as children's rights to learning, privacy, property, life, freedom, equal opportunities and the environment without specifying or referring to constitutional rights or international covenants. Indicator 6-3-4 lists the constitutional rights and duties of the R.O.C. citizens, which is clearly confined to the constitutional level. It is advisable to include international human rights standards so as to broaden the view of the students on the meaning of rights.

Theme Nine also mentions human rights from the point of view global connections. Indicator 9-3-4 raises such global issues as environmental protection, protection of species, protection of laborers, hunger, crime, disease, fundamental human rights, economy and trade, and technological research. Indicator 9-4-5 looks at how the above issues are correlated and propose possible solutions to those problems. These indicators show that fundamental human rights are an issue of global concern and attract worldwide attention. While no direct reference to international human rights standards can be found in these indicators, the issue of human rights is clearly shown to be of great significance and by no means confined to any single country. International human rights standards and their universal values can be introduced by teachers in the classroom or included in textbooks to raise awareness of their global nature and impact.

As one of the Primary Topics of the curriculum guidelines, human rights education is further divided into (1) values and implementation of human rights and (2) content of human rights. Indicator 2-3-2, indicator 2-4-4, and indicator 2-4-5 all refer to international human rights standards and international organizations. Indicator 2-3-2 is about understanding the Declaration of Rights of the Child and protection and

support of children's needs by international covenants on children's rights. Indicator 2-4-4 mentions understanding the Universal Declaration of Human Rights and its protection of human rights. Indicator 2-4-5 talks about getting to know how human rights can be protected by United Nations and other organizations related to human rights. While no direct reference to international human rights standards can be found in indicator 2-4-7, indicator 2-3-5, indicator 1-4-5, and indicator 1-2-2, words such as "humans", "world", "global" and "universal" all indicate universal values of human rights. These indicators look at the impact of human rights from an individual, societal and global point of view (2-4-7), the impact of war and peace on humans (2-3-5), responsibilities of world citizens and the blueprint for a fair and just society with sustainable development (1-4-5), and inalienable and universal nature of human rights, respectively. Other indicators listed under the Topic of human rights education within the curriculum guidelines also emphasize the universal, inherent and inalienable nature of human rights.

IV. International human rights standards and selection of textbooks for human rights education

As discussed above, human rights education is primarily addressed in the area of social studies in Grade 1-9 Curriculum Guidelines. It is also listed as one of the Primary Topics. Human rights education is supposed to be included into textbooks of social studies. To facilitate the implementation of human rights education, the M.O.E. has set up a curriculum and instruction network which includes the Human Rights Education Curriculum and Instruction Team at the central-government level and the Human Rights Education Curriculum and Instruction Organizations at the local-government levels (Lin, Chia Fan, 2009: 144-145). To promote human rights education, the Human Rights Education Curriculum and Instruction Team does not only develop teaching materials for human rights education, but also organizes training programs of human rights education for teachers at primary and secondary schools.....

The three leading textbook publishers in Taiwan are Han Lin, Nan Yi and Kang Hsuan. References made to international covenants on human rights can be found in social studies textbooks for secondary school students. For example, the Universal Declaration of Human Rights is cited where social groups and freedom of private individuals to associate voluntarily and to form organizations for pursuing common purposes are discussed. Article 20 of the declaration states that everyone has the right to freedom of peaceful assembly and association, and no one may be compelled to

belong to an association (Nan Yi, 2010; Han Lin, 2010). Where social welfare and social justice are concerned, for another example, Article one of the Universal Declaration of Human Rights is cited, “All human beings are born free and equal in dignity and rights (Kang Hsuan, 2010; Nan Yi, 2010).” These two examples indicate that textbooks for primary and secondary schools merely cite statements from the Universal Declaration of Human Rights instead of offering a comprehensive introduction of international human rights standards. In addition, no textbooks talk about the United Nations and the Universal Declaration of Human Rights where the Theme Nine of Global Connections is concerned.

In terms of civil liberties, when introducing constitutional rights and duties, all textbooks mention rights to freedom. Yet they only briefly and formalistically describe each type of rights to freedom such as personal freedom, freedom of speech and freedom of association without explaining how the concept of right to freedom can be applied to civic participation in politics (Nan Yi, 2010a; Kang Hsuan, 2010a; Han Lin, 2010a). 8th graders or 2nd year middle school students from Taiwan participated in the 2009 International Civic and Citizenship Education Study, or 2009 ICCS, a comparative study conducted by the International Association for the Evaluation of Educational Achievement (I.E.A.) which looks at lower secondary students’ value beliefs and attitudes towards citizenship issues in 38 countries. The ICCS student questionnaire sought to ascertain the extent of student endorsement of basic democratic values. Students indicated their level of agreement (“strongly agree,” “agree,” “disagree,” “strongly disagree”) with the following statements: (1) Everyone should always have to the right to express their opinions freely. (2) Political leaders should not be allowed to give government jobs to their family members. (3) No company or government should be allowed to own all newspapers in a country. (4) All people should have their social and political rights respected. (5) People should always be free to criticize the government publicly. (6) All citizens should have the right to elect their leaders freely. (7) People should be able to protest if they believe a law is unfair. (8) Political protest should never be violent. It is noteworthy that percentage of Taiwanese students agreeing with statements (3) and (7) reflecting democratic values is far below the ICCS average among the 38 countries (Schulz et al , 2010 : 89-90). However, these two statements are most closely related to civil liberties, which lie in the heart of the implementation of democracy. It is obvious that 8th graders in Taiwan have yet to understand more about the concept of civil liberties. Civil liberties and political rights covered by the ICCPR are precisely the type of human rights that are indispensable for the implementation of democracy. Most textbooks in Taiwan formalistically include the constitution and the concept of the right to freedom without connecting them to international human rights standards and

the idea of civil liberties and political rights. By making such connections, we can broaden students' view on human rights protection.

In addition to the textbooks in the social studies area discussed above, the Human Rights Education Curriculum and Instruction Team also translated ABC: teaching human rights - practical activities for primary and secondary schools, a book developed and published by the United Nations during the U.N. Decade for Human Rights Education, and used this book for implementing human rights education. Based on international human rights standards such as the Universal Declaration of Human Rights, the Declaration of the Rights of the Child, the ICCPR and the ICESCR, this book is being applied to different age groups and used to translate abstract international human rights norms into practical day-to-day reality on campus. For example, this book extends conflict resolution among students to the broader issues of war, peace and human rights. The same approach can be adopted in addressing the issue of human rights education under Grade 1-9 Curriculum Guidelines, in particular competence indicator 2-3-5 regarding our understanding of the impact of war and peace on human beings.

This book also addresses the issue of corporations and human rights, which is a little-discussed aspect of locally published textbooks. Corporations not only have significant influence on economy but also play a key role in human rights violations and protections. In spite of its importance with respect to human rights education, Grade 1-9 Curriculum Guidelines merely talk about such private associations as trade groups, political groups and social groups without establishing competence indicators for business corporations, which are more closely related to people's daily lives (Nan Yi, 2010, Han Hin 2010, Kang Hsuan 2010).

Other translations on the topic of human rights education done by the Human Rights Education Curriculum and Instruction Team include a series of seven books published by the Human Rights Center of the University of Minnesota - Foundation Volume: Human Rights Here and Now, Topic Book 1: Economic and Social Justice: A Human Rights Perspective, Topic Book 2: Raising Children With Roots, Rights & Responsibilities: Celebrating the UN Convention on the Rights of the Child, Topic Book 3: Lesbian, Gay, Bisexual, and Transgender Rights: A Human Rights Perspective, Topic Book 4: The Human Rights Education Handbook: Effective Practices for Learning, Action, & Change, Topic Book 5: Lifting the Spirit: Human Rights and the Freedom of Religion or Belief, and Topic Book 6: Human Rights. YES! Action and Advocacy on the Rights of Persons with Disabilities. These books also include international human rights standards and can be used to supplement ABC: Teaching Human Rights - Practical Activities for Primary and Secondary Schools.

By introducing ‘From Civil Rights to Human Rights: Martin Luther King, Jr.’, a chapter mentioned in *Social and Economic Justice: A Human Rights Perspective* (Shiman · 2011 · 69-77), we can help students understand that the struggle of this widely celebrated civil rights hero not only shows what it means to have civil rights but also brings out the significance of human rights. Again, the Universal Declaration of Human Rights, the ICCPR and the ICESCR can be included in the curriculum to promote the idea of universality and the importance of these international human rights standards to our lives.

V. International human rights and Human Rights Day on Campus

On Dec. 10th, 2010 when Human Rights Day was celebrated across the world, the Human Rights Education Curriculum and Instruction Team launched an event called ‘Kids for Kids - Send Postcards of Love to Darfur’. In 2003, tired of being treated like second-class citizens, or worse, by the government, Muslim militants of the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM) launched their first attack on Sudanese government forces in Darfur, which is a western region of Sudan in Africa. The Sudanese government responded swiftly and viciously to extinguish the insurgency. Consequently, up to 600,000 people have been killed since and two million people displaced. Darfur soon came to be a synonym for genocide and the crisis has since become a global concern. International response to the Darfur conflict includes intervention by the United Nations and International Criminal Court (ICC), which charged [Sudan's](#) President [Omar al-Bashir](#) for orchestrating Darfur genocide in violation of the Convention on the Prevention and Punishment of the Crime of Genocide. The school event lasted less than 20 minutes, during which students got to learn about the geographic location of Darfur and express their concern about human rights of the children in Africa by sending hand-written postcards, which is a way Amnesty International or AI members all over the world use to raise government concerns about human rights in order to improve human rights conditions.

In fact, neither promotion of human rights nor implementation of human rights action plans can be forced by any government or anyone for that matter. Instead, they should be absolutely voluntary and spontaneous. Therefore, rather than forcing the concept of human rights on students, we should show them the importance and true meaning of human rights issues through concrete social actions. Take Events like ‘Kids for Kids - Send Postcards of Love to Darfur’ for example. Events like this can be organized by primary and secondary schools in a wide range of classes. In history

or geography class, students can use Google Earth or a world globe to get to know the Darfur region of Sudan. In language class, they can learn how to write postcards or use different ways to express protest and love. In English class, they can express their concern about children's human rights using words and phrases they have learned. In civics class, they can expand their knowledge and broaden their view from rights and duties of citizenship to international human rights standards. In addition, teachers can show them how postal service in Taiwan works by helping them send postcards to children overseas. Such events do not need to be limited to taking place on Human Rights Day only. Any other occasion would offer the same opportunity to address the issue of human rights and promote international human rights standards on campus.

According to the Human Rights Education Curriculum and Instruction Team, as of Dec. 10th, 2010, a total of 17 Human Rights Education Curriculum and Instruction Organizations at the local-government levels and a total of 48 primary and secondary schools have responded to 'Kids for Kids - Send Postcards of Love to Darfur'. There were perhaps more schools and organizations out there participating in this event. For example, the post office in Hualien County set up mailboxes on campus for students to send their postcards. Students in Taichung County formed the letters of H and R, which stand for human rights, during morning assembly to raise awareness of human rights. Some students are said to have expressed shock at the horrendous situation kids in other countries are in and as well as gratitude for having better lives. They are also reported to have said they were impressed with the horrors of war. When students are angry and shocked about a situation like the one in Darfur, teachers could teach them how to verbally express dissatisfaction and anger in a rational manner.

There will certainly be more human rights events in the future, and they don't have to be confined to taking place on Human Rights Day. There are also many other ways to promote human rights besides sending postcards. For example, one can write a letter to the editor of a newspaper, make posters or tie yellow ribbons to express their concern about the issue of human rights. The most important thing is to truly understand the meaning and values of human rights and show genuine respect for human dignity. However, events like 'Kids for Kids' are probably one of the best ways to broaden students' view on international human rights.

Unfortunately, during 'Kids for Kids - Send Postcards of Love to Darfur', some teachers wondered if students should have actually sent out the postcards, or would a symbolic gesture of writing them have sufficed. This is a good question and the following are my personal opinions. First, we should not limit students' opportunities to learn. Asking students to write postcards without sending them out would be restricting their learning opportunities. Likewise, asking students to do well on

entrance exams without teaching them how to acquire real-life problem-solving skills would be narrowing their scope of education and would go against the ultimate goal of education. Problems that students will encounter when they leave school are trickier and much more complicated than those they see on tests. Students should learn how to solve problems in real life and acquire the ability to adjust to changes. According to 2009 ICCS, Taiwanese students ranked the lowest in their participation in human rights events (Schulz et al, 2010: 132-133).

Second, genuine social actions can enhance students' political efficacy (Meintjes, 1997). Take writing postcards for example. The objective is not so much to practice writing skills, or to gain knowledge of the geographic location of Darfur, or to know about universal values of human rights (i.e. kids in other countries also have human rights). The goal is for participating children to realize that the mere act of sending a postcard can have tremendous impact on the lives of children in another country whom they've never met. From the perspective of civic education, such an event can enhance students' political efficacy, develop concern for public issues, and help them realize their ability to change the world. Some students may question the amount of difference their action can make. Instead of reinforcing their doubt, teachers should tell them it's their action that counts, that even small actions can make big differences, and that without evening trying, there would be no chance for change.

Third, values education should be placed in the context of real life. The concept of human rights should not be something that exists only in laws and regulations or textbooks. Rather, it should be applied to interpersonal interactions. Grade 1-9 Curriculum Guidelines include the issue of global connections in the area of social studies. When one postcard after another arrived in Sudan, children over there must have been impressed with and moved by the love and affection coming from the children in Taiwan. Through such an event, children in Taiwan had the opportunity to learn that people across the world all enjoy the same human rights, notwithstanding their race, color and language.

Fourth, honesty is an integral part of education, which should be built on mutual trust between teachers and students. When we teach our students about the importance of making a difference in our society by taking action, we must practice what we preach. In the case of 'Kids for Kids - Send Postcards of Love to Darfur', failing to actually sending out the postcards to Darfur would go against what we try so hard to preach in school and lead to an education system full of hypocrisy. If the students found out the postcards they'd written were not sent over to Africa, they would likely lose their trust in the teachers. They would even become cynical about social actions of any kind in the future. Such potential impact on students is too great to be

overlooked. While we can only simulate social contexts in a school setting, organizing events such as ‘Kids for Kids - Send Postcards of Love to Darfur’ can increase students’ understanding of the real world. Simulation of social contexts is by no means a form of false education, while failure to send out students’ postcards is.

Some people are concerned that introducing the issues of international human rights standards and international current events on campus might be too political. Some even try to limit students’ understanding of human rights for the same reason. Yet politics is an integral part of human rights. Human rights are claimed for the purpose of fighting the imbalance between great powers and weak states, and in the process politics is inevitably involved. Should we avoid addressing the issue of human rights just because it’s controversial and politically sensitive? Or should we simply regard human rights as an essential part of education from a professional rather than a political point of view? If the answer to the second question is yes, how do we guide students in discussing the issue of human rights without undermining the neutral stance of education?

First, taking a neutral stance does not mean avoiding the issue of politics. Politics is defined as the governing of public affairs, and multi-party systems are a key feature of any democracy. Therefore, it’s essential that legislative, judicial and educational independence be maintained at the highest level possible. However, participation by students in politics and respect for diverse opinions and points of view should be highly encouraged. What should be avoided, on the other hand, are political propaganda and religious beliefs forced upon students and teachers, not their participation in or views on politics.

Second, we cannot expect to promote the concept of human rights and develop the ability to appreciate the true meaning of democracy by sidestepping controversial issues like human rights. A democratic society allows for diverse opinions and encourages freedom of expression. These are the fundamental rights protected by the constitution. Instead of turning a blind eye to these problems, we should address them in a peaceful and rational manner, actualize the concept of human rights through daily practice, and learn how to find solutions to conflicts (United Nation, 2009: 24-25). Education on human rights would not be complete if we swept any controversial issues under the rug and pretended they did not exist.

Third, making clear their position on certain controversial issues does not translate into campaigning for a particular political party. Neither teachers nor schools are allowed to propaganda for a certain political party or religion, but when faced with controversial issues like human rights, they should teach students the importance of critical thinking and allow them to express different opinions. This kind of freedom

and tolerance represent the true spirit of democracy. They are by no means the same as showing support for any preferred political party. Moreover, no human rights education should be affected by any political party or authority. In other words, any violation of human rights should be addressed and denounced even when the government is involved.

Fourth, it's the responsibilities, not privileges of the M.O.E. and other local education agencies to implement human rights education. Human rights are the core values of the constitution. Fundamental Law for Education states that raising students' awareness of human rights is one of the primary goals of education in Taiwan. It is also included in Grade 1-9 Curriculum Guidelines. Both the M.O.E. and other local education agencies have the responsibilities to carry out human rights education across the education system in Taiwan. However, neither the M.O.E. nor its minister has exclusive rights to such implementation. Rather, all taxpayers, including teachers, should be a part of this task and share with the M.O.E. all the resources available to make human rights education a success.

Fifth, the M.O.E. violated the principle of professional autonomy when it banned the Human Rights Education Curriculum and Instruction Team and the Human Rights Education Curriculum and Instruction Organizations from discussing controversial issues or organizing controversial events considered to be "politically sensitive." When such violation occurs, teachers, the Human Rights Education Curriculum and Instruction Team, and the Human Rights Education Curriculum and Instruction Organizations have the responsibilities to offer advice for improvement in the spirit of human rights, education and the law.

VI. Conclusion

Despite the fact that Taiwan is a non-U.N. member and thus prevented from its human rights protection, we cannot afford to exclude international human rights standards from our democratic system. This paper looked at how human rights education is being carried out at primary and secondary schools on the basis of universal values of human rights and international human rights standards.

First, this paper talked about Friendly Campus Campaign and pointed out international human rights standards can be applied to either measure human rights environmental indicators or to evaluate school rules and administrative policies. However, international human rights standards will have to be adjusted so as to fit the school setting in Taiwan.

Second, this paper examined Grade 1-9 Curriculum Guidelines and suggested international human rights standards be adopted to fill the gaps in two of the nine themes in the area of social studies, that is, Theme Six (Power, Rule and Human Rights) and Theme Nine (Global Connections), especially by comparing civil rights and human rights or by distinguishing human rights protection by the constitution from human rights protection by international covenants.

Third, this paper discussed human rights education textbooks, indicating social studies textbooks used by secondary schools merely cite certain provisions on international human rights standards rather than providing a comprehensive view. As far as global connections are concerned, these textbooks do not cover the United Nations and the Universal Declaration of Human Rights.

In terms of civil liberties, when introducing constitutional rights and duties, all textbooks make reference to rights to freedom. Yet they only briefly and formalistically describe each type of rights to freedom without making real connections to people's daily lives. In addition, the issue of business corporations and human rights, despite its tremendous influence and significance, is a little-discussed aspect of locally published textbooks. It is suggested that translations on the topic of human rights education done by the Human Rights Education Curriculum and Instruction Team be used to fill the gaps.

Finally, this paper looked at Human Rights Day on Campus, citing as an example 'Kids for Kids - Send Postcards of Love to Darfur', organized by the Human Rights Education Curriculum and Instruction Team. This event served as a great opportunity for students to broaden their view on international human rights standards. Teachers also learned the true meaning of social actions in the implementation of human rights by discussing whether or not they should 'actually' send out the postcards. They were able to realize that universal values of human rights can only be actualized through concrete actions rather than words only. Unfortunately, some government officials tried to stop the events to take place on campus out of political and diplomatic concerns. Such restrictions run the risk of violating professional autonomy.

The application of international human rights is not confined to the two international covenants on human rights. Nor is the implementation of human rights limited to introducing international human rights standards on campus. How to actualize the concept of universal human rights and turn them into reality is indeed a daunting task for primary and secondary schools in Taiwan.

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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

主持人/Moderator：林正弘 教授
(Professor Cheng-Hung Lin)

發表人/Presenters：廖福特 副研究員
(Associate Professor Fu-Te Liao)

魏千峯 律師
(Mr. Chien-Feng Wei)

與談人/Discussants：Professor James Seymour
廖元豪 副教授
(Associate Professor Yuan-Hao Liao)

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彙列目標之執行方針，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

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，以強化男女平等原則。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，

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，而其中最具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。

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

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，其中最具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 serve 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 law¹. 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 years 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 world².

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 months³. 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 uncompleted⁴.

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

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 right⁵, 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 proposals⁶.

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

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 efficiency⁸.

There are two cases in the discussion. The case A was proposed by the Executive Yuan while the case B was by female organizations⁹. 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 policies¹⁰.

¹⁰See <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 minister 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 sectors¹¹.

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 role¹².

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 14th. 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, independence¹³, 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 managers, 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 infringement¹⁴.

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 security¹⁵. 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 Nations¹⁶. 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 10th 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 commission¹⁷. 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 promote¹⁹. 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 century²⁰.

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.

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 United 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 country²², 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-xiong²⁴.

