2011 Taiwan Human Rights Report

Parallel Report on the Implementation of the International Covenant on Civil and Political Rights

In response to the initial report submitted under Articles 40 of the Covenant by the Government of the Republic of China (Taiwan)

Submitted to the International Review Committee

by

Covenants Watch

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Preface

On 20 May 2012, Covenants Watch (of which the Taiwan Association for Human Rights serves as secretariat) published the original Chinese edition of "2011 Taiwan Human Rights Report: Shadow Reports on ICCPR and ICESR from NGOs."[1] The Shadow Report is in response to Taiwan's initial State Report pursuant to the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic and Social Rights (ICESCR), which the government published on 20 April 2012.[2]

The Shadow Report is a collective effort of a coalition of 63 civil society organizations and 57 authors from various relevant fields (at the beginning of the section on each article, the list of contributors for that section is given). It includes critiques and responses to the State Report, as well as specific examples of human rights violations that were neglected by the State Report, in order to illustrate the extent to which the official version misunderstands or neglects human rights conditions in our country.

From the beginning of the drafting of the State Report, civil society actively participated in and monitored the process. At the same time, civil society groups organized training workshops, study groups, online platforms, editorial meetings, and communication between the Covenants Watch Secretariat and various NGOs. Through these intensive discussions, the human rights issues that the Shadow Report should focus on were identified, and this foundation enabled Covenants Watch to complete the Shadow Report relatively soon after the State Report was published.

Finally, in order to enable the Shadow Report to be submitted to the International Review Committee, a team of six translators, all of whom have extensive experience in the human rights movement in Taiwan over the years, was assembled. In the process of translation, some additional information was added to enhance the clarity, and some updates were made when major developments occurred after the publication of the Chinese edition of the Shadow Report (for example, when the a group of businessmen moved to purchase one of Taiwan's major media groups in the fall of 2012; see the section on Article 19 of the ICCPR).

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[1] The full text of the Shadow Report in Chinese is available at http://ppt.cc/@A!G.

[2] The State Report was published in 3 volumes, respectively "Implementation of the International Covenant on Civil and Political Rights"; "Implementation of the International Covenant on Economic, Social and Cultural Rights"; and "Core Document Forming Part of the Reports." The full texts are available at http://www.humanrights.moj.gov.tw/ct.asp?xItem=285670&ctNode=33254&mp=205.

I. Structure of the Shadow Report

For the original Chinese edition of this first civil society Shadow Report, the ICCPR and ICESCR were not been treated as two separate volumes. Rather, in one document of over 300 pages, Covenants Watch and the participating advocacy groups addressed the substantive rights enumerated in both covenants. However, to facilitate the International Review Process that will take place in February 2013, the English edition of the Shadow Report has been restructured into three sections, one for each of the two covenants, as well as a Common Core Document.

Each of the rights covered has its own section, in order as they are listed in the covenants. Each section consists of four elements: first, a brief introduction; second, responses to the relevant paragraphs of the State Report; third, notable instances of issues not mentioned in the State Report; and fourth, civil society proposals for further concrete reforms.

For the ICCPR, the Shadow Report addresses the right of self-determination; non-discrimination and equality; the right to life; the prohibition of torture; the prohibition of slavery; the right to liberty and security of person; the right of all persons deprived of their liberty to be treated humanely and with dignity; freedom of movement and residence; procedures for expulsion of aliens; the right to fair trial; the prohibition of being held guilty of an act which did not constitute a criminal offense under law at the time; the right to privacy; freedoms of thought, expression, and the press, as well as freedom of information; freedoms of assembly and association; the rights of children; the right of political participation, and the rights of minorities.

For the ICESCR, the Shadow Report also addresses the rights to self-determination and non-discrimination, as well as the right to work, the right to just and favorable conditions of work, the rights to form unions and to strike, the right to an adequate standard of living, the right to health, and the right to education.

II. Problems with the Drafting of the State Report

Based on the long-term monitoring of Covenants Watch as well as the direct experience of some members in various working meetings in the process of drafting the State Report, we can see some overall issues. First, many government agencies when drafting their sections almost completely neglected to cite the General Comments issued by both the Human Rights Committee and the Committee on

Economic, Social and Cultural Rights.[3] Lacking these authoritative interpretations, their understanding of the content of the articles was insufficient. As a result, much of the State Report reads like a massive "work report" from the agencies of the government. Inspection and reflection of current human rights conditions in Taiwan is generally lacking, much less concrete measures to improve these conditions.

In contrast, in the process of drafting the civil society Shadow Report all General Comments were referred to. Moreover, the civil and political rights sections were enriched by extensive reference to the 2005 work by Professor Manfred Nowak (former U.N. Special Rapporteur on Torture), *U.N. Covenant on Civil and Political Rights, CCPR Commentary*. For the economic and social rights sections, many other international studies and data were considered.

Another issue discovered by Covenants Watch in the State Report's drafting process was the misunderstanding of the content of U.N. reporting guidelines. For example, the Committee on Economic, Social and Cultural Rights has requested all States parties to include in their reports, under Article 11, "Whether the State party has adopted a national action plan or strategy to combat poverty… and whether specific mechanisms and procedures are in place to monitor the implementation of the plan or strategy and evaluate the progress achieved in effectively combating poverty." However, in our government's State Report, we see instead the "Executive Yuan Working Group on Improving Income Distribution" shoehorned in as the anti-poverty action plan mandated by the U.N. (see State Report on ESCR, ¶ 202 (p. 106)).

During the process of the editorial review of the State Report draft, the Presidential Advisory Committee on Human Rights, all branches of government (*yuan*) as well as their subsidiary agencies were to be covered. However, alone among the branches, the Executive Yuan only submitted the reports from each of its subsidiary agencies, there is no mention in the report of the work of the Executive Yuan itself. Thus, the opportunity for a truly comprehensive examination of the human rights work of the executive branch of government was lost. This gap raises

[3] The General Comments which each treaty body has promulgated over the years form the most important basis for delineating the scope of the covenants. This was recognized in Article 3 of our country's "implementation law," which reads: "In the application of the provisions of the two covenants, reference shall be made to their legislative intent and the interpretations of the relevant treaty bodies." This amply demonstrates that the government may not simply look at the text of the articles, but must study as well the General Comments. As of January 2011, the Human Rights Committee had published 34 General Comments, and the Committee on Economic, Social and Cultural Rights had published 21. For the convenience of Taiwanese citizens, Covenants Watch has published compilations of these two sets of General Comments in Chinese on its website. See http://covenants-watch.blogspot.com/2011/06/blog-post.html.

the concern of Covenants Watch as to the attitude of the Executive Yuan to the State Report and its contents. Among specific agencies, we observed the hostile attitude of the Environmental Protection Agency towards the requirement to submit its draft section, as well as in its exclusion of the suggestions put forth by civilian experts during the editorial review stage.

III. International Review Process Key to Enable Constructive Dialogue Between Government and Civil Society

The "implementation law" enacted along with the ratification of the two covenants, Article 6, reads: "The Government shall, according to the provisions of the two covenants, establish a human rights reporting mechanism." The basic elements of the mechanism have been gradually put in place since the completion of the State Report in April 2012. A seven-member committee has been created to oversee the "ICCPR and ICESCR Republic of China Initial State Report International Examination Secretariat," and several distinguished international human rights experts have been invited to come to Taiwan to hold a formal examination of Taiwan's State Report in February of 2013.[4]

Now that this review process is beginning to get under way, the government's publication of the State Report on 20 April will no longer just be one single day's news. The initial State Report on the two covenants will be submitted to an external, international examination process, including procedures to ensure further implementation. Under such a process, all shadow reports, counter-reports, or alternative reports provided by national or international NGOs will be included as reference materials for the independent experts conducting the examination. This will lead to a "constructive dialogue," not at all like earlier efforts (notably, the series of "pilot" National Human Rights Reports issued by the Executive Yuan from 2003 to 2009), when officials and civil society simply restated their positions, with no useful interaction. Indeed, the actual experience of the U.N. Treaty Bodies demonstrates that the committee members often rely heavily on materials and evidence submitted by civil society, and that this information makes it possible for a rigorous examination to take place during the formal meetings with the officials of the state parties.

IV. Our hope for "letting many flowers bloom"

[4] Covenants Watch played a key role in advocating for such an international review mechanism, repeatedly proposing specific measures for how to institutionalize the process. See http://covenants-watch.blogspot.com/2012/04/blog-post.html (in Chinese only).

Although this report is entitled “2011 Taiwan Human Rights Report: Shadow Reports on ICCPR and ICESR from NGOs,” Covenants Watch strongly emphasizes that this report has been produced by only a portion of Taiwan’s civil society organizations. It cannot represent all the views of all of Taiwanese civil society. Instead, we hope that this first Shadow Report will stimulate other efforts, providing a precedent or a template that other groups may follow. We hope that more and more NGOs will, from their various perspectives, put forth a variety of shadow reports, counter-reports, or alternative reports. This will enhance the prospects for such human rights dialogue to become a regular, systematic practice, in order to effectively promote the improvement of human rights conditions in Taiwan.