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

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

觀察兩公約施行法實施之情形，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禁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 教師國外學歷改敘薪級為例，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，中央申訴會評議再申訴有理由，台北市教師申訴會之決定不予維持。中央教師申訴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，但中央教師申訴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政法院訴訟中。

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 年度矚上易字第 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，學生祇得轉校，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。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 億韓圓（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充足，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(Gujarat)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。而無論總統府人權諮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勢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檺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 came 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 Muslim 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 advise and affects the operation of government systematically by examining acts or drafts, human rights reports, policies 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 Gujrat, 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 affairs and to organize its financial budget 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 Denmark 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 budget; 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 public 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 , 2007:20)

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 first 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 Indonesian 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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場次六：專題演講

Panel VI: Speech

主持人/Moderator：李念祖 律師
(Mr. Nien-Tsu Li)

講者/Speaker：Professor Theodoor Cornelis van Boven

國際人權法在國內法院的實踐：潛力與遠景

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壹、前言

在荷蘭某個省的鎮上，有個關於地方法官的軼事，他剛駁回一項基於歐洲人權公約的抗辯。這位法官說他從未聽過這類協定。而且，他無法在他的書庫內搜尋到該文件。他進一步裁定，引用模糊的文件而非依循國內法律是論點薄弱的極致證明。這個故事回到上世紀六零年代。荷蘭已經在 1950 年代批准歐洲人權公約，不過顯然在法律專業人士，特別是這位地方法官體認到本條例的重要性與存在之前，已經持續了某段時間。如今，數十年後，國際人權法在荷蘭法制體制的所有領域幾乎都有莫大的影響力，重要性與日俱增。法律界人士無論在立法、行政或司法的管理部門上，都無法想像忽略了歐洲人權公約將會如何；特別是無法忽視公民與政治權利國際公約與經濟社會文化權利國際公約這類全球性人權機制的潛力。培養國際人權法之重要性與潛力的知識與洞察力，是現今法律學院之法律教育與訓練不可或缺的一環，不再侷限於國際法律課程內容，而是將所有法律訓練與教育分支整合到課程內。這是持續進行的過程，亦須付出時間執行。荷蘭經驗也受到所謂的「一元論者」模式影響，其意指在協約批准後，其條款成為國內法的一部分，只要這些條款可直接應用，便可在法庭上援引之。我會在本文後段回到國內的「一元論」和「二元論」模式的討論。

我一直提到這個荷蘭軼事，是因為發現其他國家也有類似的經驗。不過，說這個故事且觸及其旁支的主因在於強調國際人權法之潛力與覺醒的重要性，並且重視法律專業的訓練與教育，以作為運用國際人權法的首要條件。在發展人權文化的立場上，這類的訓練與教育，乃是替保護與實踐人權創造更好條件的一大憑藉。

貳、緒論

本文的主題為：國際人權法在國內法庭的實踐，其既可廣泛應用於各領域，也可以各種方式來處理。首先，我將簡單扼要地指出國家的地位，因為國家是國際人權義務之主要擁有權者。司法部與法庭是國家結構的一部分，在此脈絡下履行明確的功能。之後，我會處理國際與國內人權法之間的關係，尤其普世規範，

但這將以國家及區域的特殊性為基礎討論。這種概念途徑與關係隨後將帶出更技術性的司法本質之評論，攸關各種實行國際人權法的國內體制之評論。此外，我將提出國際人權法之可訴性的觀察，將國際人權法之可訴性作為國內法庭與其他公共機構的條件，以便在公民、政治、社會與文化領域應用人權準則。之後，在重點放在所有透過司法與其他公共機構來尋求正義的人，他們的權利，並會留意作為國家與國際人權體系內強化信念的工具，即修正與補償。最後，當處理國內法庭的角色時，要適當地指出維持司法獨立與公正，是公平的法律執行之基本條件。尤其處於危機與緊急狀況時，法庭體制可能在嚴重緊繃狀態下運作，此種需求是更重要的。

參、作為主要人權義務擁有者的國家

各人涉及國際人權法--且在某些群體的情況下，譬如原始民族與弱勢族群--都屬於人權持有者，而國家是主要人權義務的擁有者。國家是國際社群的主要構成成員，且作為國際人權條約之一方，致力於遵守條約規定的義務。國家不但必須能面對面地向其人民說明，也要向國際社群解釋--此處的國際社群乃指對遵循國際條約、以及對所有人類家庭成員都有尊嚴且有權利享受有價值的生活有興趣。國家是在國際人權條約下的義務持有者，應該要保護個人免受侵犯與虐待。不過國家也有義務將保護範圍延伸到私人或實體如企業團體所犯的不當行為，因為他們違反國際人權法所認可的權利。甚且，這並無任何價值，如同人權事務委員會在國家所承擔之一般法律義務的一般性意見所述--也就是關於公民與政治權利國際公約之本質(General Comment No. 31 (2004))，意即，關於國家一方應負起用所有政府(行政、立法與司法)部門的責任，對其他任何層級(國家、地區或地方)的公共機構或政府當局也應如此。在相同的脈絡下，委員會受到維也納公約在條約法的啟發而憶及一締約國「不可行使本國法的條款，來辯護無法履行條約的行為。」

來逐步實施達成人權的實現。在確定這些原則後，接下來，便要考量預算的問題。我們可以觀察政府整體預算在健康、教育、國防等不同領域的分

有爭議的顯然是加諸於締約國的義務性質，有立即要履行的義務與需要逐步實施才能達成的義務之間可能會有差異。此兩種性質的區別是將國際權利法案切割為兩個條約--公民與政治權利國際公約與經濟社會文化權利國際公約的原因。有人主張，前者必須立即實施不得延誤，後者則是逐步或漸次地履行。這項決策回溯到上世紀 50 與 60 年代的切割人權，起初以單一份文書銘記於世界人權宣言，再切割成兩份不同的文書是事實，但有爭議的是這乃概念上的誤稱。事實上，這樣的分隔無法覺察不可分割性與所有人權的相互依存性。將義務分成立即應用的任務以及漸進認識的任務，在概念上與實際上都過分簡單。因此，監督經濟社會文化權利公約之實行的經濟社會與文化權利委員會，指出早期的一般性意

見(General Comment No. 3 (1990))中，有一些經濟社會文化權利公約的條款可立即由國內法制體系中的司法或其他公共機構運用。在稍後討論人權的可訴性時，我再回頭探討這個問題。在國家作為主要人權義務擁有者的脈絡下，應該注意觀察和經濟社會文化權利委員會的同一個一般性意見，其大意为「以最低的核心義務，確保各締約國至少在最低的權利基礎層面上，達到一個最基本的水準。因此，締約國內有較大數目的個人被剝奪基本食物、基本的主要健康照護、基本的庇護所與住家或最基本的教育，初步看來，是無法履行公約的義務。」

關於國家身為主要人權義務擁有者的責任，我只提到條約是國際人權法的來源。這在其本質上是合乎邏輯的，因為在全球與區域背景下的條約，目前都成為國際人權法文集的主要法律構成要素。條約以及特別是國際人權條約都受制於國際監督與判決，並由包含司法單位的政府部門明確執行。然而我們也要考量，無論國家是否認可人權條約，也都受到反映基本人類價值且凌駕其他標準與義務的強制性法規、緊急規範所約束。這類強制性規範並無正式地由國際與國內法庭所分類。這些緊急規範對所有人而言是基本價值，必須受到所有國際社群與國內社會所尊重，包括禁止種族屠殺、虐待、謀殺、強制失蹤、奴役與奴隸買賣、任意延長拘留、以及系統性的種族歧視。所有緊急規範都清楚且明確地收納在一般與特定的人權條約中，例如集體屠殺、虐待、失蹤與種族歧視，但其受到之重視與奉行是多於超條約義務(a supra treaty obligation)。

再者，習慣法是國際人權法源，且對國家有約束力。而藉由將國際人權法與一系列條約編入法典，加上國家愈來愈接納這些條約，國際人權習慣法之重要性看來正在衰退。然而，時常經人們廣泛引用的世界人權宣言，不只作為一個實現的共同規範，可以在前言讀到，也是人們遵循的習慣法規範，因而反映出「法律確信」(opinio iuris)之證據推翻矛盾的實務。

肆、國際人權法與國內人權法之間的關係

一般國際法的特色可歸於共存法(the law of coexistence law)，管制主權國家之間用來區分權利與利益，以及將重要性歸在被視為屬於國家內部司法事務之非介入性的原則。不過，共存法日益增加，並由合作法(law of cooperation)補充。引導至該方向的一個清楚訊號，來自於美國總統羅斯福在黑暗時代 1941 年所聲明的四大自由。言論自由、信仰自由、不虞匱乏的自由，以及免於恐懼的自由，是羅斯福主張在我們的時代與世代要達成的。世界人權宣言作者們的靈感來源是四大自由，也成為建立國際人權建物的規範基礎。共存法目前並未廢棄，但是無法有效地處理人類面臨的整體挑戰。合作法在全球的層級上未一個負責的社會建立一套原則與規範：地方、國家、區域與全世界。

因應一個承擔責任之社會所遭逢的困境，國際人權法與國家人權法之間的關係也不斷演化。發展、和諧地生活與和平並非必然的過程。這需要所有人類家族

的不懈努力，對於持有政經力量者尤其如此，他們是政府各部門的領導者，包含掌理司法與文教者。過去六十年的歷史展現了充滿希望的合作徵兆，尊重與融合，但過去與現今在國家與國際層面上仍然存在有持續地與結構上的排他、剝奪、歧視、否定認同與拒絕自決等，否定一個負責任社會的基本價值的情況。最令人困擾及難以接受的是殘暴的大規模行動，在國際法下累積成嚴重的罪行，最惡名遠播的是集體屠殺、違反人性的犯罪、戰爭與侵略罪，都出現在國際犯罪法庭的審判。國際法與國際機構與制度皆已就定位且成形，以處理這些錯誤與惡行。

在本文的主題中，問題來自於身為司法機構的國內法庭如何維護法治、公平地分配正義、遏止虐待，並提供補償良方。對國內法庭而言，要提供一個負責的國際社會所要求之世界主要問題的解決途徑，顯然是超出其能力之外。然而，在特定個案中，國內法庭的確遭逢與世界問題密切相關的議題，例如，牽涉到在武裝戰鬥違反人道原則的行為或由無人看管的環境剝蝕引起的嚴重傷害的民視或行事責任。面對與支持和平、懲罰與補償正義，以及生態整體之法律層面的國內法庭之任務，是一項極其有趣、應獲得注意，但超出本文範疇的議題，本文主要焦點仍是在國際人權法於國內之實踐。

我所要提出的觀點是，國內法庭在國際人權法與國家人權法之間扮演重要的角色。此乃根據基本人權規範的普世性，但應適當地考慮到國家與區域特色，作為我在此處開始表達的論點。我時常引用世界人權會議在 1993 年 6 月所採用的維也納宣言(Vienna Declaration)當中的一個段落：

「所有人權都是普遍存在，不可分割，相互依存與相互關連的。國際社群必須以公平與平等的方式，在同樣的立足點，且賦予相同的重要性來處理人權。國家的義務在於牢記國家與區域之特質具有特殊性，也具有各種歷史、文化與宗教背景，無論其政治、經濟、與文化體制為何，都要促進且保護所有人權與基本自由。」

人權標準的普世性問題，至今仍是不同領域辯論的主題：哲學、政治、文化、社經等等。我只回溯 1990 年代蔚為主流的亞洲價值之辯論。中國、印尼、馬來西亞、新加坡、巴基斯坦與其他國家的發言人質疑國際工具的現行做法，以及西方國家在其國外政策中利用人權來掩護。他們譴責所謂的人權帝國主義，且強調社群的利益—包含義務凌駕權利、人權的社會與集體的重要性，以及安全利益。回應此種對亞洲價值的爭辯，亞洲的非政府組織在 1993 年集會，通過曼谷非政府組織人權宣言。當中有一些值得引用的內容：

「我們能從蘊含多元觀點的不同文化中學習，從這些文化的人道精神擷取教訓，以耕深對人權的尊重[.....]。普遍的人權規範深植於許多文化中。我們確信人權之普世性基礎，也就是保護所有人類，包括特殊族群如女性、兒童、少數族群與原住民、勞動者、難民與遊民、殘障者與老人。在擁護文化多元主義時，絕不寬貸那些貶損普遍為人接納的人權，包含女權的文化實踐。」

這些辯論有時以新的標籤持續進行。因此，去年俄羅斯聯邦在聯合國人權會議中發起一個草案--「更深入了解與欣賞傳統對於尊嚴、自由與責任的價值觀。」對人權普世性的根本挑戰，起於對國家安全的主張、極權主義意識形態與體制的主張、以及宗教基本教義派的主張與訓令。

這些概念的討論以及對人權普世性相關的基本挑戰，有多少程度涉及國際人權法在國內法庭中的適用？我認為當司法人員在捍衛人權與法律規則中扮演特殊角色時，其並非在虛無中運作，而是在國家的脈絡下，以本身的歷史與政治、社會與文化背景下運作。國內法庭在解釋與適用法律時，當然要考量維也納文本所指涉的「國家與區域特殊性以及歷史、文化與宗教背景」。在此同時，國內法庭對於法律的詮釋與應用，必須認知道國家所接受的國際人權標準。理想上，對相關的國際人權標準的認知，應該暗示國內法庭須留意國際標準，無論這些標準是被激發、還是出於自發(*proprio motu*)。然而，應該要讓人充分了解規範或標準的普世性，在全世界與各方面之應用並不需要全然一致。不同的權利應加以區分。有些非常基本的權利在世界各處必須嚴格執行，其他權利在各國執行時留有一些自由裁量空間。一般說來，國際人權法提供人們法律上的保護，對國家而言是互補的保護工具與標準，但並不能取而代之。因此整體而言，人權規範的普世性在實踐上不等同於一致性。不過，正如先前指出的，在各種權利本質間有所區分。某些權利，一般指稱為核心權利或非貶損權利，在任何環境下皆不能成為中止或限制的主體，甚至就算在緊急或武裝衝突下也是如此。這些非貶損權利可見於各種人權條約中；最為著名的是公民與政治權利國際公約第 4 條第(2)款。同樣地，這些權利不能保留且必須被視為與條約之對象和目的的不相容。關於保留的議題，人權委員會提出適當地一般性意見：

「國家不得保留從事奴役之權利、折磨、支配人們處於殘酷、不人道和有辱人格的對待或懲罰，不得任意地剝奪人們的生命，任意逮捕與拘留，不得否決思想、意識與宗教自由，不得擅自假定一個人有罪除非當事者證明自己無罪、不得處決孕婦與兒童、不得允許國家、種族或宗教仇恨發聲，不得拒絕讓適婚年齡者結婚，或是拒絕少數族群享有其文化、專業、宗教或使用自己的語言；以及擁有公平審判的權利.....」(一般性意見 No. 24 (1994))。

普遍為眾人所接受的是，由於這份一般性意見攸關在公民政治權利公約下禁止保留某些權利，也延伸到不允許裁量餘地的權利。在這樣的關係上，由歐洲人權法庭所發展的「裁量餘地」原則是有意義的。歐洲人權公約的前言談及政治傳統、理想、自由與法律規章等共同的傳承，歐洲法庭卻也同時認可公約締約國可以抱持對某些蘊含強烈道德內容之議題的不同觀點，例如墮胎、安樂死、性癖好、色情描寫。尤其關於可允許的限制前提，諸如公共秩序與道德，歐洲法庭留給各國裁量餘地或是考量的空間。就某些權利而言，考量各國社會之歷史、文化與宗教傳統，裁量餘地原則作為歐洲人權法庭之法學的一項特色，可說明國際間人權

規範適用的不一致。在另一方面，這項原則並非毫無危險，因為可能會允許某些在性別或性向的差別待遇的措施繼續存在，也可能在其效應中，與另一項歐洲法庭的法律學有歧異；換句話說，公約應該是動態的、是活的，對當前人類自由與尊嚴在裁量方面的演化保持跟進的步調。

這個關於普世性的基礎問題，就如同與一致性有區別般，不僅被認知為概念與政策的議題，也被當成一般人權論述的一部分。而此問題也和具體個案與情況如何有效詮釋和應用人權法密切相關，乃國內法庭在履行國際人權法時的基本考量。

伍、國內履行國際人權法之體制

顯然國際人權法只能訴諸於國內法庭，若我們限定為條約法，則其範圍是與國內法律合併的人權條約。在這個層面，要區別所謂一元論體制與二元論體制是相當明確的。在一元論體制中，不需要立法轉化，國際法規範就能形成一部分的國內法。在二元論體制中，二元性的特色因國際法與國內法是兩種不同體制的事實而突顯出來。因此，在二元論體制中，國際法規範必須在成為國內法律秩序前，經由立法程序來轉換。荷蘭是一元論國家，允許法庭判決國內法律條款若與國際法律規範不同，就因此不適用，我傾向於相信一元論體制比二元論體制更令人偏愛，因為一元論可以更直接與有效地實踐國際所認可的規範。在此同時，我體認到這樣的假設可能多少純屬我個人偏見，且需要分別針對眾多一元論與二元論國家詳盡地分析兩者之措施與成果。許多方面都須仰賴各種國家脈絡中的司法態度與傳統。一元論體制中的法官會對援用國際法規範感到不安與勉強。他們可能認為自己在這方面缺乏充分的專業知識，然而只要他們將國內法律的解釋與應用，使其終歸成為自身法律教育與訓練中重要的一部分，便更會覺得自己站在穩固與熟悉的法律基礎上。在另一方面，一元論體制會在國內法庭的能力與意志上加諸沉重的聲明，以援用國際人權法規範，而二元論體制可能也有缺陷，因為現有的立法或法案，無法將條約的條件與實際上符合這些條件的國內法律合併。一般而言，並不存在偏愛這兩者之一且廣受國際接納的法律輿論。對兩種體制有決定性影響的是，國家充分且忠誠地遵循其義務，以對條約之條款產生效應。就這個理由而言，重要的是國家達成其義務的方式，是在獨立的國際監視與監控之下。因此才有一系列國際人權條約提供獨立監督的特定工具與機制。

事實上，在聯合國人權促進與保護體系中，有九個條約主體負責監督與調查的任務，也可能接收已明確接納申訴步驟的國家的違反條約之受害者的請願。詳盡地討論人權條約主體活動細節乃超出本論文範疇。我希望強調條約監督的重要性，且此監督乃是基於締約國提供之全方位國家報告資訊以及來自其他來源的補充——尤其是可信與可靠的公民社會組織，此個案可能意指的國家人權委員會。這將促使監督主體開始與締約國的公開對話，並分析目前的進展，以及在相關的人

權條約下完成其義務期間所面對的困難。這些對話與分析將導致結論性的觀察，其給與國家對於如何對條約遵守與實踐之建議。這些結論性的觀察也是國家與國際層面在後續控制時所運用的工具。回到國內法庭之角色，重要的是所有政府部門，包含司法部都要熟悉和本國相關之國際監督機制的結論與建議，以便能充分地將這些結論與建議納入考量。此外，大多數條約主體已經發展出經由謹慎準備與起草對於某些整體或個別條約條款的一般性意見。這些一般性意見包含有益的見解，並針對整體與個別條款提供解釋與應用的方針。同樣地，國際人權法在國家層面，尤其是在法庭上的施行，期待這些一般性意見能廣為人知，並且成為研究與分析的主題。另外，就國際法學與區域司法主體而論，由條約主體在個人申訴以及歐洲、美洲與非洲區域人權法庭之判決形成「觀點」的判例法，對於解釋國際人權法也具可觀的重要性，有時主要的意涵是要透過國內法庭在國家層次保障人權。

在本節開端，我將國際人權規範與國內法律層面的接軌，區分為一元論體制與二元論體制。我提出兩種體制的優缺點，並觸及國內法庭的角色。然而，回到區分的主題，要牢記這樣的差異可能只有實際結果，因為國際人權規範是「直接適用」或「自我執行」的，因而自然人或法人可直接仰賴之，且司法部門可直接適用。條約條款是否可以直接適用或自我執行，要視條約起草者的意圖而定，也要看條約條款的本質為何而定，尤其若以充分精確的語言表達，則無須要求立法，至少在一元論體制下更是如此。假如國際人權規範尚未能直接應用，此時一元論與二元論的分割並無意義，因為這類的人權規範需要國家立法制定，與國家層次的憲制類型無關。

陸、國際人權之可訴性

討論在國內法庭履行國際人權法時，基本上是假設法庭在分權原則下是獨立、不偏袒、且有能力解決違反權利的案件。為了讓法庭履行權利，權利必須具有可訴性。我們已經觸及關乎權利可直接適用的問題。可直接適用的問題和可訴性的議題密切相關。長久以來，許多律師與政治家爭辯只有某些權利能歸為人權，因為屬於人權的權利能夠在法庭前行使，並被法庭採用；因此，人權是可訴與可仲裁的。沒有人會否認公民與政治權利，例如生活的權利、免於折磨或殘忍與不人道對待的自由、隱私權、言論與宗教自由，皆為可訴的權利。然而，論到經濟、社會與文化權利，像是工作、健康、食物、水和住屋與教育，當中的爭論是在履行這些權利時，法庭可以管轄歧視的議題，卻不能管轄對這些權利的侵害。過去主要的觀點認為某些國家的經濟、社會與文化權利，並非適當的人權，而是人的渴望。與此背景背道而馳的是，亦為意識形態分歧的觀點，決策是將國際人權公約的結構分為兩部，雖然兩部條約都有前言，其內容皆為「按照世界人權宣言，只有在創造了使人可以享有其經濟、社會及文化權利，正如享有其公民

和政治權利一樣的條件的情況下，才能實現自由人類享有免於恐懼和匱乏的自由理想」。

當然，經濟、社會與文化權利的實踐要比公民與政治權利需要更充分的財務與物質資源，因而國家當局需要承擔義務，國家之立法與行政方面尤甚，以便讓這些資源得以運用。當我們正在討論法庭作為人權的引導者與法治之角色時，永遠要牢記政府其他部門有履行人權公約義務的責任。不過，人們愈來愈認知與實行的是，法庭不能在經濟、社會與文化權利處於緊要關頭時，保持漠不關心的態度。本文前面曾提出經濟、社會與文化權利的一般性意見，大意是一些經濟社會文化權利公約的條款能夠馬上應用，因而歸在可仲裁權利的類別(一般性意見 No. 3 (1990))。委員會列出這些條款：不分男女皆平等地享有經濟社會文化權利公約中所陳述的一切經濟、社會與文化權利(第三條)；不分種類同等價值的工作提供同等的酬勞(第 7 (a)(i)條)；組織工會和參加他所選擇的工會的權利(第 8 條)；應為一切兒童和少年採取特殊的保護和協助措施，不得因出身或其他條件而有任何歧視(第 10 (3)條)；接受免費基本義務教育的權利(第 13 (2)(a)條)；父母擁有為其兒女選擇最低教育標準之學校的自由(第 13 (3)條)；不介入個人與主體建立與引導教育機構的自由(第 13 (4)條)；尊重科學研究與創造性活動中不可或缺的自由(第 15 (3))。不過，我們應該承認這些經濟社會文化權利公約的條款在其內容與本質上、就其非歧視性的原則而論、以及作為政治自由之表達，是具有強烈的可訴性特點。但將可訴性附加到經濟、社會與文化權利上，還有另一種說法，即這些權利是與公民與政治權利密切相關，也因而具備法庭的司法評論與法律判決的能力。事實上，民眾之健康、食物與水的基本權利遇到危機時，公共當局卻無法採取必要措施來為絕大部分人口或拘留/服刑者擔保這些權利，這類國家行為可能對生存權利產生反效果，或者可能構成不人道或有辱人格的待遇。同樣地，將人從庇護所逐出或破壞庇護所可能等同於殘酷、不人道或有辱人格的待遇，或是侵害隱私、家庭生活與住家的權利。當這類措施涉及對經濟、社會與文化權利的侵害，可能會構成公民與政治權利，導致司法糾正，對於受害者之權利則適當地補償，其形式包括賠償、彌補、昭雪、或是償還。法律意見的認知與接納更有成效，不只公民與政治權利如此，經濟、社會與文化權利亦然，至少在最低核心義務方面是司法擔保或補償的主題。近來，經濟社會文化權利公約之任擇議定書中也表達這種認知與演化，公民政治權利公約之第一任擇議定書，個體與群體可以因經濟社會文化權利公約所列出之權利受到傷害，而提出請願。這種認知與更為人所接納的經濟與社會權利，也在國內法律體制中的經驗反映出來。有一種有趣的解釋來自於最近在荷蘭法庭的判決，當時的法官裁定因為居民無法負擔水供應公司的帳單，而切斷供應給住戶的飲用水是不合法的，此乃侵犯飲用乾淨水質的基本人權。的確，這是一個具爭議性的法庭裁決，但也是重要的創新之舉。