Participating Civil Society Organizations

A. Covenants Watch member organizations

Executive Committee Member Organizations:

- 台灣人權促進會 Taiwan Association for Human Rights
- 民間司法改革基金會 Judicial Reform Foundation
- 台北律師公會人權委員會 Committee for Human Rights, Taipei Bar Association
- 台灣勞工陣線 Taiwan Labor Front
- 國際特赦組織台灣分會 Amnesty International Taiwan
- 台灣國際醫學聯盟 Taiwan International Medical Alliance
- 環境法律人協會 Environmental Jurists Association
- 台灣廢除死刑推動聯盟 Taiwan Alliance to End the Death Penalty
- 台灣促進和平基金會 PeaceTime Foundation of Taiwan
- 台灣原住民族政策協會 Association for Taiwan Indigenous Peoples' Policies
- 社區大學全國促進會 National Association for the Promotion of Community Universities
- 台灣國際法學會 Taiwanese Society of International Law
- 台灣企業社會責任協會 CSR Taiwan
- 小米穗原住民文化基金會 Millet Foundation

Other Member Organizations:

- 台灣法學會 Taiwan Law Society
- 中華民國律師公會全國聯合會 Taiwan Bar Association
- 中華民國智障者家長總會 Parents Association for Persons with Intellectual Disabilities, Taiwan
- 中華民國殘障聯盟 League of Organizations for the Disabled, R.O.C.
- 中華民國全國教師會 National Teachers' Association R.O.C.
- 全國教師工會總聯合會 The National Federation of Teachers Unions
- 中華民國愛滋感染者權益促進會 Persons with HIV/AIDS Rights Advocacy Association Taiwan
- 中華民國銀行員工會全國聯合會 The National Federation of Bank Employees Unions
- 公民監督國會聯盟 Citizen Congress Watch
- 日日春關懷互助協會 Collective of Sex Workers and Supporters
- 台北市上班族協會 Association of Wage-Earners

- 台北市女性權益促進會 Taipei Association for the Promotion of Women's Rights
- 台灣太平洋發展協會 Taiwanese Association for Pacific Ocean Development
- 台灣少年權益與福利促進聯盟 Taiwan Alliance for Advancement of Youth Rights and Welfare
- 台灣北社 Taiwan Society North
- 台灣自由緬甸網絡 Taiwan Free Burma Network
- 台灣性別人權協會 Gender/Sexuality Rights Association Taiwan
- 台灣原住民族非政府組織聯盟 Taiwan Indigenous Peoples NGO Alliance
- 台灣婦女團體全國聯合會 National Alliance of Taiwan Women's Associations
- 台灣勞動與社會政策研究協會 Taiwan Labor and Social Policy Research Association
- 台灣新聞記者協會 Association of Taiwan Journalists
- 台灣圖博之友會 Taiwan Friends of Tibet
- 台灣青年逆轉本部 Guts United, Taiwan
- 外省台灣人協會 Association of Mainlander-Taiwanese
- 東吳大學張佛泉人權研究中心 Chang Fo-Chuan Center for the Study of Human Rights
- 國家人權委員會推動聯盟 Alliance for the Promotion of a National Human Rights Commission
- 基督教恩友中心 Grace Home Church
- 綠色陣線協會 Green Formosa Front Association
- 綠黨 Green Party Taiwan
- 澄社 Taipei Society
- 鄭南榕自由基金會 Deng Liberty Foundation

B. Organizations not formally members of Covenants Watch which also contributed to various sections of the Shadow Report

- 南洋台灣姊妹會 TransAsia Sisters Association
- 台灣愛之希望協會 Taiwan Love and Hope Association
- 新移民勞動權益促進會 New Immigrants Labor Rights Association
- 工作傷害受害人協會 Taiwan Association for Victims of Occupational Injuries
- 綠色公民行動聯盟 Green Citizens' Action Alliance
- 台灣都市更新受害者聯盟 Taiwan Association for Justice of Urban Renewal
- 人本教育文教基金會 The Humanistic Education Foundation
- 集遊惡法修法聯盟 Alliance for the Amendment of the Parade and Assembly Law

- 台大工會 NTU Labor Union
- 台灣母語聯盟 Taiwanese Languages League
- 台灣蠻野心足生態協會 Wild at Heart Legal Defense Association, Taiwan
- 台灣當代漂泊協會 Working Poor Unite
- 地球公民基金會 Citizen of the Earth, Taiwan
- 台灣真相與和解促進會 Taiwan Association for Truth and Reconciliation
- 伊甸基金會 Eden Social Welfare Foundation

C. Contact Information

All questions regarding this report may be referred to the Secretariat of Covenants Watch, which is hosted by the Taiwan Association for Human Rights, at the following:

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Article 1: The Right to Self-Determination[1]

I. Introduction

Due to intense urging by civil society organizations, the State report finally acknowledged in its section on Article 1 regarding the right of self-determination that there were many aspects which the government had been unable to realize. However, in general, the State report has only offered an acknowledgement of its inability to realize these rights and has not offered any substantial proposals for improvement.

Although the Taiwan government has enacted "The Indigenous Peoples Basic Law" (IPBL) to ensure the spirit of self-determination for indigenous peoples, the government has obliterated the spirit of indigenous peoples self-governance by both failing to enact related legislation and by instead enacting laws contrary to the spirit of the IPBL. A number of concrete cases also demonstrate that the IPBL has not been genuinely implemented. These examples include the following: (a) the infringement on traditional lands of indigenous people manifested in the Statute for the Development of the Hualien Region and (b) the policies adopted in the wake of the August 8 Flood Disaster of 2009 and the process of their implementation.

II. Responses to the State Report

(1) Indigenous peoples have become puppets of political parties: Response to ¶ 1 (p. 1) of the State Report

The Constitution of the Republic of China, which was enacted in Nanjing, China at the end of 1946, contains articles mandating "equality among the various racial groups" (Article 5). However, under the historical conditions of that time, the so-called "racial groups" or "nationalities" did not include Taiwan's indigenous peoples. Therefore, Article 10 of the Additional Articles of the Constitution of the ROC (Taiwan), promulgated in 2005 added the stipulations that "the State shall, in accordance with the will of the ethnic groups, safeguard the status and political participation of the aborigines" to ensure self-governance among the indigenous

[1] This section was authored by Chiu E-ling (邱伊翎), Chen Yu-chi (陳郁琦), Huang Fei-yueh (黃斐悅), Pasang Hsiao (拔尚), and Oto Micyang (伍杜˙米將), and translated by Dennis Engbarth (安德毅).

peoples.[2] Nevertheless, in the actual operation of government administration in the past few years, it can be seen that indigenous legislators who have been nominated by political parties and elected by indigenous voters have mostly listened to the voices of the political parties which nominated them and have been unable to manifest the concepts or exercise their influence to promote indigenous peoples' autonomy.

(2) The right of referendum is stifled: Response to ¶ 3 (p. 1) of the State Report

The right of initiative and referendum is the most direct method by which the people can exercise the right of self-determination. However, since Taiwan's Referendum Act officially took effect on 2 January 2004 until the present, not even one referendum has passed. The most castigated features of the Referendum Act are undoubtedly the excessively high thresholds for the initiation and petition signatures to put a proposal on the ballot, the unclear powers and responsibility of the "Referendum Review Committee," and the excessively high turnout quorum for validation of a referendum. All of these features build barrier upon barrier in the path of the exercise of direct democracy by the people. For example, the Consumers' Foundation launched a campaign for a referendum to overturn the government's decision to import bone-in beef from the United States, which was then a danger zone for Creutzfeldt-Jakob ("mad cow") disease. However, in August 2010, the second-stage of petition-gathering failed due to various types of interference from government agencies.[3] Beginning in 2009, four referendum campaigns launched by the Democratic Progressive Party or the Taiwan Solidarity Union for referendums on the Economic Cooperation Framework Agreement[4], despite having received a total of over 4.3 million signatures,[5] were all vetoed by the commissioners of the Referendum Review Committee.

The inability to realize the right of referendum has also affected the rights of

[2] Translations from the Republic of China Constitution's main text and Additional Articles are taken from the official translation on the website of the Office of the President, available at http://english.president.gov.tw/Default.aspx?tabid=1037#10.

[3] Huang Kuo-chang (2010), "The Right of People's Political Participation in 2010: A Year of Setbacks and Reversals," in *2010 Taiwan Human Rights Report*, Taiwan Association for Human Rights, Taipei, Taiwan (in Chinese). See *Taipei Times*, "Campaign to hold poll on US beef imports fails," 11 August 2010, http://www.taipeitimes.com/News/taiwan/archives/2010/08/11/2003480111.