柒、獲得實際賠償的權利

極具重要性的是，侵犯人權的受害者有權利在國家正義機制前，訴求對於補償與賠償的主張。為了這個目的，國際人權法中的賠償日漸發展為獲取正義的條件。作為國際規範過程的一環，實際賠償權利的法律基礎穩固地在國際人權法主體中，起初是在世界人權宣言(第8條)與公民與政治權利國際公約(第二條，第三段)。正如後者所闡明：「任何人在聲明此類賠償時，應有權利由有權能的司法、行政或是立法當局裁定，或是由其他國內法律體制之適任當局裁定。」雖然司法機制，尤其是法庭，不一定是提供賠償或補償的國家機關，卻天生就在適當的位置上行使此功能。人權委員會監督公民與政治權利國際公約，在一般性意見中就提到：「……司法部門可以用許多不同的方式以有效地確保人們可享有公約所承認的權利。其中包含：直接執行公約、實施類似的憲法或其他法律規定，或是實施國內法時對公約做出解釋」(一般性意見，No. 31，第15段)。

行使實際賠償權利的一個主要先決條件，是擁有取得實際賠償管道的能力或更權利。這是一件重要的事情，在法律與許多國家實際措施方面，有效的補救措施是罕見，甚至是無效的，當受害者屬於最貧困與最邊緣化的社會族群時更是如此。在司法主體前，他們通常缺乏工具、資源與知識以提出補償與賠償的主張。因此，他們無法負擔律師費，而且在許多國家中，事實上佔用法庭的高額費用對人口中較為貧困者來說是過高的。這種情況公然違背正義的基本規範，因此更加需要強調增強——透過法律與財務支援的方式，也透過散播可能的救濟管道的資訊——個人與族群擁有平順與平等接觸正義的權利，尤其為了那些持續受到虐待、忽視、剝奪與歧視之人們。

取得實際賠償的權利有雙重意義，具有程序與實質方面的特點。程序方面的特點在於國家須提供不受阻礙的工具與平等接觸管道的國內救濟措施。國際人權法的判決者，例如人權委員會曾經裁決，當核心權利在危急關頭時，例如生存權與禁止折磨或殘忍、不人道或有辱人格的對待，國家有義務進行即時與公平的調查，並根據國際公約條款將罪犯繩之以法，給受害者應有的交代。在許多情況下，當法律批准免罪，或事實上免罪凌駕於嚴重侵犯人權，受害者實際上無法尋求正義或擁有實際賠償的資源。當國家當局無法調查事實、建立罪責時，很難讓受害者或其親人依據實際的法律訴訟獲取充足的補償與賠償。

實際賠償權利的實質層面基本上反映在一般法律原理上，即抹滅犯錯的後果。在這方面，人權委員會在之前所引用的一般性意見中表示，實際的賠償以適當的財務補償來承擔罪責，形式包括償還、康復，以及以下的補救措施：如公開道歉、公開紀念、不再重犯的保障措施、相關法律措施的改變、以及將違反人權者繩之以法(一般性意見 No. 31，第16段)。在這方面，人權委員會含蓄地運用聯合國嚴重侵犯人權法之受害者賠償與補償權利基本原理、方針與嚴重侵害國際人道法。這些聯合國的補償原理在2005年獲同意採用，詳加說明受害者對賠償的權利：(a)平等與有效的正義取得管道；(b)充足、有效與立即的傷害補償；以及(c)關於侵權與補償機制之相關資訊的取得管道。最重要的是各種補償形式的描

述：歸還、賠償、彌補、康復、贖罪與不再重犯的保障。詳細討論這些補償原則超出本論文的範圍，但眼前的目的在於開始一個受害者導向的人權觀點，作為人類連帶責任的主張。國家當局與國家機關，包含法庭與其他司法機制，皆應接受建議，謹記補償原則。

捌、法庭作為正義之守衛

在本論文中，司法部門與其角色以各種方式出現。我們已經指出所有法律專業人士，包含司法部門與所有預備從事法律者，需要對人權法律進行密集地法律訓練與教育。我們已觸及法庭在支持和平、正義與永續環境的所扮演的角色。我們從基本人權規範之普世性切入討論，以國家和區域特性，與各種文化與宗教的背景為基礎，迅速完成人權法律的解釋與評論。除此之外，我們審視法庭的功能，探討在國際人權規範下，國家憲政與法律秩序中所謂的一元性與二元性體制。我們請求法庭與法律專業人士的知識能夠通達，由國際監督主體對國際人權規範的解釋，其解釋呈現於一般性意見與建議、觀察結論以及判例法。我們也提到法庭有責任判定人權的可訴性，且觀察到這方面愈來愈傾向考量除了公民與政治權利，經濟、社會與文化權利以外的可訴權利。最後，我們強調法庭在確保實際賠償、補償與彌補人權受到侵犯的受害者時所扮演的角色，因此適當地在心裡保持受害者導向的觀點。

作為司法部門之一部分的法庭，顯然扮演人權保護者與保障者的基本角色。世界人權宣言已經宣布法律之前人人平等、清白的假設，以及由法律所建立的無私法庭來做公平與公開的審判與聽證。這是。兩部公約都保障這些權利的行使。基於這些權利與原則，聯合國於 1985 年通過〈司法獨立之基本原則〉。事實上，為了適當且公平地運作，司法獨立是基本的條件。基本原則明確地規定，司法獨立應由國家保證，並且涵蓋在憲法或國家律法之中。司法獨立暗示，司法程序不應受到任何不適當或未經授權的介入。基本原則也規定，在決定事務時，司法應該無私地基於事實，並且根據法律，不受到限制、不當影響、勸誘、壓力、威脅或干涉。關於司法獨立尚有許多其他相關層面，例如任用原則與程序、財務自治與適當的資源，以及倫理規範與責任。

在危機發生時，例如公共危險、武裝衝突、國內政局不穩與公民不安的狀態，必須特別注意司法所扮演的重要角色。在這類情況下，行使與享有人權是在極度危險中，司法部門可能面對重大壓力。在這些條件下，他們身為人權保護者與保障者的角色，甚至要比在「正常」情況中更不可或缺。因此，在危機發生期間，司法負有更深入與重要的責任。基於這個理由與背景，可敬的國際法律人協會在三年前通過〈危機時期法官與律師角色之宣言和行動計畫〉。

我們在這份提案中已經強調司法的重要角色，國內法庭的角色在履行國際人權法時是一個基礎條件。早在 18 世紀，法國哲學家孟德斯鳩發起三權分立(Trias

Politica)，是分權的政治寶典：行政權、立法權與司法權。這三種權力—有些可能比較有權力—各司其職，皆各有其責任來促進與保護國際人權。不過，在最後的分析中，永遠要記住獨立且公正的司法，乃是公平行使正義的首要條件，也是支撐人類尊嚴與權利之固有價值的基石。

The implementation of international human rights law in domestic courts; potentials and prospects

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I. An anecdote

There is an anecdote of a local judge in a provincial town in The Netherlands who dismissed a plea that relied on the European Convention on Human Rights. The judge said that he had never heard of such a Convention. Moreover, he could not trace the text in his library. He further ruled that invoking such an obscure document rather than relying on national law was the ultimate proof of the weakness of the argument. This story goes back to the sixties of the last century. The Netherlands had already ratified the European Convention on Human Rights in the fifties but apparently it lasted quite some time before members of the legal profession, notably this local judge, became aware of the existence and the significance of this Convention. At the present time, after many decades of growing significance of international human rights law with a major impact on nearly all fields of the Dutch legal system, it is unthinkable that the legal profession, whether in the legislative, administrative or judicial branches of governance, would be ignorant of the European Convention on Human Rights and, I add with some caution, of the potentials of worldwide human rights instruments such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Developing knowledge and insights on the significance and the potentials of international human rights law is now an indispensable ingredient of legal education and training in Law Schools, not any more limited to the curricula of international law courses but integrated in the curricula of all branches of legal training and education. This is an ongoing process and has taken time. The Dutch experience was also influenced by what is called the “monist” model which implies that after ratification of a treaty its provisions become part of domestic law and may be invoked before the courts insofar as these provisions are directly applicable. I will return to the domestic models of “monism” and “dualism” later in this presentation.

I have been referring to this Dutch anecdote and experience in the awareness that

similar experiences are shared in the practice of other countries. However, the main reason for telling this story and touching upon its wider ramifications is to stress the importance of awareness building about the potentials of international human rights law and to highlight training and education of the legal profession as a prerequisite for making use of international human rights law. Such training and education, also in the perspective of developing a culture of human rights, is one of the proven means to create better conditions for human rights protection and enforcement.

II. Overview

The subject matter of this presentation, viz. the implementation of international human rights law in domestic courts, is broad in scope and can be approached in various ways. I plan first of all to briefly point to the position of the State which is the primary holder of international human rights obligations. The judiciary and for that matter the courts are part of the State structure and carry out distinct functions in that context. Thereafter I will deal with the relationship between international and domestic human rights law with emphasis on universality of standards but with due regard to national and regional particularities. This conceptual approach and relationship will be followed by some remarks of a more technical-juridical nature about the various domestic systems of implementing international human rights law. Further, I will make some observations on the justiciability of international human rights law as a condition for domestic courts and other public institutions to apply human rights standards in the civil, political, economic, social and cultural fields. Thereafter, mindful of the rights of all those who seek justice through judicial and other public institutions, attention will be paid to remedies and reparations as a means to strengthen faith in the national and international human rights system. Finally, when dealing with the role of domestic courts, it is appropriate to point to the need of upholding the independence and the impartiality of the judiciary as an essential requirement for the fair administration of justice. This counts even more in times of crisis and emergency when the court system may operate under severe tensions.

III. The State as the primary human rights duty-holder

While in international human rights law individual persons – and in some cases collectivities such as indigenous peoples and minorities – are the rights-holders, it is the State that is the primary duty-holder. States are still the main constituent members of the international community and States, as parties to international human rights

treaties, have committed themselves to comply with the obligations these treaties entail. For that matter States must be held accountable primarily vis-à-vis their own populations but also towards the international community which has a collective interest that international treaties are complied with and that all members of the human family enjoy a worthy life in dignity and rights. The State as duty-holder under international human rights treaties is under the obligation to protect persons against violations and abuses by its own agents. But the State has also the duty to extend this protection against acts committed by private persons or entities such as business corporations insofar as they are in violation of rights recognized in international human rights law. Further, it is worth noting, as the Human Rights Committee stated in a General Comment on the Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights (General Comment No. 31 (2004)), that obligations engaging the responsibility of a State Party apply to all branches of government (executive, legislative and judicial) as well as to other public or governmental authorities at whatever level (national, regional or local). In the same context the Committee recalled in the light of the Vienna Convention on the Law of Treaties that a State Party “may not invoke the provisions of its internal law as a justification for its failure to perform a treaty”.

Now it may well be argued that the nature of obligations imposed on States Parties may differ as between obligations of immediate application and obligations that are conducive to progressive application. This distinction was one of the reasons for dividing the International Bill of Rights into two separate treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It was argued that the former treaty was to be applied without delay whereas the latter was subject to progressive or gradual implementation. The decision dating back to the fifties and sixties of last century to divide human rights, initially enshrined in the Universal Declaration of Human Rights in a single instrument, into two distinct instruments is a reality but remains contested as a conceptual misnomer. In fact, this separation fails to appreciate the indivisibility and interdependence of all human rights. The classification of obligations into undertakings of immediate application and of progressive realization is conceptually and practically too simplistic. Thus, the Committee on Economic, Social and Cultural Rights which monitors the implementation of the ESCR Covenant has pointed out in one of its early General Comments (General Comment No. 3 (1990)) that there are a number of provisions of the ESCR Covenant which would appear to be capable of immediate application by judicial and other public organs in national legal systems. I will come back to this question somewhat later in this presentation when the justiciability of human rights will be discussed. For the moment in the context of the

State as the primary human rights duty-holder, due attention should be paid to a basic observation in the same general comment of the Committee on Economic, Social and Cultural Rights to the effect that “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. Thus, for example, a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant”.

With reference to the obligations of the State as the primary human rights duty-holder, I only mentioned treaties as a source of international human rights law. This is in itself logical because treaties, in global and regional settings, have now become the principal legal components of the comprehensive corpus of international human rights law. Treaties and in particular the core of international human rights treaties are subject to international monitoring and adjudication and are phrased in such a manner as to lend themselves to specific implementation by national branches of government, including the judiciary. But we have also to take into account that States, irrespective whether they have ratified human rights treaties, are also bound by what have been termed *ius cogens* norms, imperative norms which reflect essential values of humankind and prevail over any other standards and obligations. These *ius cogens* norms are not formally classified but over the years they have been confirmed by international and domestic tribunals and courts. These imperative norms which are basic to all humanity and which have to be respected by all organs of the international community and national society include the prohibitions of genocide, torture, murder, enforced disappearances, slavery and slave trade, prolonged arbitrary detention, and systematic racial discrimination. It is true that all these imperative norms are also clearly and explicitly included in general and specific human rights treaties, such as those relating to genocide, torture, disappearances and racial discrimination, but their respect and observance is in addition a *supra* treaty obligation.

Further, much could be said about customary law as a source of international human rights law and binding upon States. Again, with the codification of international human rights into a series of treaties and with the growing acceptance of these treaties by States, it appears that the importance of customary international human rights law is on the decline. It is nevertheless not without significance that the Universal Declaration of Human Rights is frequently and widely invoked, not only as a common standard of achievement, as can be read in its preamble, but also as a customary law standard to be complied with, thus reflecting evidence of “*opinio iuris*” that overrides incompatible practice.

IV. The relationship between international and domestic human rights law

For long general international law could be characterized as the law of coexistence governing the demarcation of rights and interests between sovereign States and attributing primary importance to the principle of non-intervention in matters considered to belong to the domestic jurisdiction of States. Progressively, however, the law of coexistence was complemented by the law of cooperation. A clear signal into that direction were the Four Freedoms proclaimed by US President F.D. Roosevelt in the dark year of 1941. Freedom of expression, freedom of worship but also freedom from want and freedom from fear were to be attained, as Roosevelt pleaded, in our time and generation. These Four Freedoms were among the sources of inspiration to the authors of the Universal Declaration of Human Rights which grew into the fundament whereupon the whole normative fabric of the international human rights edifice is being built. The law of coexistence is not obsolete these days, but it falls short to deal effectively with the overall challenges humankind is facing. The law of cooperation sets out principles and rules for a responsible society at all levels of our globe: local, national, regional and worldwide.

In response to the plight of a responsible society the relationship between international and domestic human rights law is evolving. This is not an automatic process of growing together and living in harmony and peace. It requires strenuous efforts on the part of all sectors of the human family, in particular those holding political and economic power, those who are leaders in various branches of government, including the judiciary, and those who carry educational and cultural responsibilities. The history of the last sixty years shows hopeful signs of cooperation, respect and inclusion, but still there were and there are persisting and structural situations of exclusion, deprivation, discrimination, denial of identity and refusal of self-determination which negate the essential values of a responsible society, nationally and internationally. Most troubling and unacceptable are atrocious large-scale practices amounting to serious crimes under international law, notably genocide, crimes against humanity, war crimes and the crime of aggression as brought under the jurisdiction of the International Criminal Court. International law and international institutions and systems are in place and in the making to cope with these wrongs and these criminal evils.

The question comes up in the light of the theme of this presentation what domestic courts as judicial organs can do to uphold the rule of law, to administer a fair distribution of justice, to stop abuses and to offer redress and remedies. Obviously it is beyond the capacities of domestic courts to offer solutions for the major world

problems related to the requirements of a responsible international society. However, it does happen that in specific cases domestic courts are seized with issues that are closely linked with world problems such as the criminal implications of the violation of principles of humanitarian law in armed conflict or the civil and criminal liability for serious harm caused by unattended environmental degradation. The tasks of domestic courts facing legal aspects in relation to upholding peace, retributive and reparative justice and ecological integrity, are a subject of major interest and deserve due attention but arise above the scope of this presentation with its focus on the domestic implementation of international human rights law.

The point I would like to raise and that has a bearing on the role of domestic courts is the relationship between international and domestic human rights law in the light of the universality of basic human rights standards but with due regard to national and regional particularities: As a point of departure I take here an often quoted paragraph from the Vienna Declaration adopted by the World Conference on Human Rights in June 1993. This paragraph reads:

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

The basic question of the universality of human rights standards was and still remains a subject of intense discourse with many perspectives in mind: philosophical, political, legal, cultural, socio-economic, etc. Let me only recall the debate on Asian values which took prominence in the nineties of the last century. Official spokespersons from China, Indonesia, Malaysia, Singapore, Pakistan and other nations questioned prevailing approaches in international instruments and the manner Western nations were making use of human rights in their external policies. They denounced so-called human rights imperialism and put emphasis on the interests of the community, on duties above rights, on social and collective dimensions of human rights, on security interests. In response to this Asian values debate, Asian NGOs gathered in 1993, adopted the Bangkok NGO Declaration on Human Rights. It is worth quoting some phrases from this text:

“We can learn from different cultures in a pluralistic perspective and draw lessons from the humanity of these cultures to deepen respect for the human

rights [.....]. Universal human rights standards are rooted in many cultures. We affirm the basis of universality of human rights which afford protection to all of humanity, including special groups such as women, children, minorities and indigenous peoples, workers, refugees and displaced persons, the disabled and the elderly. While advocating cultural pluralism, these cultural practices which derogate from universally accepted human rights, including women's rights, must not be tolerated.”

This debate continues, sometimes under a new label. Thus, the Russian Federation initiated last year in the UN Human Rights Council an item: “better understanding and appreciation of traditional values of dignity, freedom and responsibility”. Fundamental challenges to the universality of human rights are certainly posed by claims of national security, claims of totalitarian ideologies and systems and by claims and prescriptions of religious fundamentalism.

To what extent are these conceptual discussions and these fundamental challenges to the universality of human rights relevant to the implementation of international human rights law in domestic courts? I submit that the judiciary, while its members have a special role in safeguarding human rights and the rule of law, is not operating in a vacuum but in a national context with its own constitutional history and its own political, social and cultural settings. The interpretation and application of laws by domestic courts certainly carries the imprint of what the Vienna text referred to as “national and regional particularities and various historical, cultural and religious backgrounds”. At the same time domestic courts, in their interpretation and application of laws, must be mindful of the relevant international human rights standards as accepted by the State of which they are a structural component. Ideally, being aware of the relevant international human rights standards should imply that domestic courts pay due attention to international standards whenever these standards are invoked or on their own initiative (*proprio motu*). It should, however, be well understood that the universality of norms or standards should not necessarily mean uniformity in their application everywhere and worldwide. In this regard a distinction has to be made between the various rights at stake. Some very fundamental rights must be implemented strictly everywhere, whereas other rights may leave a certain discretion as regards their national implementation. It is generally assumed that international human rights law is meant to provide legal protection to persons which is complementary to national means and standards of protection and which is not a substitute thereof. Therefore, by and large universality of human rights norms cannot be equated with uniformity in their implementation. However, as already indicated, a distinction has to be made between the nature of the various rights. Some rights, commonly referred to as core rights or non-derogatory rights, may never be the

subject of suspension or limitation under any circumstances, not even in times of emergency or armed conflict. These non-derogatory rights are listed in various human rights treaties; notably also in Article 4 (2) of the International Covenant on Civil and Political Rights. Similarly, reservations with regard to these rights are not allowed and must be considered incompatible with the object and purpose of the treaty. On this issue of making reservations, the Human Rights Committee stated appropriately in a general comment:

“A State may not reserve the right to engage in slavery, to torture, to subject people to cruel, inhuman and degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women and children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profession, their own religion, or use their own language; and the right to a fair trial” (General Comment No. 24 (1994)).

It is generally accepted that this general comment, inasmuch as it deals with the prohibition to make reservations to certain rights under the CPR Covenant, also extends to rights that do not allow a margin of appreciation. In this connection the doctrine of “margin of appreciation” developed by the European Court on Human Rights is relevant. While the preamble of the European Convention of Human Rights speaks of a common heritage of political traditions, ideals, freedom and the rule of law, the European Court nevertheless recognizes that countries parties to the Convention may hold different views on certain issues with strong moral implications, such as abortion, euthanasia, sexual habits, pornography. In particular with regard to permissible limitation grounds, such as public order and morals, the European Court leaves a margin of appreciation or discretion to individual States. This doctrine which is a particular feature in the jurisprudence of the European Court of Human Rights, may serve as an illustration of non-uniform application of international human rights norms as far as certain rights are concerned, having regard to the variety in historical, cultural and religious traditions of national societies. On the other hand, this doctrine is not without hazards inasmuch as it may allow the continuation of discriminatory practices on the grounds of gender or sexual orientation and may in its effects be inconsistent with another feature of the jurisprudence of the European Court, viz. that the Convention should be a dynamic and living instrument that holds pace with current evolutions in the appreciation of human freedom and dignity.

This fundamental question of universality as distinct from uniformity was raised not only as a conceptual and policy issue to be perceived and discussed as part of general human rights discourse. This question is also highly relevant for the effective interpretation and application of human rights law in concrete cases and situations and for that matter a basic consideration for domestic courts in implementing international human rights law.

V. Systems of domestic implementation of international human rights law

It is obvious that international human rights law can only be invoked before domestic courts insofar as – if we limit ourselves to treaty law – human rights treaties are incorporated into domestic law. In this respect it is clarifying to distinguish between what are called *monist* systems and *dualist* systems. In a monist system international law norms form part of domestic law without the need of legislative transformation. In a dualist system the duality is characterized by the fact that international law and national law are two separate systems. Therefore, in the dualist system international law norms must be transformed by legislative enactment before they become part of the domestic legal order. Coming from the Netherlands which is a monist country and allows the courts to rule that provisions of domestic law may be at variance with international law norms and therefore not applicable, I am inclined to believe that monist systems are to be preferred over dualist systems inasmuch as monism may secure a more direct and effective realization of internationally recognized norms. At the same time I am aware that such an assumption may be somewhat biased on my part and would need a thorough analysis of practices and outcomes in a variety of countries that are governed by monist and dualist systems respectively. Much depends on the attitude and the traditions of the judiciary in the various national contexts. It may well be that judges functioning within the monist system feel uneasy and are reluctant to apply norms of international law. They may consider that they lack sufficient expertise in this respect and that they are on more solid and familiar legal ground as long as they interpret and apply domestic law which after all was an important part of their legal education and training. On the other hand, while the monist system would lay a heavy claim on the capacity and willingness of domestic courts to apply international human rights norms, the dualist system may also bring about deficiencies insofar as it fails to see to it that existing legislation or legislative acts aimed at incorporating the requirements of a treaty into domestic law actually meet these requirements. Generally speaking, there is no widely accepted international legal opinion that favours either of the two systems. It is decisive for

both systems that the State complies fully and faithfully with its obligation to give effect to the provisions of a treaty. For this reason it is important that the manner in which a State is meeting its obligations is subject to independent international scrutiny and monitoring. Therefore, a series of international human rights treaties provide for specific means and mechanisms of independent supervision.

In fact, within the United Nations human rights promotion and protection system, nine treaty bodies carry out tasks of monitoring and inquiry and may also receive, with regard to States that have explicitly accepted complaint procedures, petitions from persons who claim to be victims of the violation of the treaty. It would go beyond the scope of this paper to discuss in detail the ins and outs of the human rights treaty bodies' activities. I wish only to stress the importance that treaty monitoring be based on a full scope of information provided by national reports of States Parties supplemented by information from other sources, notably reliable and credible civil society organisations and, as the case may be, national human rights commissions. This will enable the supervisory body to enter into a constructive public dialogue with States Parties and analyse progress made as well as difficulties encountered in meeting their obligations under the respective human rights treaties. Such dialogue and analysis will lead to concluding observations with emphasis on recommendations addressed to States Parties with a view to improving their record of treaty compliance. These concluding observations are also serving as tools for follow-up control, domestically and internationally.

Coming back to the role of domestic courts, it is important that all branches of government, including the judiciary, make themselves familiar with the conclusions and recommendations of international supervisory mechanisms relating to their country so as to duly take these conclusions and recommendations into account. Moreover, most treaty bodies have developed the practice of drawing up, after careful preparation, general comments relating to some overall aspects or individual provisions of the treaty. These general comments contain useful insights and provide guidance for the interpretation and application of a treaty as a whole and its individual articles. Again, for the implementation of international human rights at the domestic level, notably by the courts, it serves a useful purpose that these general comments become widely known and be the subject of study and analysis. Further, insofar as jurisprudence of international and regional judicial bodies is concerned, case law in the form of "views" by treaty bodies on individual complaints and judgments by regional human rights courts in Europe, the Americas and Africa are also of considerable significance for the interpretation of international human rights law, sometimes with major implications for securing human rights at the national level through domestic courts.

I started this part of my presentation by making a distinction between countries that follow a monist system or a dualist system as regards the incorporation of international human rights norms into domestic law. I mentioned in this respect some advantages and disadvantages of both systems and I touched upon the role of domestic courts. Coming back to this distinction it should be kept in mind, however, that this distinction may only have practical consequences insofar as international human rights norms are “directly applicable” or “self-executing” and thus lend themselves to be directly relied upon by natural or legal persons and to be directly applied by the judiciary. Whether a treaty provision is directly applicable or self-executing may depend on the intention of the drafters of a treaty and also on the nature of a treaty provision, in particular if it is couched in language which is sufficiently precise and would for that reason not require, at least in monist systems, implementing legislation. Therefore, insofar as international human rights norms are not directly applicable, the monist dualist divide is not relevant because such human rights norms would require national legislative enactment anyway, irrespective of the type of constitutional arrangements at the national level.

VI. The justiciability of international human rights

When discussing the implementation of international human rights law in domestic courts, it must be a basic assumption that courts under the principle of separation of powers are independent and impartial and capable to provide remedies in case of violations of rights. In order to be implemented by the courts, rights must be justiciable. We touched already upon the question to what extent rights are directly applicable. This question of direct applicability is closely related to issue of justiciability. For long, many lawyers and politicians argued that only those rights may qualify as human rights insofar as they can be invoked before the courts and applied by the courts; thus, human rights as adjudicatory or justiciable rights. No one would deny that civil and political rights, such as the right to life, freedom from torture or cruel and inhuman treatment, the right to privacy, freedom of speech and religion, are justiciable rights. However, when it comes to economic, social and cultural rights, such as the right to work, health, food, water, housing and education, it was argued that courts may well be in a position to rule on issues of discrimination regarding the implementation of these rights but not on violation of the rights themselves. It was a prevailing view in some countries that economic, social and cultural rights were not properly human rights but rather human aspirations. It was against this background that, also in view of ideological divisions, the decision was made to structure the International Covenants on Human Rights in two separate

instruments, albeit with the preambular proviso in both treaties that “in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want only can be achieved if conditions are created whereby everyone can enjoy his economic, social and cultural rights as well as his civil and political rights”.

It is of course true that the realization of economic, social and cultural rights, more than civil and political rights, requires the availability of adequate financial and material resources and thus entails an obligation for State authorities, notably the legislative and executive powers of the State, to make such resources available. While we are discussing the distinct role of courts as guardians of human rights and the rule of law, we should never forget the responsibilities of the other branches of government to implement human rights treaty obligations. But there is a growing awareness and practice that the courts cannot remain indifferent when economic, social and cultural rights are at stake. Earlier in this presentation, reference was made to a general comment of the Committee on Economic, Social and Cultural Rights to the effect that a number of provisions of the ESCR Covenant are capable of immediate application and thus fall in the category of justiciable rights (General Comment No. 3 (1990)). The Committee listed among these provisions: the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the ESCR Covenant (article 3), equal remuneration for work of equal value without distinction of any kind (article 7 (a)(i)), the right to form trade unions and join the trade union of his/her choice (article 8), special measures of protection and assistance for all children and young persons without discrimination (article 10 (3)), the right of compulsory and free primary education (art. 13 (2)(a)), the liberty of parents to choose for their children their own schools which conform to minimum educational standards (art. 13 (3)), non-interference with the liberty of individuals and bodies to establish and direct educational institutions (art. 13 (4)), respect for the freedom indispensable for scientific research and creative activity (art. 15 (3)). It should be acknowledged, however, that these provisions of the ESCR Covenant have, by their content and nature, in terms of the principle of non-discrimination and as expressions of political liberties, strong justiciable dimensions. But there is also another line of argument for attaching justiciability to economic, social and cultural rights insofar as these rights are closely interrelated with civil and political rights and thus capable of judicial review and legal adjudication by the courts. In fact, where basic rights to health, food and water are at stake and public authorities deliberately fail to take the necessary measures to guarantee these rights to significant parts of the population or to persons in detention or imprisonment, such State behaviour may have adverse effects on the right to life or may constitute inhuman or degrading treatment.

Similarly, evictions and destruction of shelter may amount, or often do amount to cruel, inhuman or degrading treatment or to a violation of the right to privacy, family life, and home. Such practices where the violation of economic, social and cultural rights, can be framed in terms of civil and political rights, may well lead to judicial remedies and to the right of victims to adequate reparation in the form of restitution, compensation, rehabilitation or satisfaction. The awareness and the acceptance of the legal opinion are gaining ground that not only civil and political rights but also economic, social and cultural rights, at least as minimum core obligations, are the subject of judicial guarantees and remedies. This awareness and evolution is also finding expression in the recent adoption of an Optional Protocol to the ESCR Covenant which, as a counterpart to the First Optional Protocol to the CPR Covenant, provides for the right of petition by individuals or groups of individuals claiming to be victims of a violation of any of the rights set forth in the ESCR Covenant. This awareness and the wider acceptance of the notion of justiciability of economic and social rights are also reflected in experiences in domestic legal systems. An interesting illustration is a recent court decision in The Netherlands in which the judge ruled that the cutting off of drinking water supply to a dwelling because the dweller had persistently failed to pay the bill to the water supplying company, was unlawful as a violation of the basic human right to clean water. Truly, a controversial court decision but nevertheless a significant trendsetter.

VII. The right to an effective remedy

It is of crucial importance that victims of human rights violations have a right to pursue their claims for redress and reparation before national justice mechanisms. For this purpose remedies in international human rights law progressively developed as a requirement to obtain justice. As part of an international normative process the legal basis for the right to an effective remedy became firmly anchored in the elaborate corpus of international human rights law, initially in the Universal Declaration of Human Rights (Article 8) and in the International Covenant on Civil and Political Rights (Article 2, par. 3). As the latter Covenant stipulates: “any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State”. Although judicial mechanisms, notably the courts, are not necessarily the only organs of the State to provide remedy and redress, they are by nature well-placed to exercise this function. The Human Rights Committee, monitoring the International Covenant on Civil and Political Rights, noted in this regard in a general comment: “. . . the enjoyment of the rights recognized under the

Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretative effect of the Covenant in the application of national law” (General Comment No. 31, par. 15).

A major precondition for the exercise of the right to an effective remedy is the facility or rather the right to have access to an effective remedy. It is a matter of concern, that in law and in actual practice of many countries effective remedies are scarce or of no avail, in particular where victims belong to the most destitute or marginalized groups of society. They often lack the means, the resources and the knowledge to bring any claims for redress and reparation before judicial bodies. Thus, they cannot afford legal counsel and in many countries the high fees to be paid for seizing the courts are in fact prohibitive for the poorer sectors of the population. This state of affairs defies basic standards of justice and underscores the need to strengthen – by way of legal and financial assistance and by the dissemination of information about available remedies – the right of individuals and groups to have smooth and equal access to justice, in particular for the benefit of those who are victims of persistent abuse, neglect, deprivation and discrimination.

The right to an effective remedy has a dual meaning. It has a procedural and a substantive dimension. The procedural dimension is subsumed in the duty of the State to provide effective domestic remedies by means of unhindered and equal access to justice. International human rights adjudicators, such as the Human Rights Committee, have ruled, in particular when core rights are at stake such as the right to life and the prohibition of torture or cruel, inhuman or degrading treatment, that States have the duty to proceed to prompt and impartial investigation of the facts, to bring to justice persons found criminally responsible and to extend to the victim(s) treatment in accordance with the provisions of the International Covenant. In many situations where impunity is sanctioned by the law or where *de facto* impunity prevails victims of gross violations of human rights are effectively barred from seeking justice and having recourse to effective remedies. Where State authorities fail to investigate the facts and to establish criminal responsibility, it becomes very difficult for victims or their relatives to rely on effective legal proceedings aimed at obtaining just and adequate redress and reparation.

The substantive dimension of the right to an effective remedy is essentially reflected in the general principle of law of wiping out the consequences of the wrong committed. In this respect the Human Rights Committee stated in the earlier cited general comment that the effective remedy entails reparation by way of appropriate financial compensation which may involve restitution, rehabilitation and by measures

of satisfaction, such as public apologies, public memorials, guarantees of non-repetition, changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations (General Comment No. 31, par. 16). In this respect the Human Rights Committee implicitly draws upon the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. These UN Reparation Principles, adopted by consensus in 2005, spell out in detail the victim's right to remedies in terms of: (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms. Most significant is the description of the various forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. It goes beyond the scope of this paper to discuss in detail these Reparation Principles but for present purposes it is submitted that they set out a victim-oriented perspective of human rights as an affirmation of human solidarity. State authorities and State organs, including the courts and other judicial mechanisms, are well advised to take these Reparation Principles to heart.

VIII. The courts as guardians of justice

In this paper the judiciary and its role have come up in a variety of ways. We have pointed to the need of intense legal training and education in human rights law for all members of the legal profession, including the judiciary and all those who are preparing themselves for a legal career. We have touched upon the role of the courts in upholding peace, justice and a sustainable environment. We discussed the role of the courts in the light of the universality of basic human rights standards, with due regard to national and regional particularities and various historical, cultural and religious backgrounds as a basis for an expeditious interpretation and appreciation of human rights law. Further, we reviewed the functioning of the courts in so-called monist and dualist systems of giving effect to international human rights norms in the domestic constitutional and legal orders of the States. We pleaded for a close familiarity by the courts and all members of the legal profession with the interpretation of international human rights standards by international supervisory bodies as evident in general comments and recommendations, concluding observations and case law. We also noted that it is incumbent upon the courts to rule on the justiciability of human rights and we observed in this regard an increasing tendency to consider, in addition to civil and political rights, economic, social and cultural rights as justiciable rights. Finally, we underscored the role of the courts in

assuring effective remedies, redress and reparations for victims of human rights violations, thus duly keeping in mind a victim-oriented perspective.

It is obvious that courts as part and parcel of the judiciary have an essential role to play as protectors and guarantors of human rights. Already the Universal Declaration of Human Rights, enunciated the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. Both International Covenants guarantee the exercise of these rights. It was with these rights and principles in mind that the United Nations adopted in 1985 the Basic Principles on the Independence of the Judiciary. In fact, in order to function properly and impartially, the independence of the judiciary is an essential condition and, as the Basic Principles clearly prescribe, the independence of the judiciary shall be guaranteed by the State and enshrined in the constitution or the law of the country. The independence of the judiciary implies that there shall not be any inappropriate or unwarranted interference with the judicial process. The Basic Principles also prescribe that the judiciary shall decide matters before them impartially on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences. There are many other aspects of relevance to the independence of the judiciary, such as appointment criteria and procedures, financial autonomy and adequate resources as well as standards of ethics and accountability.

Special attention should be given to the critical role of the judiciary in times of crisis, such as public emergencies, armed conflicts, internal political instability, and state of civil unrest. Under such conditions the exercise and enjoyment of human rights is in jeopardy anyway and the judiciary may come under enormous stress. Their role as protectors and guarantors of human rights is in these circumstances even more indispensable than under “normal” conditions. It is therefore in times of crisis that the judiciary carries an enhanced and crucial responsibility. For this reason and against this background the respected International Commission of Jurists adopted three years ago a Declaration and Plan of Action on the Role of Judges and Lawyers in Times of Crisis.

We have highlighted in this presentation the crucial role of the judiciary and for that matter the role of domestic courts as an essential condition for the implementation of international human rights law. Already in the 18th century the French philosopher De Montesquieu launched the *Trias Politica* as a political doctrine of the separation of powers: the executive power, the legislative power, and the judicial power. These three powers – some may be more powerful than others – carry their own distinct responsibilities which all encompass the promotion and protection

of international human rights. Yet, in the final analysis, it must always be kept in mind that an independent and impartial judiciary is a major condition for the fair administration of justice and for upholding the intrinsic values of human dignity and rights.

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

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兩年內檢討不符合兩公約的法規—— 一個 NGO 工作者的經驗與省思

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摘要

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

關鍵詞

兩公約、非政府組織、人權、兩公約施行監督聯盟

壹、前言

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

貳、兩公約施行監督聯盟和修法

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

參、「法令及行政措施是否符合兩公約規定」之檢討

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

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

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

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

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

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

一、對於哪些是兩公約該處理的議題，範圍界定不清：

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

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

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

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

二、政府事前準備不周，事後政治決心不足

政府當初訂定在兩年內完成修法工作，著實低估了問題的廣泛性與深度，其所規定之期限，並未參酌國外先例。就英國與加拿大之經驗而言，即使長期關注人權議題的國家都難以完整修法，更何況我國已脫離國際人權系統長達四十年？若與英國情況相比，英國於一九九八年將歐洲人權公約內國法化的時，特別設計將其生效日定於二〇〇〇年，以便有整整兩年進行必要的培訓與法令及行政措施之檢討。脫離人權體系已三十九年的我國，準備期卻只有短短七個月又十八天（自2009年四月二十日施行法公布，至同年12月10日生效），（黃文雄，2010）若參考曾勇夫（2011），可知各機關用於檢討之時間更短，僅至10月31日。

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

三、狹義解釋減損經社文公約的適用性

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

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

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

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

四、只論法律，不看政策

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

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

年排擠社福預算」，2010/11/04。

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

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

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

五、只問法律，不看執行

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

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

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

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

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

肆、結論

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

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

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

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Abstract

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

Keywords

Two Covenants, NGOs, Human Rights, Covenant Watch

I. Preface

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

II. Covenant Watch and Modifies the Laws

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

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

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

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

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

¹See <http://covenants-watch.blogspot.com/p/blog-page.html>

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

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

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

1. There are so many different kinds of problems that NGOs face. Every case involves the complicated laws, the management authorities, the society's situation, and the different values and so on. NGOs also keep working hard on the issue of legislation and serving between the cases' people. These two issues are very different, no matter the concepts, methods, or practical operation. NGOs perhaps can try to understand every case's difficulty but the case may involve many laws and the more difficulty is the official document from the local institution. There are many problems in reality and the difference between two covenants. It's a big challenge to NGOs that which articles in the covenants belong to national laws or which national laws conflict with which articles of the two covenants. In addition, some measures violating the human rights may come from the overall policy of the government instead of the single law. For example, the controversy of the case of Kuo-Kuang Petrochemical is unlikely to simplify to a single law.
2. There are so many international human rights covenants in the world but only two covenants and Elimination of Discrimination against Women have the enforcement act in Taiwan and the act even has to wait to implement until 2012. And because the contents of the two covenants are very simple, they need the general comments' explanations to clear its purposes. Moreover, beyond the two conventions, many other covenants are more specific and more suitable for some cases; such as Convention on the Rights of the Child, Convention on the Rights of Indigenous People, International Convention on the Protection of the Rights of All Migrant, International. Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities. Even at the end of 2010, one year after implementing, the government cannot provide the collection of general comments. Later, Taiwan Association for Human Rights and Covenant Watch

³ See http://www.lawtw.com/article.php?template=article_content&area=free_browse&parent_path=1.6.&job_id=158086&article_category_id=19&article_id=86097

publish the version of traditional Chinese in June, 2011.

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

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

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

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

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

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

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

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

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

According to the report of 16th reexamining conference on Apr. 6th, 2010⁶, the discussion was mainly about the civil groups proposed the government for substantially changing the death penalty policies—to abolish death penalty. The government executed the death penalty was objecting a person's lawful right, and this might violate International Covenant on Civil and Political Rights (ICCPR), Article 6 and 16. The government should set a timetable as soon as possible to abolish the death penalty. The outcome was: "this case had something to do with the policies instead of

⁵ Tseng Yung-fu. "Promote and Implement Two Covenants—Human Rights Protection." RDEC , 35-3, June, 2011.

⁶ See <http://www.humanrights.moj.gov.tw/ct.asp?xItem=223296&ctNode=27273&mp=200>

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

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

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

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

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

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

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

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

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

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

⁸ See <http://www.coolloud.org.tw/node/64356>

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

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

4. Neglect Policies, Focus on Law.

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

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

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

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

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

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

5. Neglect Execution, Focus on Law

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

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

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

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

IV. Conclusion

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

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

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

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

廢除死刑：臺灣司法改革和政府落實兩公約的照妖鏡*

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摘要

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

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

關鍵字

廢死、司法改革、兩公約、生命權、公民與政治權利國際公約

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壹、前言

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

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

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

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

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

貳、說一套、作一套

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

對於廢除死刑的政策問題，當前的執政者口徑幾乎是一致：廢除死刑是長遠

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

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

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

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

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

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

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

參、對兩公約的知識不足：從人權報告初稿談起

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

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

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

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

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

⁶ 2011 年 10 月 27 日，中央社報導。

⁷ 見前註 3。

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

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

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

一、只有流水帳,沒有具體政策

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

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

二、真心要「減少死刑」?

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

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

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

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

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

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

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

三、修法計畫：何時會過？

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

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

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

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

四、預算

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

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

依據聯合國人權諮詢委員會所作的第 6 號和第 14 號關於生命權的一般性意

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

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

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

肆、讓政府重回人權保障的舞台：兩公約人權報告及審查制度

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

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

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

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

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

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

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

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

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The Abolition of the Death Penalty: A True Picture of the Implementation of Judicial Reform and the ICCPR²⁹

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Abstract

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

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

Keywords

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

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

I. Preface

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

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

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

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

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

II. Talking the talk but not walking the walk

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

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

Since 2010, Taiwan has twice carried out the batch execution of prisoners yet President Ma Ying-jeou, Premier Wu Den-yih and Justice Minister Tseng Yung-fu have all declared that the abolition of death penalty is their long term goal, but that abolition should be carried out step by step, and with respect for public opinion. On both occasions the Ministry of Justice ignored criticisms from civil societies that these executions violated the Articles of the ICCPR³⁰, instead claiming in ambiguous language that it acted in accordance with the law, consistent with the two human rights covenants.

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

³⁰ Same as note 3.

Group has yet to discuss the draft³¹.

On October 25th 2011, the Presidential Office Human Rights Consultative Committee³² announced the first draft of the Initial Report³³(or the First Draft) required by the two Covenants. In the sixth Article of the draft, the national position on the abolition of the death penalty was not proposed and even the long term goal (the abolition of the death penalty) was absent.

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

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

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

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

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

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

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

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

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

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

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

1. A series of ledgers instead of concrete policies

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

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

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

³⁵ See note 5.