[4] Translator's Note: The full name of the agreement is "Cross-Strait Economic Cooperation Framework Agreement," but is commonly referred to by the acronym ECFA. The Taiwan government signed this agreement with the People's Republic of China, through semi-official intermediary organizations, on 29 June 2010.

[5] "ECFA Referendum: Referendum Review Committee Kills it Four Times in a Row", *Liberty Times*, 1 January 2011, http://www.libertytimes.com.tw/2011/new/jan/6/today-t1.htm (in Chinese). For an English-language report, see Loa Iok-sin," Committee once again says no to referendum bid," *Taipei Times*, 6 January 2011, http://www.taipeitimes.com/News/front/archives/2011/01/06/2003492788.

indigenous peoples. According to the Nuclear Materials and Radioactive Waste Management Act, which regulates the final disposal of spent fuel and other radioactive waste from nuclear power plants, the operation of related installations may not harm public health, safety, or environmental ecology. Moreover, the selection of sites for nuclear waste repositories should be made based on the Act on Sites for Establishment of Low Level Radioactive Waste Final Disposal Facility.[6] However, this law was only promulgated in May 2006 while, three decades earlier, the government had already established a nuclear waste repository on Orchid Island (Lanyu), which is inhabited by the Tao people, without soliciting the views of the indigenous residents. In the past three decades, the Tao people have continuously protested against the location of this radioactive waste repository on Lanyu. On 30 December 2011, Tao people held a protest in Taipei City after an investigative report found that land in Lanyu had been contaminated due to leakages of barrels containing nuclear waste.[7]

Draft revisions of the Act on Sites for Establishment of Low Level Radioactive Waste Final Disposal Facility proposed in February 2011 by the Cabinet-level Atomic Energy Council revealed that the government intends to change the current requirement for a compulsory referendum to ratify a candidate repository site to a

[6] Translator's Note: According to Article 9 of the Act on Sites for Establishment of Low Level Radioactive Waste Final Disposal Facility, any candidate site for a radioactive waste disposal facility must be approved by a local referendum in the county or city in which the site would be located within 30 days after the end of the period of public announcement. This stipulation exempts compulsory referendums on nuclear waste repositories from the "dual majority" requirement of Article 2 of the Referendum Act, which requires a "yes" vote from 50 percent of voters in a poll which has at least a 50 percent turnout. A similar exemption of the 50 percent turnout quorum in the Referendum Act was made for tourist casinos in Article 10-2 of the Offshore Island Development Act so that referendums on proposals to establish tourist casinos Before an Offshore Island may be approved by more than half of the valid votes but "the validity of the referendum result shall not require votes to have been cast by at least half of the eligible voters in the county or city." Thanks in part to this exemption, a referendum on a tourist casino project in the offshore island group of Matsu was approved by a 56 to 44 percent margin in July 2012. See Rich Chang and Chris Wang, "Group says Matsu Casino Referendum was Rigged," Taipei Times, 11 July 2012, http://www.taipeitimes.com/News/taiwan/archives/2012/07/11/2003537468.

[7] Public Television News (PTS) Network, "After Coexisting with Nuclear Waste for 30 Years, Tao Braves Curse Government Genocide," 30 December 2011, http://pnn.pts.org.tw/main/?p=37429 (in Chinese). See also in English, Loa Iok-sin, "Tao march against Lanyu nuclear leak," *Taipei Times*, 31 December 2011, http://www.taipeitimes.com/News/taiwan/archives/2011/12/31/2003522065.

stipulation that a referendum to oppose the selection would have to be initiated by citizens in order to block such a selection.[8] If this revision is made, local residents would have to overcome the thresholds in the two-phase proposal petition process to put a referendum on the ballot and then win over 50 percent votes against the site with at least 50 percent turnout to be valid. Moreover, based on the administrative divisions in effect for a referendum, residents in the villages physically close to nuclear power plants or facilities may be a different administrative district from the facility and therefore be unable to hold or participate in any related referendum.[9]

(3) The failure to enact secondary laws has turned the Indigenous Peoples Basic Law into an empty shell: Response to ¶ 4 (p. 2) of the State Report

The government promulgated the IPBL in February 2005 and approved a number of other laws related with indigenous peoples' affairs. However, most of these laws were mainly statements of principle, and many secondary laws on substantive matters have yet to be enacted. As a result, the IPBL has not been able to be genuinely implemented and has become an empty shell.