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

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

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

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

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

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

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

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

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

³⁷ See note 11, p.136

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

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

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

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

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

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

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

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

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

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

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

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

members and the final say lies with the President of the Judicial Yuan. Those moves handed the budding external mechanism on supervising judges back into the governments' hands. Overall, we give the final version of the Judges' Act a score of only 50 out of 100.³⁹

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

4. Budgets

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

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

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

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

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

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

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

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

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

In order to supervise the implementation of the Two Covenants, the Covenants Watch was established one day before International Human Rights Day in 2009.⁴¹

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

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

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

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

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

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

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

場次八：專題演講

Panel VIII: Speech

主持人/Moderator：蘇永欽 副院長
(Vice President Yeong-Chin Su)

講者/Speaker：Mr. Allan Rock

國家保護責任的 10 年：對其過去、現在、未來的檢討

Allan Rock

(加拿大渥太華大學校長)

壹、介紹

當聯合國會員國在 2005 年全體一致通過採用國家保護責任(R2P)時，在現實層面的適用上卻出現了不確定性，是否能成功將此概念從一個政治宣言轉化為一被各國承認的國際準則，並讓聯合國安理會授權軍事行動。

在 2005 年的全球高峰會上，R2P 的概念在大會中被全票通過，但在 40 頁的「結果文件」中，其僅僅只在兩頁被表達。

此高峰會與結果文件的平衡是用來處理多面向的主題，例如國際發展援助、反恐與安全、限武與防止武器擴散、建構和平、與聯合國的改革。在這些情況中，R2P 的概念很容易被認為是事後諸葛，或是空中樓閣：一種絕不可能被通過的概念，但之所以會被採用，原因是成員國被其他引起爭論的議題而分散注意力。

R2P 並不只是一持續性的概念，同時也是聯合國安理會作出應對利比亞危機的決議的基礎，其提供了一個對於國家主權以及保護人民避免由於政府無能而被暴露在生命危險之下新架構。

然而 R2P 的概念在利比亞事件的試用性上引出了一些困難的問題：

- ω 在利比亞事件的處理中，R2P 是否被認為是一種成功？
- ω 此教條的運用是否不是原先所意圖的行為？
- ω 有什麼個案是暴行持續，並且沒有相關行動以應對？

貳、干預的個案：R2P 的起源

R2P 的起源來自於干預與國家主權委員會(ICISS)於 2001 年所提出的，此概念的提出是(透過加拿大政府的領導)因為對一些聯合國會員國的邊界出現了大規模暴行的強烈反應。其中又以盧安達和塞布忍尼卡的事件最令人無法忘記。

這些駭人聽聞事件包含了種族屠殺、種族清洗、以及違反人道罪等等，都震驚了全球。但各國並未採行「人道干預」，因為其認為一國的政府對自身的內政有主導權，即使其對自身人民進行屠殺，或是支持此種行為，都不能被干涉。這些反對者引用了聯合國憲章第二條第七款，意即對於「一國內部的司法管轄」各

國無權干涉。

ICISS 認為，面對這些事件的一個問題，在於國家主權的準則是否限制了國際社會，在面對一些國家的政府對人民進行大屠殺，或支持相關作為時，僅能當一名旁觀者。意即國家主權是否已成為防止所有外來介入的盾牌？對於上述令人髮指的事情，道德上的介入可輕易達成，然而是否可有法律上的支持？

在提及國家主權不僅僅代表權利，同時也代表義務後，ICISS 作出結論，其表示一國政府最根本的責任便是保障其人民不被大屠殺所侵害。若其無法，或沒有意願提供這類保護，導致許多生命喪失，此類責任便轉移到國際社會之上，此時國際社會便須採取行動，包含必要的軍事介入，以預防或停止相關暴行。

ICISS 提出了三個實行 R2P 根本的要素：預防—此是 R2P 最重要的要素，也是關注的重點、介入、與危機之後的重建。

預防的要素包含了國際發展援助、能力的建構、應對潛在危機的早期預警機制，以及其他措施以避免各種會激發大規模暴行的情況。

干預意指運用廣泛的手段以及連續的步驟，此包含了從政治抨擊到武器禁運，從政治斡旋到區域壓力以及面對特定目標的制裁行動的一連串措施，其目的在於阻止暴力，停止衝突升高，並保證對受害者的保護。軍事手段是各種可能行動中的最後選項，且僅能在依照嚴格的比例性準則之下才能行使，並使用適當的手法，同時要塑造更多的好處而不是傷害。

聯合國會員國通過 R2P 對全球而言是革命性的，因為此帶來了可以直接介入一個沒有能力或沒有意願保護其國民的國家內政的可能性。R2P 的採用，意指對我們迄今所熟知的國家權力提供了一些重要的例外觀念，為此改變了長久以來我們對國家主權的概念。

在 2007 年，身為歷史學家，同時也是邱吉爾傳記作者的 Sir Martin Gilbert 主張：

「自從 1648 年的西伐利亞和平以來，不介入一國內政—即使是最令人不滿的政府—已成為國際外交之金科玉律。加拿大所提出的「國家保護責任」概念代表此三百六十年以來對國家主權的一個重大的調整。」

儘管 R2P 的概念很重要，但其在 2005 年的全球高峰會之前，並未被認為會為各國所認可。其中一點是在於在 2001 年的 911 事件將各國的注意力從人道介入轉移至安全議題方面。再者，在 2003 年出兵伊拉克後，R2P 的概念便在當時的地緣政治環境中被辯論。美英兩國在伊拉克的軍事行動加深了許多發展中國家對其意圖的疑慮，其認為美國的行動是一種帝國主義的行為，且沒有合法授權，而英國則是幫助者與煽動者。

此種不信任造就了一種很難提出相關原則以介入其他國家的內政的氛圍，不論此目的有多高尚。

儘管有如此多的問題，R2P 的概念仍在高峰會上被全票通過，並有以下宣言：

「每個國家都有義務保障其人民不受種族屠殺、戰爭罪行、種族清洗、以及違反人道罪等罪行，包含預防這些罪行的產生。」

「國際社會與聯合國……都有責任……幫助人民免於種族屠殺、戰爭罪行、種族清洗、以及違反人道罪的迫害。在此背景之下，我們已經準備好在及時的以及決定性的態度之下，實行任何集體行動，並透過安理會與根據聯合國憲章以及憲章中的第七章所進行……此是在和平的手段不足以面對，以及一國當權者無法保障其人民免於種族屠殺、戰爭罪行、種族清洗、以及違反人道罪的迫害。」

R2P 與聯合國憲章第七條的關聯使安理會可將此概念與國際法相連結，若能順利，則可將軍事介入列為可能的集體行動選項的一環。

R2P 之所以被採用，最重要的一點是來自於 77 國集團(G77)的一些關鍵成員國的支持，特別是一些來自非洲的成員國。畢竟非洲聯盟(African Union)的規章與 R2P 的原則在理念上不謀而合，其都表達了在一個政府威脅到其人民的安全時，必須要有集體行動。

參、第二種想法

雖然 R2P 已在 2005 年的全球高峰會上被通過，但在高峰會之後，卻充斥著許多對 R2P 概念感到諷刺的言論。許多觀察家都想了解這種概念到底可持續多長時間，因為由西方國家領頭的介入伊拉克與阿富汗的行動已引起發展中國家不滿。

其他人則認為，無論在何種情況下，是否有足夠的政治意志來呼籲施行 R2P 乃是一問題。即使在此件事上，必須先克服中國與俄羅斯可能投下反對票，這兩個國家都不太支持聯合國「介入」成員國的內政。

而在高峰會之後，在發展中國家中廣泛流傳的「買家的懊悔」(buyers' remorse)報告也預測了 R2P 的概念將持續不長，而這些國家都採用了 R2P 的概念，但往往是不情願的。

因此，這些反對 R2P 的國家將會尋求方法，使聯合國大會重新考慮不通過 R2P。

但是，此兩頁的概念中所包含的偉大想法，使 R2P 可被持續。

在 R2P 被聯合國大會通過後的七個月內，此教條被聯合國安理會所重申，並在蘇丹西部的達佛所爆發的內戰中，被用來組織軍隊以保護當地人民。

在聯合國大會於 2009 年夏天提出要對 R2P 概念進行特別辯論後，反對 R2P

的國家藉此提出高峰會對 R2P 概念的背書不足以使此概念被通過，且意圖藉此使 R2P 被撤回。但在該場辯論中，有 94 個國家參與，且支持 R2P 的國家就占了絕對多數。而聯合國大會也從善如流。

在此場辯論開始前，一種想法已被提出，就是 R2P 已經成為了國際上的準則。

這個問題依然持續著，不論 R2P 是否可能被應用，並且繼續存活。

若 R2P 證明可以存活，則我們所要觀察的，就是其是否有潛力運作，此也是 R2P 的支持者所觀察的焦點。但在許多事件中，那些認為 R2P 是一種可以預防大規模屠殺的新手段的人們都失望了。

即使在 2005 年 9 月 R2P 的概念被正式採用，但在達佛、剛果民主共和國、辛巴威、或斯里蘭卡，人民仍然是大屠殺的目標。

事情真的有改變嗎？

肆、創造歷史：R2P 在利比亞

上述的問題於 2011 年三月得到解答。此時聯合國安理會通過決議案，對利比亞採用軍事行動以應對其領導人格達費對人民的抗議行動進行殘暴鎮壓，而 R2P 在此也從一種概念轉化為行動的準則。

在軍事行動之前，聯合國安理會於 2011 年二月 26 日提出第一個決議案，將利比亞的情況傳達給國際刑事法院，同時對利比亞進行武器禁運。但除了大家一致表決將此事件轉交給國際刑事法院外(很不尋常，因為美國長期以來抵制國際刑事法院)，該決議並未有具體的成果。

是第二個利比亞決議創造了歷史。

在 2011 年三月 17 日，聯合國安理會通過了 1973 號決議，在利比亞上空設立禁航區，並授權在保護人民安全以及加強武器禁運上要採取「所有可能的行動」。此意味著可對利比亞進行軍事介入。此次表決在安理會以十比零通過，而有五國棄權，分別是巴西、中國、德國、印度、與俄羅斯。在常任理事國有否決權之下，若中國與俄羅斯投下反對票，則此決議將付諸東流。

該決議重申利比亞的當權者應在保護人民之上負起責任，並強調若利比亞政府對人民進行「廣泛與有系統的攻擊」將是違反人道的罪行。

此決議排除了用軍隊占領利比亞的想法，因此使阿拉伯世界與其他國家了解到此次軍事行動將不同於出兵伊拉克與阿富汗。

伍、利比亞的 R2P：為何發生於此？

在利比亞的案例中有什麼因素讓安理會如此快速且深入的執行 R2P？有一些要素的出現帶來此戲劇性的發展。

第一個是格達費政權將事件視為動亂處理，然後利比亞在 2011 的一月與二月捲入內戰。

隨著暴動初期幾週反抗軍一個接一個地掌握不同城鎮，利比亞官方以逐漸升高的暴力與侵略行動回應。不同於阿拉伯之春中突尼西亞與之後埃及的革命，專制君主面對大規模群眾抗議而流亡且軍隊拒絕攻擊民眾，利比亞軍隊(以及傭兵)將槍桿轉向異議人士。

當反抗軍掌握了東部大城班加拉，格達費威脅要攻擊並殺害他們且發誓「將毫不憐憫與留情」。他的言行--特別加上他過去的犯行與不理性--顯示出當殘暴的格達費面對不成比例的軍力與班加拉手無寸鐵的民兵時真的會有大屠殺出現的風險。對一個對過去的不作為仍深感羞恥的世界--在盧安達、塞爾維亞、以及其他地方--現在是行動的時候了。

第二個重要的原因是地區組織的鼓勵與支持。

安理會顯然注意到阿拉伯聯盟、非洲聯盟、以及伊斯蘭會議組織秘書長對利比亞違反人權以國際人道法律的譴責。

安理會特別受到阿拉伯國家聯盟在 2011 年 3 月 12 日要求設立利比亞戰機禁航區以及在炮擊地區建立安全區域以作為保護平民之預防措施的決議影響。

最後，一定要提到不同於其他 R2P 支持者未能成功擁護一強硬行動的案例(直接想到達佛)，利比亞的情況總體而言容許一個強力的回應。地理上來說，同時也是地緣政治的觀點，此行動是可行的。在其他地方可能阻礙此干預行動的自然因素，如距離遙遠或是地形，在利比亞都未成為阻礙。除此之外，空中軍力很特別地可以達到任務目標，因此組織及部署地面軍力的困難與分裂議題並未出現。這些情況的加總效果為擁護強硬行動者創造了一個有利的環境。

除此之外，當然安理會自己處理了此案例中的政治面向以避免了否決權的使用，並取得足夠的共識，因此得以允許此大膽的行動。

美國及英國提供了強而有力的領導。法國在推動 2011 年 3 月 17 日的決議案中扮演一個積極的角色，或許受先前未能提供初期的鼓勵給後來成功推翻暴政的突尼西亞而遭受批評的刺激使然。黎巴嫩持續地並執意擁護強而有力的行動有助於激勵地區國家的認可。南非與奈及利亞借予重要的支持力量：沒有他們的贊成投票，決議案無法達到通過所需的九票。

有些安理會會員對此決議案的立場令人訝異(如當德國棄權，雖然之後宣稱他們與任務目標的立場一致)。俄羅斯與中國沒有否決此決議案大概是因為評估

各界普遍對格達費失去耐心，以及國際間有強烈的共識認為應該中止格達費。

陸、利比亞的教訓

現在利比亞的行動已經結束，是時候反省此歷史事件並評估我們學習到的教訓。

一、保護還是改變政權？

首先，且或許是最急迫的，應指出許多聯合國違反其目的的干預措施此嚴重問題。我們應該討論分隔戰線，一方面有防禦性的行動保護人民不受屠殺式的攻擊(可能需要讓暴君的指揮與掌控能力失靈)，另一方面以攻擊性的行動以達到改變政體的結果(此超越了 R2P 保護委託任務)。

考量地面任務可能出現的各種情況以及「戰爭迷霧」的複雜效應，這個重要的議題應在下次危機出現前由聯合國會員國辯論以辨認治理的原則並讓我們下次能更有準備以在適當使用武力上能更做出細微但重要的區別。

2011 年 3 月 17 日決議案與 NATO 行動的目標是為了保護平民。然而美國歐巴馬總統與英國首相卡麥隆一再地斷言格達費必須下台，型塑了一個北約主要行為者認為行動目標是為了改變政局的印象。選擇在黎波里攻擊目標，遠離危害班加里的民眾，增加了 NATO 的目標是領導者而不僅是軍隊的觀感。

未來 R2P 作為一種保護措施有其風險。

在這第一次依 R2P 原則的主要攻擊行動，R2P 的支持者被認為是超越了預防及保護措施且是在內戰中選邊站，特別加上如果他們被認為是以消滅國家領導人為目標，他們會讓政策反對者在下次類似的案例發生時有很強而有力的說法來抗拒行動。這些給過去幾年許多將 R2P 與西方帝國主義聯結的發展中國家人士表達憂慮者更好的立論基礎。

畢竟，嚴格來說對抗格達費武力的軍事成功不必然是 R2P 的成功。如果此政策真的是為了保護與預防，則當班加里避開了格達費威脅的大規模殺害時任務就算成功。如果僵局因此產生且需要其他政治提議來解決之--無論是透過談判來分割國家或是權力共享的安排，或是兩者，則就應該是如此。

二、敘利亞呢？

其次，這裡還有一致性的問題。有些人問到為什麼類似的決議案與行動在巴林、敘利亞、或是葉門這些壓迫政權對他們的人民進行屠殺式攻擊的地方沒有出現。

對於敘利亞情勢應有更有力道的回應的主張特別強大。根據聯合國估計，至今在敘利亞有超過 3400 個平民被政府的安全部隊殺害，隨著阿賽德政權持續訴

諸武力以鎮壓抗議者並完全不遵守他在 11 月初假裝接受的阿拉伯聯盟仲裁的協議，敘利亞的死傷持續增加中。

當然，對於這些實行 R2P 不一致的指控沒有一簡單的答案可以回答。可以確定的是，每一個案例都有一些情況可以解釋，雖然他們可能無法辯解，為何未能採取防禦人民的行動。但最終來說，當目標是保護人民不受人道侵犯時，我們很難對不同的對待方式自圓其說。

若阿拉伯聯盟在制裁外進一步要求安理會介入敘利亞，安理會沒有藉口阻擋他們在利比亞案例中施行的保護行動。

可以確定的是，我們不採取行動保護其他地方人民的原因並不是因為我們在利比亞沒辦法做到。

三、北非公約組織？

第三，現在當然是思考聯合國實行干預措施的方式之時候。NATO 為國際社群所作的是否恰當？

對於由世界各地區組合成的常設多邊武力有很強烈的爭論。雖然 NATO 在利比亞的軍事行動很有效，NATO 並不是為了這樣的目的而創立的。為了政治與實際的理由，歐洲和北美國家不應該被委託作這樣繁重的工作。歐巴馬政府似乎同意這樣的觀點。美國支持 R2P 但是他們樂見更廣泛的國家參與執行。

現在應該將精力放在創造一個各區域國家都能貢獻、且可以快速成軍以落實安理會保護行動的聯合國常設軍力。

四、重建

最後，我們別忘了 R2P 原則的第三個要素：國際社群在干預結束後應貢獻重建所需之力量。利比亞人民在修復、協商、以及建立民主制度的廣泛任務中將需要協助。這些工作也構成部份的「保護」。

若我們未能在一個已被一政治強人有效統治 40 年的國家其建立治理制度的過程中貢獻力量，則將留給利比亞人民極大的風險。

這並不是說我們自大的以為自己有權利決定利比亞應如何被統治：這應該是利比亞人民自己決定的。但我們應該以謙卑並尊重的方式來支持他們的努力，我們可以幫助建立能力、提供有用的模範並分享治理見解以供他們參考。

柒、結論

當被要求在國際法與治理下解釋 R2P 的現狀時，安南回答這些一個「新興的規範」。他的出現是快速的、也是戲劇化的。在短短 10 年間，R2P 已由單純的政策提案成為安理會在授權軍事干預時的基礎。但隨著他快速的浮現，他的解讀與實行也引發了深刻的及具爭議的問題。

透過令人信服的案例，利比亞的行動讓這些問題成為焦點。那些相信要以集體行動保護在殘酷暴君手下受到極可能使用大規模武力威脅的人民的人現在必須以誠實與嚴厲的角度來看待這些問題。只有透過展現 R2P 保有其初衷，我們才可以在這個重要且具歷史意義概念上保持我們對國際社群的信心。

THE RESPONSIBILITY TO PROTECT 10 YEARS ON : REFLECTIONS ON ITS PAST, PRESENT AND FUTURE¹

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I. Introduction

When UN member states in 2005 unanimously adopted the bundle of principles known as “the Responsibility to Protect” (or R2P), there was real uncertainty whether the concept would ever succeed in moving from mere political declaration to a recognised international norm, let alone a basis for the Security Council to authorize military action.

The adoption of R2P was expressed in just two paragraphs of the 40 page “outcome document” following the 2005 Global Summit that was adopted by a unanimous vote of the General Assembly.

The Summit, and the balance of the outcome document, dealt with subjects as diverse as international development assistance, counterterrorism and security, disarmament and nonproliferation, peacebuilding and UN management reform. In those circumstances, it was easy to allege (as many did) that R2P was either an after-thought or an oversight: a radical notion that many believed would never have been approved as a standalone proposal, but that had survived the final cut only because member states were too distracted by larger and more controversial issues to pay sufficient attention.

R2P has not only endured, but by serving as a foundation for a Security Council resolution adopted in response to the crisis in Libya, it has provided a framework for an entirely new approach to national sovereignty and an instrument of unique value for the protection of populations when the failures of their own governments expose them to mortal risk.

But its dramatic application in Libya has given rise to difficult questions:

ω In the wake of the Libyan mission, can R2P be judged a success?

¹ Notes for a Presentation¹ by Allan Rock at the Human Rights Symposium, Soochow University, Taipei, Taiwan. December, 2011

- ω Is the doctrine being applied in ways that were not intended?
- ω What of the cases where atrocities continue and no action has been taken?

II. The Case for Intervention: the Origins of R2P

R2P has elicited strong reactions from the moment it was first proposed in 2001 by the International Commission on Intervention and State Sovereignty (“ICISS”) appointed (through the leadership of the government of Canada) in the wake of several mass atrocities within the borders of UN members. Massacres in Rwanda and Srebrenica are only the most prominent that come to mind.

Those appalling incidents of genocide, ethnic cleansing and crimes against humanity shocked the world’s conscience. Calls for “humanitarian intervention” as these awful events unfolded were met with the objection that each country’s government is master of its own affairs, even, it seems, when that involves slaughtering its own people, or standing by as others do so. Those who resisted action referred to the UN Charter’s Article 2 (7) which expressly prohibits intervention “in matters which are essentially within the domestic jurisdiction of any state”.

ICISS grappled with the question whether the principle of national sovereignty confines the international community to the role of bystander when civilian populations face mass murder carried out or enabled by their own governments. Is sovereignty a shield to prevent all outside interference? The moral case for intervention in such cases is easily made, but can there be a legal justification for doing so?

Reasoning that sovereignty entails not only rights but responsibilities, ICISS concluded that each government’s most fundamental responsibility is to protect its citizenry from mass murder. If the government is unwilling or unable to provide that protection with the result that there is a real risk of significant loss of life, the responsibility shifts to the international community to take steps—including military intervention if necessary—to prevent or stop the mass atrocity.

ICISS set out three fundamental components of R2P: prevention—by far the most important and the greatest focus of its work—intervention and rebuilding once the crisis has passed.

Prevention includes international development assistance, capacity building, early warning systems to pick up potential crises and many other efforts to avoid circumstances that can give rise to mass atrocity.

Intervention means a vast range of measures on a broad continuum of possible steps, from political denunciation to arms embargoes, from mediation to regional pressure and targeted sanctions, all with the purpose of dissuading violence, stopping escalation and ensuring protection. Military means are truly the last resort in that long list of potential actions, and then only to be used in accordance with strict principles of proportionality, proper purpose and when reasonably capable of producing greater good than harm.

The adoption of R2P by the UN membership was truly revolutionary, given the prospect that it raises of direct interference by outside actors in the domestic affairs of a state that is unwilling or unable to protect its own citizens. Its adoption changed forever the notion of national sovereignty by introducing an important exception to the hitherto absolute nature of a country's prerogatives.

In 2007, historian and Churchill biographer Sir Martin Gilbert asserted that,

“Since the Peace of Westphalia in 1648, noninterference in the internal policies even of the most repressive governments was the golden rule of international diplomacy. The Canadian-sponsored concept of ‘responsibility to protect’ proposed the most significant adjustment to national sovereignty in 360 years.”

Despite its significance, R2P had seemed an unlikely candidate for approval in the runup to the 2005 global summit.

For one thing, the focus of the world's attention had, on Sept. 11, 2001, shifted away from humanitarian intervention to issues of security.

Furthermore, R2P was being debated in the toxic geopolitical environment created by the 2003 invasion of Iraq. Seen by many as an illegal and illegitimate means of regime change by an imperialistic Pentagon, aided and abetted by the United Kingdom, the Iraq invasion deepened longstanding suspicions among developing countries about the motivations of the U.S. and the UK.

The resulting distrust created an atmosphere that was hardly conducive to the adoption of a principle calling for outside intervention in countries' domestic affairs, no matter how noble the alleged purpose.

Despite these long odds, the summit's declaration recorded unanimous agreement in these terms:

ω *“Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity [including] the prevention of such crimes.”*

ω *“The international community, through the United Nations, also has the responsibility...to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII...should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”*

The reference to the UN Charter’s Chapter VII opens the way for the Security Council to make its demands binding under international law, if it chooses to, adding military intervention to the list of possible collective actions.

Critical to R2P’s adoption was the active support of some key members of the G77, particularly among the African member states. After all, the African Union constitution itself contains language very similar to the R2P principles, recognising a collective role when a rogue government threatens its own population.²

III. Second Thoughts

Notwithstanding the apparent clarity of the 2005 commitments, the postSummit commentary about R2P’s prospects was highly cynical. Many observers wondered how long such a decision could stand, given the allergic reaction among developing countries to Western-led interventions following Iraq and Afghanistan.

Others questioned whether the political will to invoke R2P could ever be generated, no matter what the circumstances. Even in such a case, it would of course be necessary to overcome the potential veto of China and Russia, each notoriously reluctant to countenance UN “interference” in the affairs of member states.

Predictions of a short lifespan for R2P following the Summit acquired greater currency from widespread reports of “buyers’ remorse” among developing nations who had gone along (in some cases very reluctantly) with R2P rather than stand apart from the crowd.

And so, the expectation grew that its opponents would find ways to have the General Assembly reconsider if not reverse the adoption of R2P.

But the two paragraphs and their powerful idea proved remarkably durable.

² See AU Constitutive Act, Article 4, which sets out principles by which the AU will act, including: *the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.*

Within seven months of its adoption by the General Assembly, the doctrine had been reaffirmed by the Security Council and then invoked by the Council in creating a protection force for civilians caught up in a civil war in Darfur in western Sudan.

When the General Assembly scheduled a special debate on R2P in the summer of 2009, the doctrine's opponents seemed to have found their moment: an opportunity to roll back the summit's unqualified endorsement and to narrow or revoke the broad and unanimous commitment. But of the 94 nations that participated in the debate, the clear majority were generally very supportive. The resulting General Assembly resolution was benign.

In the wake of that debate, there finally arose a cautious sentiment that perhaps R2P had indeed taken root: that it was here to stay, as an emerging standard of international conduct.

The question remained, however, whether it would ever be applied and brought to life.

If R2P proved hardy enough to survive a difficult infancy, even its strongest supporters were left to wonder whether it would ever fulfill its potential. In case after case, those who saw it as a new and effective instrument to prevent or stop mass killings were disappointed.

Whether in Darfur or Democratic Republic of Congo, Zimbabwe or Sri Lanka, the targeting of civilian populations continued unabated despite the ringing declaration of September 2005.

Had anything really changed?

IV. Making History: R2P in Libya

That question was answered with the transformation of R2P from emerging concept to operational principle through the adoption in March, 2011 by the Security Council of the second of two resolutions dealing with the crisis in Libya after the brutal response of its leader, Col. Muammar elQaddafi, to peaceful protests that had surfaced in his country.

The first resolution, adopted February 26, 2011, referred the situation to the International Criminal Court and imposed an arms embargo on the country. Apart from the unanimity of the vote in favour of referral to the International Criminal Court (unusual because of longstanding U.S. opposition to the court), the resolution was hardly groundbreaking.

It was the second Libya resolution that made history.

Resolution 1973, adopted March 17, 2011, imposed a no-fly zone over Libya and authorised “all necessary measures” to protect civilians and enforce the arms embargo. Taken in its entirety, the measure clearly gave a green light to military intervention. The vote was 100 with five abstentions: Brazil, China, Germany, India and Russia. Since permanent members have veto power, a “no” vote by China or Russia would have killed the measure.

The resolution expressly reiterated the responsibility of the Libyan authorities to protect the population and took into account that the “widespread and systematic attacks” being carried out by the government against its own citizens might amount to crimes against humanity.

The resolution did, however, expressly rule out an occupying force, thus reassuring the Arab world and others that this operation would be very different from either Iraq or Afghanistan.

V. R2P in Libya: Why There?

What was it about the case of Libya that impelled the Security Council to move so fast and so far in applying R2P? A number of factors set the stage for these dramatic developments.

The first was the nature of the Qaddafi regime’s response as unrest and then civil war engulfed Libya in January and February of 2011.

Authorities in Libya responded with increasing violence and aggressiveness as rebels seized control of one town after another in the early weeks of the uprising. In contrast to the Arab Spring revolutions in Tunisia and then Egypt, where the despots fled in the face of massive popular demonstrations and the armed forces refused to attack the population, the Libyan military (and paid mercenaries) turned their guns on the dissidents.

When the rebel forces took control of the eastern city of Benghazi, Qaddafi threatened to attack and kill them and vowed that “there would be no mercy or compassion.” His words and deeds—especially given his history of criminality and irrationality—demonstrated a real risk of mass atrocity as the ruthless Qaddafi forces bore down on the militarily overmatched rebels and the vulnerable civilian population of Benghazi. To a world still feeling the shame of inaction in Rwanda, in Srebrenica and elsewhere—the time had come to act.

A second crucial factor was the encouragement and support of regional organizations.

The Security Council expressly took note of the condemnation by the League of Arab States, the African Union, and the Secretary General of the Organization of the Islamic Conference of the serious violations of human rights and international humanitarian law in Libya.

The Security Council was especially influenced by the decision of the Council of the League of Arab States on March 12, 2011 to call for the imposition of a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure for the protection of civilians.

Finally, it must be said that in contrast to other cases in which supporters of R2P had unsuccessfully advocated strong action (here, Darfur comes to mind), circumstances in Libya overall permitted a robust response. Geographically as well as geopolitically, the operation was feasible. Physical factors that may have inhibited such an intervention elsewhere such as remoteness and terrain did not present obstacles in Libya. Furthermore, air power was uniquely capable of achieving the mission's stated objectives, so that the difficult and divisive issue of organizing and deploying ground forces did not arise. The cumulative effect of these circumstances created a propitious environment for those who advocated strong action.

In addition, of course, the Security Council itself managed the political dimension of the case so as to avoid the exercise of a veto and achieve sufficient consensus to permit bold action.

The Americans and the British provided strong leadership. France played an active role in the process leading to the March 17, 2011 resolution, perhaps stung by criticism that it had failed to provide early encouragement to the successful revolt against tyranny in Tunisia. Lebanon's continuous and insistent advocacy for vigorous action helped motivate regional approval. South Africa and Nigeria lent crucial support: without their votes in favor, the resolution would have failed to achieve the 9 votes needed for adoption.

Some of the Security Council members' positions on the resolution elicited surprise (as when Germany abstained, while afterwards claiming solidarity with the mission's aims). The fact that Russia and China did not veto the resolution is perhaps a measure of the widespread impatience with Qaddafi and of the strong international consensus that he should be stopped.

VI. Lessons Learned in Libya

Now that the Libyan mission has ended, it is time for reflection on that historic episode and to take stock of what we have learned.

1. Protection or Regime Change?

First, and perhaps most urgently, there are serious questions to be addressed about the nature of the UN intervention measured against its purpose. We need to discuss the line separating, on the one hand, defensive military action to protect populations from murderous attacks (potentially requiring the disabling of a tyrant's command and control capacity), and on the other, going on the offense to effect regime change (which is beyond the R2P protection mandate).

Given the infinite variety of circumstances that can arise on the ground and the complicating effect of the “fog of war”, this crucial issue should be debated by UN member states before the next crisis arises, to identify governing principles and better prepare us the next time to make subtle but important distinctions in the proper use of force.

The stated purpose of the March 17, 2011 resolution and the NATO operation that followed was to protect civilians. Repeated assertions by U.S. President Barack Obama and British Prime Minister David Cameron however that Qaddafi must leave office created the impression that key NATO actors saw the objective as regime change. The selection of bombing targets in Tripoli, far from the endangered Benghazi population, added to the sense that NATO was aiming at the leadership and not just the military.

There is risk here for the future of R2P as an instrument of protection.

If in this first major foray under the R2P principles, its proponents are seen to have gone beyond prevention and protection and to have actually taken sides in a civil war, and especially if they are seen to have targeted the country's leader for elimination, they will give the doctrine's opponents very powerful arguments for resisting action the next time such a case arises. The concerns expressed for years by many in the developing world linking R2P with Western imperialism will be seen to have been wellfounded.

After all, a military victory over the Qaddafi forces was not, strictly speaking, necessary to R2P's success. If the doctrine is truly about protection and prevention, the mission arguably succeeded when the mass murder threatened by Qaddafi in Benghazi was avoided. If a stalemate had thereafter resulted and other political initiatives had been required to resolve it—whether through negotiating partition, or a

powersharing arrangement, or both then so be it.

2. What About Syria?

Second, there is the question of consistency. Some are asking why similar resolutions and operations were not undertaken in Bahrain, Syria or Yemen, where oppressive regimes have launched deadly attacks on their civilian populations.

The argument for a more muscular response is particularly strong in Syria where, by UN estimates, over 3400 civilians have been killed to date by government security forces, and where casualties continue to mount as the Assad regime repeatedly resorts to force to quell protests and fails utterly to abide by the Arab League-brokered agreement that it pretended to accept in early November.

There is, of course, no easy answer to these charges of inconsistency in the application of R2P. To be sure, each of the other cases involves circumstances that explain, even if they do not excuse, the failure to act in defence of their vulnerable populations. But ultimately, it is very difficult to justify differential treatment when the objective is the protection of civilians from crimes against humanity.

Should the Arab League move beyond sanctions to call upon the Security Council to intervene in Syria, there will surely be no excuse for the Council to withhold the protection it afforded in Libya.

What can be said is that the mere fact that we are not acting to protect populations elsewhere is not a reason for failing to do so in Libya.

3. The North African Treaty Organisation?

Third, the time has surely come to consider the means by which UN interventions are carried out. Is it really appropriate for NATO to act on behalf of the international community?

There are strong arguments for a standing multilateral force, drawing from all the world's regions. While NATO was effective in carrying out the military operations in Libya, it was not created for such a purpose. For political and practical reasons, European and North American countries should not be left to do the heavy lifting. The Obama administration seems to agree. The Americans support R2P but they would also like to see a broader base of countries involved in its enforcement.

Efforts should now be devoted to the creation of a standby UN military capacity to which states from all regions would contribute, and which would be available quickly to act on Security Council protection mandates.

4. Rebuilding

Finally, let's not forget the third element in the R2P principle: the international community must contribute to the effort required to rebuild now that the intervention has ended. The people of Libya will need help with the massive task of repair, reconciliation and establishing democratic institutions.

This effort too forms part of "protection".

It would leave the Libyan population at great risk to fail in our duty to contribute to the process of establishing institutions of governance in a nation that has been effectively under oneman rule for over 40 years.

This is not to say that we are to arrogate to ourselves the right to decide how Libyans will be governed: that is to be determined by the Libyan people themselves. But we must work with humility and respect to support their efforts, making available such means as we can to help build capacity, provide useful models and share insights about governance for their consideration.

VII. Conclusion

When asked recently to explain the current status of R2P in the context of international law and governance, Kofi Annan replied that it is "an emerging norm".³ Its emergence has been both rapid and dramatic. R2P has moved from a mere policy proposal to the basis for Security Council authorized military intervention in just 10 years. But as quickly as it has emerged, it has engendered profound and unsettled questions about its interpretation and application.

The Libyan mission has brought these questions into sharp focus through a compelling case in point. Those who believe in collective action to protect civilian populations imperilled by credible threats of mass violence at the hands of ruthless tyrants must now address those questions with honesty and rigour. It is only by showing that R2P will remain true to its original purpose that we can maintain the confidence of the international community in this vital and historic concept.

³ Kofi Annan, Panel Discussion presented in Ottawa, Canada by the Centre for International Policy Studies, University of Ottawa, Friday November 4, 2011.

場次九：專題演講

Panel IX: Speech

主持人/Moderator：蘇友辰 律師
(Mr. Yiu-Chen Su)

講者/Speaker：Professor Kyong-Whan Ahn

韓國國家人權委員會：十年的榮耀與失望（2001-2011）

Kyong-Whan Ahn

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壹、前言

1987 年是韓國現代歷史的分水嶺，為後續的執政治民主化提供了重要的基礎。在 1987 年群起民變，為總統民選而奮鬥，在同年六月底獲得勝利，當時對韓國人民來說，人民直選總統是一個象徵性的任務，去彌補軍事獨裁領導下被剝奪的民主價值。民眾的勝利被認為是憲政上的改善，某種程度上，它伴隨著舊有世代多年來的夢想與新起的時代精神。在新的憲法下，總統由人民直選，且一個任期為五年不能連任，新憲法也帶來了新的司法制度，也就是憲法法院。新憲法法院的出現，就像一國嶄新的制度的出現一樣，對其他國家來說，是個重要的參考依據。

人民的勝利沒有因為新制度的建立而停止，真正的勝利在於內在價值的改變：人民漸漸了解自己的主權，也在生活中主張自己的人權價值。現在人民主權這個概念也被具體化，參與式民主的精神也廣為流傳，這種意識逐漸滲透至一般民間、政治、社會、經濟以及文化生活。在社會每個層面中，舊有的實踐不斷用新的標準來檢驗，像是消費者的權利(consumers'rights)、需求導向的政策(demand-driven polices)逐漸變成每天生活中的用語，¹1990 年代非政府組織不斷地成長，也在韓國社會的民主轉變的過程中，提供了新的導航力量。²

在韓國公民社會滿心期待與祝福下，另一項制度在 2001 年 11 月產生，韓國國家人權委員會的建立。其建立要歸功於在這方面投注很多心力的非營利組織。

本文主要概述韓國國家人權委員會這十年的歷史與發展，第二部分是南韓國家人權委員會，發跡起源的過程，第三部分將簡述國際社會上，所理解的韓國人權情況是如何，第四部分則是著重在南韓國家人權委員會的架構和運作機制，第五部分將聚焦在南韓國家人權委員會近 7 年（2001-2007 年）主要的一些活動，第六部分，則是關注在新總統上任（2008 年至今）之後的轉變為何，第七部分則是總結國家人權委員會，未來的一些建議以及需要改善的地方，以便讓國家人

¹ Chang Seung Wha & Lee Chang Hee eds. *Procedural Justice and Rule of Law*, Pakyoungsa Publishing (Seoul, 2003).

² Cho Hee-Yeon, *The Role of NGOs in the Democratic Transition*, 3 ASIA Quarterly 124-144; Eun Jong Park, ed. *NGOs and the Rule of Law*, Pakyoungsa Publishing (Seoul, 2006); Cha Byung Jik, "NGOs and Law", Ewha Womans University Press (Seoul, 2002); Lee Chan Jin, "Remedy through Judicial Process and NGOs: Challenges and Alternatives", EJ Park ed. pp.85-114

權委員會，能為韓國整體建立更好的制度，讓韓國的人權能更受到重視以及提升。

貳、國家人權委員會的起源

韓國是在 1948 年由聯合國的提案下創始的，諷刺的是直到 1991 年才成為聯合國的會員國，該年度聯合國同時接受南韓與北韓為其會員國，不論南、北韓在國際的主權地位如何，南、北韓的國內法皆不承認彼此，南韓憲法仍然維持其為朝鮮半島上唯一具合法性的國家，且其領土包含北韓的部分。

1990 年 3 月，南韓國民大會全體一致通過批准聯合國的人權兩公約（分別是《公民與政治權利國際公約》，簡稱 CESCR；以及《經濟、社會與文化權利國際公約》，簡稱 ICCPR），且同年 7 月份即生效（ICCPR 的批准仍有部分異議）。批准人權兩公約是南韓成為會員國的準備步驟之一，成為聯合國會員國，讓南韓有足以參與國際上有關人權議題的討論，也讓南韓有機會從國際現況與趨勢中學習。

1993 年夏天，來自 171 國超過 7,000 名代表湧入維也納，其中包含 30 多名南韓非政府組織代表及律師，他們對於這項人權保障的議題，提升至國際上的感到有興趣，在此之前，他們對於有關人權的知識、興趣與活動，幾乎無法跨出其國家的界線。特別是他們被“NHRI”這個新名詞所吸引。NHRI（國家人權委員會）代表一種國內對於實踐人權有效的制度。反過來說，這些啟蒙都必須要有新的嘗試，為了建立一個獨立的國家人權委員會，他們組織了非政府組織聯盟。

1993 年維也納的人權宣言，以及一連串保障與提升人權的計畫行動，皆在納同年為聯合國大會接受，且國家人權委員會成為其核心要件。這些南韓先驅者認為，國家人權委員會成為一種對未來人權進步的象徵與期待。

2007 年總統選舉，他們成功地將此議題投入金大中的選戰過程中，金大中身為反對黨的候選人，其勝選對這些先驅者來說是極為榮耀的勝利。然而，選舉勝利並不代表國家人權委員會可以馬上成立，在勝選一段時間後，他們決定發動一連串活動，讓這個議題存在，必須不斷發表聲明，執行糾察任務、靜坐抗議，甚至絕食，其過程是緩慢且冗長的。當然，這些非政府組織聯盟也舉辦一連串公聽會，為委員會的成立進行法案的起草。有許多草案由不同的人來起草，造成民間社會、政黨、和政府的緊張關係。司法部的原始草案原本要讓委員會在司法管轄權之下，然而社會上許多反對的聲音，讓這個草案被撤回。國際社會同時也強烈關注這個過程。許多聯合國的條約機構，也表達他們的期待，期望能依照巴黎原則建立一個獨立的國家人權委員會。行政機關所提的草案撤回後，當時國民大會的執政黨成員，也出自己版本的草案。他們花了三年的時間，直到 2001 年 11 月，韓國國家人權委員會法案（NHRCK Act）僅以些微的票數驚險過關。當時相對保守的反對黨反對這項法案，少數的執政黨成員，也反對此項法案的制定，

這也是韓國史上第一次非政府組織在法案審查的過程中，扮演關鍵、重要的角色，最後在 11 月 25 日，韓國國家人權委員會開始接受民眾的請願書。

在傳統法令上，非政府組織是沒有法定地位的，因此他們的身分對相關利害關係人來說有些尷尬。但是新的普遍性原則下，他們的行為是可以被接受的。在參與式民主的原則下，公民社會本需要採取許多行動來面對行政、立法和司法機關，韓國許多非政府組織所從事的活動，都值得更深入去分析研究。主要有三種團體，婦女團體、環保團體與身心障礙人士在這方面有顯著的成就，1990 年代左右，這些非政府組織的領導者，也曾加入政府組織擔任決策者。他們將議題帶入政府議程設定中，並挖苦稱自己為「下一個政府官員」(Next Government Officers)、並以「接近政府的組織」(Near Governmental Organization) 來稱呼他們的團體，然而，保守派則是批評這些非政府組織為「左派政府的紅衛兵」(Red Guards of the left-wing government)。

韓國國家人權委員會的誕生，對韓國人民及這些非政府組織來說，是一個明顯的勝利，對前一年 (2000 年) 才獲得諾貝爾和平獎的總統金大中來說，也是極為榮耀的成就。然而，對當時反對黨來說，國家人權委員會的成立，猶如金大中意識型態象徵性的辯護。這是韓國國家人權委員會的原罪。對保守派來說，國家人權委員會的行動，和金大中的意識型態是同一邊。其中一個例子是處理北韓人權的態度。金大中的「陽光政策」(Sunshine Policy) 被保守派李明博政府 (2008 年) 所否定，因此國家人權委員會被要求要參與許多針對北韓政府的活動。

參、南韓目前的人權概況

儘管有些議題仍被國際社會所批評，³南韓致力於公民與政治權利的提升仍有廣泛的共識。民眾對警察和檢察當局改革的抗議，已導致具體制度上的改變，舉例來說，監督機制在調查和法律執行的過程中被強化，許多臨時拘留所的設施和軍營也必須接受固定的監督。因此，像是酷刑等國家權利濫用的事件，在近幾年都已減少。此外，過去 20 年來國際上也見證了南韓經濟起飛，南韓也在 1996 年加入 OECD (經濟合作發展組織)，且成功地克服 1997 年亞洲金風暴的危機，維持平均成長率。

相對於南韓在公民與政治上權利的突破，南韓在社會和經濟上的權利仍顯不足，在所有 OECD 國家中，南韓的社會福利預算是最低的，國家人權委員會提出許多政策，建議國家須提高社會福利預算。

同樣地，平等對待的概念成為現代韓國社會中最被可望的價值。韓國社會中，爭取「平等」，「反歧視」的議題，也因此引起大眾關注。南韓也似乎正進行

³ 南韓過去有關人權議題被批評的地方，在於其保留死刑以及國家安全法 (National Security Law)，以及反對良心者的抵抗 (conscientious objection)，然而這些在 1998 年都尚未實際執行。

一場為了平等戰爭的競選活動。在這樣的背景下，法律上禁止歧視行為，以及不平等對待的情況也被擴大。國家人權委員會法列舉了 19 項被禁止的歧視行為。這些項目有傳統的種族、性別、社會地位，也包含了年齡、個人病史以及個人性向。⁴

當韓國社會快速地轉變，韓國人民對於平等概念的感受，也不斷在轉變。總之，對平等的爭辯在未來幾十年中仍會不斷的爭辯，直到沒有韓國人可以免除徵兵制度。

肆、南韓國家人權委員會的架構與運作機制

韓國國家人權委員會具有對社會上各種人權侵犯與歧視的管轄權。一個國家其民主化的歷史較短，仍缺乏許多保障人權的機制，韓國國家人權委員會包含範圍較廣的系統是較被喜愛的。而且，也會較有效的來設定一致的人權標準。⁵

國家人權委員會創始於令人羨慕的人力和寬裕的預算。在國家人權委員會建立的一年後，已有超過 200 名正職員工，及三個地方辦公室。國家人權委員會由 11 位委員組成，其中包含 1 位委員長，3 位常務委員及 7 位非常務委員。總統、國民大會及最高法院對國家人權委員會組成的人事案，具有合法分配的權力。委員的組成必須合法多元，且至少須有 4 名女性成員。國民大會中的反對黨，亦可選擇 1 位常務委員及非常務委員，由總統任命委員長，以及 1 位常務委員、2 位非常務委員。委員會成員的任命無需經由正式聽證會。⁶

人權委員會成立之初，所有成員從不同的地方招募而來。其中 70% 是公務人員，剩下 30% 則是從各個社會部門，例如非政府組織、研究機構、學術機構所招募。所招募的成員中，公務人員過去接受之訓練，是服從政府而不是提出問題來對抗政府。他們缺乏在人權領域上的專業與經驗。後者則是被訓練經常提出問題，但是他們僅有較少的經驗或興趣去解決問題。若兩個團體間能達到和諧，國家人權委員會便可成為一個理想的機構。典型來說，國家人權委員會的地位，屬於公民社會與政府之間。委員長領導力最關鍵的部分，在於如何在這些團體中，保持維妙的平衡，而不會影響委員會的基本精神。

國家人權委員會的決定僅有諮詢性的作用，並未具有約束力。對於國家人權委員會建議，國家機關有裁量權遵守或是忽視其決定，意即國家人權委員會是處

⁴ Article 2(4) of the National Human Rights Commission Act, Law No. 6481, May 24, 2001, as amended as Law No. 8435, May 17, 2007 provides that the term discriminatory act violating equal rights means committing any of the following without any reasonable ground, on the basis of sex, religion, disability, age, social status, region of origin (referring to place of birth, base area of registration, principal area of residence before reaching maturity, etc.), national origin, ethnicity, physical condition including physical features, marital status such as married, single,

⁵ Nohyun Kwak, The Dilemma and Visions of an All-in One NI: NHRC-Korea's experience, 1-2, Conference Paper, National Human Rights Commission of Korea, (Dec. 4, 2006)

⁶ 本文至此，委員長是否要參與任命聽證案的法律修正案，目前仍懸而未決。

於一種道德上的權威，而非法定的權威。只有當國家從是侵害人權的作為時，國家人權委員會才可進行審查。但是個人從事歧視行為時，國家人權委員會仍可介入調查。

國家人權委員會屬於半國際性主體，它有義務將國際上的規範，帶入國內司法體系。如何建立起國際上的標準和國內的無知與反對的橋梁，是一項艱鉅的工作，國家人權委員會往往很容易陷入這種緊張的關係。這種的緊張關係，是來自於聯合國下的國際標準，和南韓國的國家利益和民眾情感。

國家人權委員會亦被授權對於懸而未決的案子，給予法院（包含憲法法庭）一些意見。韓國保守的司法制度並不習慣於這種新的、性質不同的系統，因此，國家人權委員會也必須克服法院所帶來的敵意。

伍、國家人權委員會的繁榮（2001-2007 年）

近年來許多研究皆顯示，南韓的國家人權委員會在保障與提升人權的行動上，有卓越的表現，⁷其主要的一些成就也被突顯出來。

首先，國家人權委員會的設置，能夠把人權保障機制的優點與功效呈現出來。「控告取代請願」成為一個對抗不人道的高貴標語。公家機關回應人民的請願，在韓國並非新鮮事。但是透過正式的控告挑戰政府的行動在過去屬於司法的領域。國家人權委員會設立之初，每年約有超過 6,000 件正式控訴，並以每年 20% 的比例增加。這些抱怨來自於政府機關的各部門，國家人權委員會都能快速有效地回覆。舉例來說，它藉由一個專責小組團隊，改善了囚犯和被拘留者被拘留時的權利，警方和軍方也是國家人權委員會的受惠對象。南韓社會上也有很高的比例（超過 85%）贊成國家人權委員會的設置。

第二，國家人權委員會已提出超過 170 項有關立法與政府的政策建議。舉例來說，國家人權委員會反對部署部隊到伊拉克，阻止全面性的反恐立法。為了減少性別歧視，國家人權委員會向憲法法院提出建議，傳統韓國家庭戶主制的概念是違憲的。這些政策建議被相關研究文獻所支持。其他主要政策建議包含了某些爭議性的議題，像是不斷被國際社會所批評的廢除死刑制度（2004 年），以及國家安全法修正案（2004.8.12）。2006 年國家人權委員會提出改善人權的行動計畫（2006-2008），為所有國家的行動計畫，建立一個基礎的指導方針（國家行動計畫在 2007 年由司法部完成）。在國家行動計畫下制訂了兩個主要的法案：人權教育法（The Human Rights Education Act）以及反歧視法（Overall Anti-Discrimination Act）。然而國家人權委員會的努力，常常被相關的政府機關的遊說所阻擋。

⁷ Bum Suk Baek, "Human Rights As Medium: National Human Rights Institutions(NHRIs) and Regional Human Rights Institutions (RHRIS) in Asian Human Rights Context," a doctoral dissertation, Cornell University Law School, (2010)

第三，國家人權委員會不斷喚醒國內對人權意識的關注，其選擇大學以前的學校作為標的。建議小學不應寫日記，也不斷地建議相關學校禁止體罰的行為，以及放寬對國高中服裝之限制。國家人權委員會也強烈要求各地方政府，應為學生們的人權制訂相關法令。⁸政府大膽地建立一個全國教育資訊系統（NEIS, 2003.5.12），將學生的相關資訊集結，被國家人權委員會認為，此種作為侵犯隱私而反對。國家人權委員會也力促政府，廢止對聯合國兒童權利協定第 21 條的保留。⁹

就像一般新的制度出現，國家人權委員會往往會走向不妥協的情緒和努力去證明他自己。其積極的行動在社會上歡迎與不滿的聲音都有。簡而言之，無論是盛名或是惡名，在二十一世紀的第一個十年，國家人權委員會已在韓國社會建立起他的地位。

陸、南韓國家人權委員會的蒙羞(2008-2011)

一、重建計畫

2007 年由韓國企業前任 CEO、前首爾市市長李明博贏得總統選舉。國家人權委員會身為一個中立且獨立機關，對於行政權的移轉並不期待會有很大的改變。然而，新政府的行為背離了人民的計畫與期待。

2008 年初政府改革團隊宣布要對政府組織進行改造。根據該計畫的內容，南韓國家人權委員會將和其他委員會合併，並且隸屬於總統管轄權下。很明顯這樣的行動違反了巴黎原則，否定了委員會獨立性的本質。委員會強烈地反對，並發動一場保衛戰爭。許多市民和反對黨和委員會站在同一立場，國際社會也注意到這個警訊，讓聯合國人權事務高級專員辦公室（OHCHR）和國家人權保障機關國際協調委員會（ICC）提出官方申明，並且來信致政府改革團隊及外交部。在部份的國際壓力以及政治妥協下，該項計畫被撤回，國家人權委員會的地位也因此保留下來。但總統府和委員會之間的氣氛卻因此降到冰點，委員會被過度地忽視，在新總統上任之前，委員會也不再像以往，被徵詢是否前往做簡報或概述，其中立的地位也不復以往，最後危機的事件便發生了。

二、燭光遊行（Candlelight Rallies）的夢靨及其餘波

新總統上任後，渡過艱難的三個月，從 2008 年 5 月初，示威群眾聚集在首都，每一晚手裡拿著燭光群聚在市政府前，示威遊行每每晚一起度過午夜 12 點。表面上，他們似乎反對總統對美國牛肉進口的聲明：「從現在起，品質最好的美

⁸ 目前已有兩個地方政府通過有關學生人權法案，另外兩個仍在進行中。

⁹ Ahn Kyong Whan, "the Role of the National Human Rights Commission of Korea in Promoting Human Rights Education- Practical Insights" 299-306 in Global Standards-Local Action- 15 years Neuer Wissenschaftlicher Verlag, Wien (2009)

國牛肉將會以最低的價格供應」，美國牛肉議題似乎是個議題點，但其他像是總統任用親信，或是內閣成員的操守問題，也跟這些議題混在一起。民眾高度期待變成了失望，首爾的夜晚對外國觀光客來說是獨特的景象。

對一個以絕對優勢超過 500 萬票勝選的總統來說，這是相當困窘之事。燭光遊行的抗爭是平和的，雖然警方認定某些非政府組織是共謀者，公平來說，這些群眾的聚集都是自發的，沒有任何組織者。手機是主要的聯絡工具。對大部分參與者來說，包含小學、中學學生，這個示威活動比較像是一個文化上的展現而非政治抗議。早期警方似乎是依法遵守「被動且防衛」的執行原則。然而在幾個有限的事件下，當群眾失去控制時，警方也會攻擊示威者，示威者及旁觀者皆遭受波及而受傷，少數警方也因此受傷。為反制此種情況，抗議者也會以聳動的標語抗議。某些保守媒體因此成為示威者的對象。當集會繼續存在，國際上的非政府組織，便快速地表達其聲明、譴責警方，並要求政府保證言論自由及和平集會。

137 份示威者的請願書堆滿了國家人權委員會，宣稱警方侵害人群，在同年 10 月底徹底的調查後，國家人權委員會經過聽證會和審慎思考，駁回了大部份的訴願書，裁決了部份事件。其認為在這些案件中，警方的確濫用其權力侵害示威者的權利。儘管這些委員是由總統任命，這項決定是以 10 比 1 的票數完成的。這個決定也讓媒體和民眾的意見陷入兩極的看法，主要媒體攻擊這些委員不公正、不負責任的決定，原諒了攻擊正當政府的示威者。但是他們卻沒有注意到委員會並無處理示威者攻擊警察的管轄權。一連串的對委員會報復的行動發生。連審計局也開始對國家人權委員會的帳戶審核特別注意。在國民大會會議中，執政黨成員也不斷用辱罵的字眼攻擊委員會成員及主持人。

在國內的不安全感下，南韓國家人權委員會在 2008 年採取許多行動，來慶祝國際人權宣言 60 周年。舉例來說，將國際間的領導者聚集起來，舉辦國際研討會。研討會中在眾多國家人權委員會的同心協力下，建立保障與促進移民權利指導方針，這些行動有助於韓國保障與提升移民者的權利，並為未來解決爭議性的議題打下基礎。

2009 年 3 月 30 日內閣會議中，通過一項組織改造法令，藉由裁員 21% 的比例，來對國家人權委員會進行組織改組。很明顯的此項報復行動主要來自總統辦公室的指揮。相關政府機關認為國家人權委員會的運作，已經在一個無效率的狀態下運作，管理不當且冗員過多。但從相關證據顯示，國家人權委員會之所以被認為需要改造，是因為他們想要趕走那些來自公民社會的成員。他們在國家人權委員會的工作，比擔任公職人員的工作還要不安全，最後很容易成為裁員的犧牲者（2011 年 10 月，國家人權委員會新增 20 名成員，部分被裁的人數被恢復，但這些人都不是當初被裁員者而重新任用的）。

國家人權委員會透過提出組織爭議請願書給憲法法院，認為總統侵犯了國家人權委員會依法獨立性的地位。法院經過 17 個月，在 2010 年 10 月 26 日因認為缺委員會缺乏合法機構的地位，而否決了該項請願。法院裁定國家人權委員會並

非在憲法架構下的一個特別機關，因此，其缺乏正當的代表性足以提出一項組織爭議的訴願書。

在李明博政府中，國家人權委員會必須承受其他政府機關帶來制度上的羞辱。國家人權委員會具有合法的義務，在總統和國民大會面前定期報告其主要活動。它早已建立一套只要書面要求，總統便可進行會面的傳統。然而，新任總統李明博，卻拒絕聽取國家人權委員會的意見。國家人權委員會不斷要求會面，卻一直無回應，直到被前任總統任命的主持人離開該職位。就此而言，總統似乎顯現出其對國家人權委員會的偏見與敵意。

從 2009 年 7 月起，國家人權委員會的主持人是由現任總統李明博指派，公民社會上強烈反對這位新的主持人，因為其無論在學術或實務上皆沒有相關人權經驗。從就職典禮後，組織成員也都更換，國家人權委員會呈現一種消極無生氣的氛圍。更糟的是，主持人對委員會獨立的本質，認識不多，也缺乏信心。他甚至在國民議會中回答，委員會是行政部門的一部分。

2010 年底兩位常務委員和一位非常務委員，辭去職位以表示對主持人獨斷的領導方式抗議，並認為其行為已違反法律和習慣。兩位常務委員中的其中一位是由國民大會執政黨的票所選出來，這讓社會大眾分化成支持者及反對者，媒體對這件事情的報導也相當兩極。在一次意外事件中，一位高中女生在國家人權委員會所舉辦的徵文比賽中得獎，但這個女學生卻不接受該獎項，且譴責國家人權委員會和其主持人，她公開聲明譴責主持人在委員會中行為失當，2011 年 8 月，一項重大事件也震怒了整個韓國社會，一項大規模的行動，反對國家人權委員會成員不適任。此事件的爆發緣由，是國家人權委員會主持人在其任期屆滿前，解雇一位已簽訂合約的員工，他的同事及工會成立組織，不斷地在各大媒體中，發表文章批評這樣的作為，這些人大部分都曾加入國家人權委員會，其中 11 位職員，被認為身為公務人員卻從事這些失當的行為，因此被懲處減薪。

在 2010 年年度報告中，國家人權委員會提出的低紀錄會議數目，和公民社會的溝通互動令人較不滿意，但整體對國家人權委員會主持人的評量還言之過早，但是國家人權委員會確實歷經大麻煩。主持人也許得到總統及保守勢力的信心，但對外來說，某些程度上已失去民眾及社會的支持。委員會也很少提出政策建議，常常在重大人權議題中保持沉默。以上種種原因，都顯示民眾對委員會的失望與落空。¹⁰

國家人權委員會必須要在兩個地方更加關注，分別是企業和人權，以及北韓人民的人權。在 10 周年紀念日上，國家人權委員會便以上述第一項主題舉辦國際研討會（2011 年 10 月），這個研討會無關政治，也無關種種之前對委員會的傷害。為了處理北韓民眾的人權議題，委員會也加強人員的訓練。

¹⁰The Korea Times, Nov.23, 2011. p.2 "Rights Commission urged to be critical of government."

柒、教訓與建議

就本質與定義來說，人權是超越政治、國界，甚至意識型態的普世價值。然而，在現實中人權很容易和政治糾結在一起，韓國人權委員會就是一個例子，可以看出人民的看法和人權的保護機制，如何隨著政治環境的改變而變動。

傳統人權對話在韓國被視為是屬於政治上進部立場壟斷。保守勢力很少提出有關人權的價值與想法，一旦保守勢力提出對人權議題的看法，其視野通常較狹隘，且具負面的、逃避的、防衛性較強的。保守勢力通常會用的說法，像是「人權通常會抑制經濟成長」，或是「多數人的人權，和少數人的人權一樣重要」，他們往往無法對人權議題有正向積極的認同，保守勢力對人權正向的說法是「我們關心北韓人民的人權」。然而上述這項說法，早已在對抗北韓政治體制中，如同競選活動中不斷被提出來。諷刺的是，那些宣稱關心北韓人權的人，並不關心那些被安置在南韓的北韓流亡者。

在最簡單的層級來說，依據巴黎原則視國家人權委員會作為一個獨立的機關，必須滿足三個基本條件。第一，行政機關首長必須尊重且包容，國家人權委員會身為獨立機關的作為。第二，國家人權委員會成員，要將自己視為人權捍衛者並引以自豪，並且要積極地對抗國家的壓制與介入。第三、最嚴格的是，人民和整體公民社會，也必須捍衛國家人權委員會，以避免其遭受政府機關不當的控制。

以南韓國家人權委員會的例子來說，上述三項不可或缺的要件中，前兩項在前 7 年已達成，但在後 3 年中這 3 項並未完全達成，我們必須省思，未來韓國民眾需要什麼樣的國家人權委員會？這是一個開放式的問題，或許 10 年的時間也不夠。

The National Human Rights Commission Of Korea: A Decade of Glories and Despair (2001-2011)

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I. Introduction

The year of 1987 was a watershed in the modern history of Korea, as it provided a monumental foundation for her later journey toward the political democratization. In late June of that year, the nationwide civil revolts finally ended with a monumental victory of the people, who, among others, had fought for the direct election of their President. For the Koreans, direct election of the President had been a symbolic task to retrieve the deprived democracy by the military dictatorship. People's victory was documented with the constitutional amendments, in a manner accommodating both the year-old dream and the newly emerging Zeitgeist. Under the new Constitution, the President is elected by the direct vote of the people, and serves for a single term of five years. The new Constitution also caused the birth of a new judiciary institution, the Constitutional Court. Within a short period, this new Court emerged as a star institution of the nation, and a valuable reference for other countries as well.

The victory of the people did not stop with the changes of the documents and the implementation of the new institutions. The true and real victory was the fundamental changes in their mindsets: People have come to realize their sovereignty and become ready to claim it in their daily lives. Now, the concept of popular sovereignty has been materialized, and the spirit of the participatory democracy has widely spread. Such awakening has permeated into all areas of their civil, political, social, economic, and cultural life. In all cross-sections of the society, old practices have been reviewed with the new standards. Catch phrases such as 'consumers' rights' and 'demand-driven policies' have become a daily terminology.¹¹ The explosive growth of NGOs in the 1990s provided a new driving force for the democratic transformation of Korean society.¹²

¹¹ Chang Seung Wha & Lee Chang Hee eds. *Procedural Justice and Rule of Law*, Pakyoungsa Publishing (Seoul, 2003).

¹² Cho Hee-Yeon, *The Role of NGOs in the Democratic Transition*, 3 ASIA Quarterly 124-144; Eun Jong Park, ed. *NGOs and the Rule of Law*, Pakyoungsa Publishing (Seoul, 2006); Cha Byung Jik,

In November, 2001, another government institution was born in Korea with the blessings and expectations of the people and the civil society. The establishment of the National Human Rights Commission of Korea (NHRCK hereinafter) largely owes to the dedicated efforts of NGOs.

This paper aims to overview the tracks and records that NHRCK had trod for its first ten years in life. In Part 2, the backgrounds how NHRCK was born are observed. Part 3 will brief human rights conditions in Korea as understood in the international society. Part 4 will sketch the structure and working mechanism of NHRCK. Part 5 will highlight some of the major activities of NHRCK for its first seven years (2001-2007). In Part 6 will focus the changes observed after the new President was inaugurated. (2008- Present) Part 7 will conclude with the suggestions for improvements in order for NHRCK, to grow into a well- established institution as an effective government agency responsible for the protection and promotion of human rights in Korea

II. The Birth of NHRCK

The Republic of Korea was born in 1948 by the U.N. initiative. Ironically, however, it was not until 1991 that she finally became a U.N. member state. In that year, U.N. accepted both South Korea (ROK) and North Korea (DPRK) simultaneously as its member states. Regardless of their status as sovereign states in the international arena, however, domestic laws of both Koreas do not grant full recognition each other. The Constitution of South Korea consistently maintains that she is the sole legitimate state on the entire Korean peninsula and her territory includes the northern part occupied by the north as well.

In March, 1990, the National Assembly of South Korea, by unanimous votes of the whole members, passed the resolutions ratifying the two major U.N. Covenants (International Covenant on the Cultural, Social and Economic Rights, CESCR) and (International Covenant on the Civil & Political Rights ICCPR). They became effective as of July, 1990. (The Protocol to ICCPR was also ratified with some reservations.) Ratification of the two major Covenants was a preparatory step for Korea to become a member of the U.N. The entry to U.N. afforded Korean society a momentum to actively engage in international discourses on human rights, and an opportunity to learn of the international currents and trends.

The 1993 Summer of Vienna was filled with passion and zeal produced by over

"NGOs and Law", Ewha Womans University Press (Seoul, 2002); Lee Chan Jin, "Remedy through Judicial Process and NGOs: Challenges and Alternatives", EJ Park ed. pp.85-114

7,000 delegates gathered from 171 countries covering all the corners of the globe. Included were some 30 South Koreans composed of NGO workers and a few lawyers. They were much enlightened with the fresh ideas of the human rights protection on the global level. Up to this moment, their knowledge, interests and activities in human rights hardly crossed over the national border. In particular, they were struck by the new terminology, 'NHRI', which was presented as an effective institution for the future realization of human rights in domestic system of justice. On return, these enlightened few initiated a new experiment. Mobilizing around, they organized the National NGO Coalition for the Establishment of an Independent National Human Rights Commission.

The 1993 Vienna Declaration of Human Rights and Action Plan for the Protection and Promotion of Human Rights were formally adopted by the General Assembly of the United Nations in December of the same year, and 'NHRI' became a core element of this document. In the mindsets of these Koreans pioneers, NHRI now has been enshrined as a symbol and hope for the future progress in the Korean human rights.

In the presidential election of 2007, they successfully put this agenda onto the catalogue of the campaign pledges of Kim Dae Jung, the winning candidate from the Opposition Party. Kim's election was a clear victory for these aspirants. However, victory in election did not guarantee the immediate birth of an NHRI. For a long period thereafter, they had to wage all-out war to keep the issue alive. They had to manifest numerous statements, conduct organized picketings, sit-in demonstrations, and even hunger strikes. The progress was slow and tedious. In the course, the NGOs coalition held a series of public hearings to formulate a draft bill for the creation of the Commission. Many proposals and drafts produced by various actors drew public attention, inviting tensions among civil society, political parties and the government. The original draft by the Ministry of Justice aimed to put the Commission under its jurisdictional control. Faced with ferocious resistance from the civil society, however, the draft had to be withdrawn. International society also paid keen attention to the progress. Many UN Treaty Bodies expressed their wishes and expectations for the birth of a fully independent NHRI in compliance with the Paris Principles. As the administration failed to propose a draft bill, the ruling party in the National Assembly took the initiative to present its own draft bill. It took almost three years until the final enactment of the NHRCK Act, in November, 2001, by a narrow margin at the National Assembly. The conservative Opposition Party officially objected to the bill, and quite a few members of the ruling party did not join either. First time in the history of Korea, NGOs played critical roles throughout the entire process in the actual enactment of a statute. Finally, on November 25, NHRCK officially opened its

doors to receive the first petition from a citizen.

NGOs had no official standing in the conventional regime of the rule of law, and their eminence was somewhat embarrassing to the existing stake-holders. However, their activities have been largely condoned, if not accepted, as a newly fostered universal rule, as epitomized in the practice of the United Nations. Under the principle of participatory democracy, the civil society has taken actions in relation to the legislature, the executive, and the judiciary. Diverse activities of the Korean NGO groups deserve in-depth analysis. At a glance, however, three groups--namely, women, environmentalists, and persons with disabilities--have reaped remarkable achievements. Some of the NGO leaders of 1990s among these groups turned into policy makers in the government. They brought their agenda to the government, gaining a sarcastic nickname, "Next Government Officers." for themselves and "Near Governmental Organization." for their home institutions. Frustrated conservative wings criticized NGOs with derogative terms such as "red guards of the left-wing government."

The birth of NHRCK was a clear victory for the citizens and the NGO activists. It was a monumental achievement of President Kim Dae Jung as well, who had been awarded the Nobel Peace Prize in the previous year (2000). However, in minds of Kim's political opponents, the Commission remained as a symbol institution advocating for Kim's political ideology. This was the original sin of the Commission. To these conservative bents, Commission's activities largely appeared to side with Kim's political ideology and orientation. A clear example is found in the attitude dealing with the human right of North Korea. As Kim's "Sunshine Policy" has been virtually repudiated by the conservative Lee Administration (2008-), the Commission was asked to actively engage in the activities directly targeted on the North Korean government.

III. Overview of the Human Rights Situation of Korea

There seems to be a wide consensus that Korea's efforts for the promotion of civil and political rights deserve a fair credit, although a few issues continue to receive international criticism.¹³ Public outcry for reformation of the police and prosecution has led to some concrete measures with institutional changes. For instance, surveillance mechanisms have been reinforced in the investigation and law

¹³ Korea's human rights records are often discredited due to its retention of death penalty and the National Security Law, and the denial of conscientious objection. However, no actual execution has been done since 1998.

enforcement processes. A number of detention facilities and military camps are now subject to routine scrutiny. As a consequence, incidents of blatant abuse of state power such as torture have been remarkably reduced in recent years. In addition, the world witnessed Korea's economic uprising over the past two decades. Eventually Korea joined the OECD in 1996, and successfully overcame the Asian financial crisis of 1997 with maintaining the average growth rate.

Contrasted with her remarkable improvements in the civil and political rights, Korea's records in social and economic rights remain poor. Among OECD countries Korea stands at the lowest level in her welfare budgets. The National Human Rights Commission has made a number of policy recommendations that would require substantial increase in welfare budgets. The ideological and political debates continue to determine to what extent these social rights should be realized and maintained.

Equal treatment has emerged as the most-craved value in contemporary Korea. On all fronts of the Korean society, battles for equality are underway. As the blatant usurpations of state power have decreased, 'anti-discrimination' has emerged as a new issue of public concern. Korea appears to be undergoing a national campaign for the equality war. Under such backdrop, legal grounds prohibiting discriminatory practice and unequal treatment have been widely broadened. The National Human Rights Commission Act (2001) enumerates 19 grounds on which discriminatory treatment is prohibited. Along with the conventional categories such as race, gender, and social status, included therein are age, medical history and even 'sexual orientation'.¹⁴

As the Korean society is passing through a rapid transformation, cultural elements in the Korean people's perception of equality are also changing. All in all, battles for the equality will be a continuing agenda for decades to come, where no Korean is exempted from conscription.

IV. The Structure and Working Mechanism of NHRCK

The NHRCK was founded with the broadest jurisdiction covering over all types of human rights violations and discrimination. In a country where democracy has short history and therefore, diverse mechanism for protecting human rights are lacking, Korean type all-inclusive system NHRI may be preferable. Also it will be

¹⁴ Article 2(4) of the National Human Rights Commission Act, Law No. 6481, May 24, 2001, as amended as Law No. 8435, May 17, 2007 provides that the term discriminatory act violating equal rights means committing any of the following without any reasonable ground, on the basis of sex, religion, disability, age, social status, region of origin (referring to place of birth, base area of registration, principal area of residence before reaching maturity, etc.), national origin, ethnicity, physical condition including physical features, marital status such as married, single,

more effective in setting up the uniform standards of human rights.¹⁵

NHRCK started with an enviable size and comfortable budget. Within a year after the birth, the Commission was staffed with over 200 full-time employees and three regional offices. The Commission consists of 11 Commissioners, - Chairperson, 3 Standing Commissioners, and 7 non Standing Commissioners. All three branches of the nation (The President, the National Assembly, and the Supreme Court) share the legal power to compose the Commission. Diversity is a legal requirement, and at least four members should be female. Opposition party of the National Assembly can elect one standing and one non-standing commissioner. The President appoints the chairperson, one standing commissioner, and two non-standing commissioners. No formal appointment hearing is required for any of the Commission members.¹⁶

At the inception of the Commission, staffs were recruited from diverse sources. Career civil servants made over seventy percent, but the rest were invited from various sectors of society, such as NGOs, research institutes, and the academic institutions. The former group had been trained to comply with, not raise question against the government. They had little expertise or experience in the field of human rights, which is basically built on the discourses of raising question based on the perspective of the minority. The latter group had been trained to 'raise' question, but they had little experience (or even interest) in 'resolving' the question. If harmony could be achieved and maintained between these groups, the Commission could grow into an ideal institution. Typically NHRI's position stays in between the civil society and the government. A critical part of Chairperson's leadership is how to maintain a delicate balance among these groups, without impairing vitality of the Commission.

A decision of the Commission has only advisory effect, without any binding force. To the Commission's recommendation for remedy, a state agency has full discretion either to comply, or to simply neglect. All in all, the Commission lives on its moral authority rather than legal power. Typically, only human rights violations by the state actions are reviewed by the Commission. But, discrimination by the private parties is also subject to the investigation of the Committee.

The Commission is a semi-international body in that it is obligated to implement the international norms into the domestic system of justice. Bridging the gaps between the international standards and the domestic ignorance and resistance is a hard job, and oftentimes the Commission falls into an easy prey of the unscrupulous patriotism. It is subject to extra tension: between the international standards under the UN.

¹⁵ Nohyun Kwak, The Dilemma and Visions of an All-in One NI: NHRC-Korea's experience, 1-2, Conference Paper, National Human Rights Commission of Korea, (Dec. 4, 2006)

¹⁶ As of this writing, an amendment to the Law on the Appointment Hearings is now pending that would require the Chairperson stand for the hearing.

schemes and Korea's national interest and public sentiment.

Also the Commission is empowered to submit opinion to the courts (including the Constitutional Court) on the pending cases. The conservative Korean judiciary is not been accustomed to such new, alien system, and therefore, the Commission has to overcome the aloofness (and subtle hostility) of the court.

V. Glories of NHRCK (2001- 2007)

A recent study concluded that for the period, Korea was quoted as a good example of how a NHRI can be a prominent actor for the protection and promotion of human rights.¹⁷

Some of its major achievements of the Commission may be highlighted.

First and foremost, the Commission has demonstrated the merits and efficiency of a new mechanism of human rights protection. "Complaints instead of pleas" has become a noble catch phrase in the battle against inhumanity. Public institutions that respond to the citizens' 'pleas' in non-judiciary manner were nothing new to the Koreans. But challenging the validity of state action by filing a formal complaint had belonged to the exclusive domain of the judiciary. For the period, over 6,000 formal complaints were filed yearly with the Commission, with steady increase by around 20 percent. They came from all the sections of state function to which the Commission responded with speed and efficiency. For example, it has dramatically improved the rights of the prisoners and detainees in other detention and protective facilities by operating a special task force team to handle in-person complaints on-site. Police and military also became the prime benefactors of the Commission activities. The extremely high level of approval rates (over 85 percent) signifies the high profile that Commission enjoyed in the Korean society.

Second, for the period, the Commission issued more than 170 policy recommendations in relation with the legislation and government policies. For example, the Commission opposed the deployment of military troops to the Iraqi War (2003. 3.26), and blocked the attempt to legislate an overall anti-terrorism act. To eliminate the discrimination on the ground of gender, the Commission submitted its opinion to the Constitutional Court to review the unconstitutionality of the traditional Family Registry System of Korea(戶主制). Generally, these policy recommendations were supported by the well- documented studies. Other major recommendations

¹⁷ Bum Suk Baek, "Human Rights As Medium: National Human Rights Institutions(NHRIs) and Regional Human Rights Institutions (RHRIS) in Asian Human Rights Context," a doctoral dissertation, Cornell University Law School, (2010)

covered the controversial issues such as the abolition of death penalty (2004), amendment to the National Security Act (2004.8.12) as had been repeatedly criticized by international society. In 2006, NHRCK presented its Action Plan to Promote Human Rights (2006-2008) to provide the founding guidelines for the overall National Action Plan. (NAP was finalized by the Ministry of Justice in 2007.) Under the Plan, two major legislations were to be enacted: The Human Rights Education Act and the Overall Anti-Discrimination Act. However, Commission's hard efforts were blocked by the lobby of the concerned government agencies.

Third, as a long term venture to raise the public awareness of the human rights, the Commission chose the pre-college schools as a target institution. It recommended against the diary writing assignments at the elementary school. The Commission continuously recommended the total prohibition of corporal punishment, and liberalization of strict dress codes in junior and senior high schools. It urged to the provincial governments to legislate ordinances for the students human rights. Ordinance.¹⁸ Government's bold ambition to build up the National Education Information System (NEIS, 2003. 5.12) where detailed information about his students were to be collected was objected by the Commission for their possible invasion of privacy. The Commission also urged the government to abolish the Reservation on Article 21 of the U.N. Convention on the Rights of Children. (CRC).¹⁹

As is often the case for a newly born institution, the Commission was driven by uncompromising passion and strived to prove itself. Unusual activism of the Commission was both welcome and frowned by the general public. In sum, both by fame and notoriety, the Commission has established her position in the Korean society for the first decade of the twenty first century.

VI. Disgraces of NHRCK (2008- 2011)

1. Restructuring Plan

The year 2007 in Korea concluded with the election of Lee Myung Bak, a former business COE and the mayor of the Seoul Special City as the President of the nation. The Commission, a neutral and independent institution, neither hoped nor expected any drastic change by the peaceful transfer of the administration. The action taken by the new administration, however, betrayed all the projections and expectations.

¹⁸ As of this writing, two local provinces passed the Students' Human Rights Ordinance and two are taking process.

¹⁹ Ahn Kyong Whan, "the Role of the National Human Rights Commission of Korea in Promoting Human Rights Education- Practical Insights" 299-306 in Global Standards-Local Action- 15 years Neuer Wissenschaftlicher Verlag, Wien (2009)

In early, 2008, the Transition Team for the President- elect announced its restructuring plan for the government organizations. According to the Plan, NHRC would be merged with a few other commissions and put under the direct control of the President. Categorically that would mean a clear violation of the Paris Principle, denying the independent nature of the Commission. Opposing vehemently, the Commission waged a full- scaled defensive war. Civil society and the opposition parties sided with the Commission. International society was also alert. OHCHR and ICC issued official statements and addressed letters to the Chairperson of the Team and the Ministry of Foreign Affairs. Partly owing to such pressure and largely by a political compromise, the plan was withdrawn and status quo of the Commission was preserved. But the cold and uneasy atmosphere lingered between the president's office and the Commission. The Commission was unduly neglected. It was neither asked nor allowed to brief before the new President, as had been customary in the past. Uncomfortable neutrality did not last long. Suddenly, a critical event broke out.

2. Nightmare of The Candlelight Rallies and The Aftermath

Hardly had three month passed after the new President had been in his office, massive street demonstrations plagued the capital city. Beginning from early May, 2008, almost every night, a huge crowd gathered downtown near the City Hall, with the makeshift candlelights in their hands. The rallies continued well past midnights. On the surface, they seemed to protest against the President's proud announcement that "From now on, the best quality American beef will be available at the lowest prices." Import of American beef was an issue on point. But other causes such as cronyism and low morality of the cabinet members were mingled. A high expectation suddenly turned into a sour disappointment. Nighttime down town Seoul was an unusual treat to the foreign tourists.

Was it more than an embarrassment to the incoming President who earned the position by an unprecedented landslide victory with the margin of five million votes. The rallies were conducted generally in peaceful manners. Although police haphazardly identified a few NGO groups as the conspirators, it would be fair to say that the crowds were gathered spontaneously with no identifiable overall organizers. Mobile phones were major communication tools. To most participants, including students of primary and secondary schools, the rallies meant more like a cultural show than a political protest. In early stages, police seemed to abide with the "passive and defensive" enforcement principle as required by the law and the police guidelines. However, on limited instances, when the crowd went wild and reckless, the riot police brutally attacked the demonstrators. Many demonstrators and bystanders were hurt. A few policemen were hurt as well. As a counter response, the slogans of demonstrators

became stronger. "Down with the 'MB'(President's Lee's initials) Government!" "Occupy The Blue House!" The buildings of a few conservative presses became the targets of the protest as well. Police barricades were attacked by a few reckless rioters. As the rallies persisted, International NGOs rushed in and speedily announced their statements denouncing the police and urged the administration to guarantee the freedom and speech and peaceful assembly.

137 individual petitions were filed with the Commission by the demonstrator citizens, alleging that their human rights were infringed by the police force. In late October, after exhaustive investigation, hearings and deliberations, the Commission dismissed the majority of the petitions, yet, ruled on a few cases. The Commission ruled that in these cases, police did abuse its power to infringe the rights of the petitioners. The decision was made by 10 to 1 votes. Even those commissioners who were appointed by the President ruled against the police. Sharply divided press and public sentiment precipitated the polarization of the national politics. Major press attacked the Commission for its 'unbalanced' and 'irresponsible' decision by condoning or even agitating violence against the legitimate government. They paid no attention to the underlying legal principle that the Commission lacks jurisdiction to deal with the demonstrators' violent acts against the police. (Its' mandates are limited to the petitions filed against but not for the public agencies.) A series of retaliative measures were taken against the Commission. Special audits by the Bureau of Audit were conducted on the Commission. At the meetings of the National Assembly, members of the ruling party bombarded abusive words against the Commission and its Chairperson.

In midst of domestic insecurity, NHRCK reaped the year of 2008. Diverse and extensive activities were done throughout the entire year, in celebration of the 60th anniversary of the Universal Declaration of Human Rights. For example, to solidify its international leadership. It hosted an international Conference on "Human Rights and Multicultural Society-Dignity and Justice for All." The Conference produced the Seoul Guidelines on Cooperation among NHRIs for the Promotion and Protection of Migrants' Rights to lay a ground work for practical actions of the states and NHRIs on the thorny issue.

On March 30, 2009 a Presidential Ordinance passed the Cabinet Meeting, to reorganize the structure of the Commission, by downsizing the Commission by 21 percent. Is it was clearly a retaliative measure orchestrated by the President Office. The rationale proffered by the concerned government offices was that the Commission had functioned in extremely 'ineffective manner', and was grossly mismanaged and overstaffed. However, by many circumstantial evidences it is

suspected that the restructuring was focused to deport the staffs who had been recruited from the civil society. Their job status within Commission was less secure than the career civil service officers, and consequently they fell easy victim of the downsizing. (In October, 2011, the Commission was added some 20 new staffs and a partial restoration of the numerical loss was restored, but none of those who were affected by the downsizing was rehired.)

The Commission immediately challenged the validity of the Ordinance by filing an Organ Dispute Petition to the Constitutional Court, as provided by the Constitution, based on the rational that the President, in formulating the ordinance, infringed the legal powers of the Commission in a manner infringing her independency as guaranteed by the law. The Court avoided a speedy ruling, and after 17 months, On October 26, 2010, by 6 to 3 decision, dismissed the petition for lack of standing. The Court ruled that the Commission is not an organ specifically enumerated in the Constitution itself, therefore it lacks the legal standing to file an organ dispute petition. By this decision, the Court retreated from its earlier position, which granted standing to a non-enumerated public organ.

Under the Lee Administration, the Commission had to suffer institutional humiliations by other government agencies. The Commission has a legal duty to regularly report of its major activities to the President and the Speaker of the National Assembly. It had been well- established tradition that the President meet the Commission on the latter's request. However, the newly elected President Lee refused to hear from the Commission. Continued requests by the Commission remained unanswered, until the Chairperson who was appointed by his predecessor left the office. As such, the President seemed to have manifested bias and hostility against the Commission.

Since July, 2009, The Commission has been headed by a Chairperson appointed by the incumbent President Lee. Civil society strongly protested the appointment of the new Chairperson who had never been exposed to the human rights experience, either in academy or on field. Since his inauguration and following changes of membership, the Commission has shown a clear tendency toward passive inactive. Worse of all, the Chairperson seemed to have little knowledge, much less confidence, in the independent nature of the Commission. He was reported to have uttered, when asked by the National Assembly, that the Commission is a part of the executive branch.

In late, 2010, two standing commissioners (full-time) and one non-standing commissioner, resigned from their offices in protest against the arbitrary managements of the chairperson, in violation of the bylaws and customs. One of the

two standing commissioners had been elected by the National Assembly with a ruling party ticket. The public statements they issued aggravated social divides between the supporters and the opponents. Sixty one "advisors" to the Commission resigned in sympathy of the leaving commissioners. Press coverage on the events was also sharply divided.

A series of public statements and picketing followed, but eventually quieted down. In an incident, the Commission and Chairperson were insulted by a female high school student who refused to accept the prize she won at the essay contest hosted by the Commission. She made an official statement denouncing chairperson's misconducts in running the Commission. In August, 2011, a devastating incident provoked the civil society. Unprecedentedly large scale of disciplinary actions were done against the 'unbecoming' staffs of the Commission. The incident broke out when the Chairperson fired a 'contract employee' before her term expired. Fellow employees and the labor union staged an organized protest- by consecutive picketing and contributing criticizing articles to the press. Most of them had joined the Commission with backgrounds. Eleven staffs were disciplined to suspension to reduction of salaries for the 'unbecoming' acts as public official. Their alleged 'unbecoming acts' were the very ones that the Commission had formally urged other state agencies to allow as they are the guaranteed under the Constitution.

In its annual report 2010, the Commission, in a diplomatic tone, subtly admitted low records of the (whole member) plenary meetings and unsatisfactory level of communication with the civil society. (p.33 The Korean version).

Overall evaluation on the records of the Commission led by the present Chairperson is premature, but it would be fair to say that at the moment the Commission is undergoing a serious trouble. The Chairperson might have gained confidence of the President and some of the conservative community. But seen outwardly, he and his Commission have substantially lost the confidence and support of the civil society and the general public. He has been repeatedly demanded to step down. Independency and political neutrality of the Commission appear to be shaky. A passive attitude seems to prevail in the daily works of the Commission. There has been a sharp decline in the approval rates. The Commission has made very few policy recommendations, and has kept silence on many important human rights issues. All these facts, taken together, indicate the Commission fails to meet the expectation as it once did.²⁰

The two priority areas that the Commission seems to put emphasis may be 'Business and Human Rights' and North Korean Human Rights. In celebration of its

²⁰ The Korea Times, Nov.23, 2011. p.2 "Rights Commission urged to be critical of government."

10th anniversary, the Commission hosted an international Conference on the former topic.(October, 2011) This topic is free of politics and harmless to the Commission. To deal with the human rights of North Korea, the Commission reinforced its staff. Recently, against the customary rule for a NHRI not to directly address to the government of other states, NHRCK issued a statement denouncing the government of North Korea. It was reported that President, in appointing the Chairperson, asked to actively engage in the human rights of North Korea.

VII. Lessons and Suggestions

By nature and definition, human rights are the universal value that transcends politics, national border, and even ideology. However, in reality, they could easily be entangled with politics. The case of NHRCK shows an example how the public perception and protection mechanism of human rights can fluctuate depending on the changes in the political environments.

Traditionally human rights discourses in Korea have been regarded as a political monopoly of the progressive bent. Conservative forces rarely professed the ideas or values of human rights. When they did, their terms were narrow, negative, defensive and evasive. The phrases typical employed by the Conservative forces are such as "human rights are counter- productive to the economic growth." or "human rights of the majority are as important as those of the minority." They tend to fail to positively identify the catalogue and contents of the human rights they profess to care for. The only positive phrase heard from the conservative may be "care for human rights in the North Korea." However, this phrase has been largely used as a political campaign against the North Korean regime itself. Ironically, those who advocate for the human rights of the people of North Korea have paid little attention to the hardened conditions of the North Korean refugees who settled down in South Korea.

At the minimum level, three prerequisites have to be met, for a NHRI to function as an independent state institution as guided by the Paris Principle. First, the chief executive has to willingly honor, or at least tolerate the independent function of a NHRI. Second, the NHRI members should maintain their own pride and devotion as human rights protectors, and be willing to resist against the state suppression and intervention. Third, and most critically, people and civil society have to guard the NHRI against unfair executive control.

In case of NHRCK, at least first two of the three prerequisites were met for the first seven years, but none of the three was met for the last three years. What kind of NHRI do the Korean people would like to have in the future? Still it is a widely open

question. Maybe ten year is not enough.