In addition, various government agencies have failed to revise laws, regulations or measures based on the IPBL. Indeed, they have actively squeezed out rights guaranteed under the IPBL. For example, the Ministry of Interior recently ignored the requirement in the IPBL that guaranteed the right of consent of indigenous peoples to delineate reserved land of indigenous peoples as "forest zones." Instead, it used the methods of administrative meeting and public notification and demanded that local governments cooperate with the public notifications, thus sparking dispute within indigenous communities. Such cases will be discussed later in this report.

(4) The draft Indigenous Peoples Self-Governance Act violates the Indigenous Peoples Basic Law: Response to ¶ 5 (p. 2) of the State report

On 28 September 2010, the Executive Yuan submitted a draft "Indigenous Peoples Self-Governance Act" to the Legislative Yuan, but this draft bill was sharply criticized by indigenous peoples' rights organizations. The draft version that passed its first reading in the Legislative Yuan actually infringed on the right of

[8] Kang Chieh-hsiu, "If You Want to Say No to Nuclear Waste Being Dumped on Your Home, Please Ask for a Referendum," Taiwan Environmental Information Center, 2 February 2011, http://e-info.org.tw/node/63556 (in Chinese).

[9] Saljeljeng, 'The Nuclear Waste Issue Keeps Burning. Taipower: Mudan has no Right to hold a Referendum," 18 January 2011. Taiwan Indigenous Television (TITV), http://www.tipp.org.tw/formosan/news/news_detail.jspx?id=20110119000014 (in Chinese).

self-determination of indigenous peoples. The draft act did not clearly grant indigenous peoples rights to traditional lands and their management, but required indigenous people to respect existing city and county administrative boundaries and the authority of central government-level state enterprises or entities over revenues from natural resources in these areas. The most controversial feature was contained in Article 24, which clearly excluded the application of the IPBL.[10] According to the IPBL, the government recognizes the indigenous peoples' rights to land and natural resources (Article 20) and mandates that state authorities shall amend, make or repeal relevant regulations in accordance with the principles of this law within three years from the date it took effect (Article 34).

Nevertheless, the government not only has not amended, enacted, or repealed relevant regulations, but, instead, Article 21 of the Executive Yuan's draft Indigenous Peoples Self-Governance Act would require that, when indigenous people exercise their land and resource rights, their actions should be in accord with the existing Wildlife Conservation Act, Forestry Act, Mining Act, Sand and Gravel Excavation Act, Water Act, Hot Springs Act, Cultural Heritage Preservation Act, and National Park Law. In this manner, the scope of rights recognized in the IPBL will be considerably shrunk.

In addition, according to the IPBL, government agencies or private individuals should consult with indigenous peoples and obtain their consent or participation and share the benefits when engaging in land development, resource utilization, ecology conservation, and academic research on indigenous peoples' lands (Article 21). However, Article 24-3 of the Cabinet's draft Indigenous Peoples Self-Governance Act stipulates that projects "carried out by responsible agencies for enterprises with central state purpose for the sake of important national benefit with the permission of the Executive Yuan are not subject to the restriction of the regulation of the IPBL to obtain the consent of indigenous peoples." From the content of its articles, it can be seen that the Cabinet's draft Indigenous Peoples Self-Governance Act is in essence a subsequent law that hollows out a prior law and that gravely infringes on the right of self-determination of indigenous peoples.

(5) Indigenous peoples cannot utilize natural resources: Response to ¶ 6 (p. 2) of the State Report

[10] Kuan Ta-wei, "The Snares in the Executive Yuan version of the Indigenous People Self-Governance Act," Public Television Service News Network, 3 May 2011, http://pnn.pts.org.tw/main/?p=26050 (in Chinese).

In the IPBL, the government recognized the land and natural resource rights of indigenous peoples. However, the subsequent failure to enact secondary legislation and amend or revoke other laws has led to the occurrence of many cases in which indigenous tribes have been indicted by the state or even convicted of utilizing such natural resources (Please refer to the discussion of Article 27 of the ICCPR in this Shadow Report).

(6) Development projects in indigenous peoples regions have not respected the will of the indigenous peoples: Response to ¶ 7 (p. 3) of the State report

The IPBL mandates that government agencies or private individuals should consult with indigenous peoples when engaging in land development projects and, after securing their consent or participation, carry out the development based on the will of indigenous peoples. However, since the phrase "indigenous peoples' lands" in the IPBL is not clearly defined, and no sanctions were listed to violation of this stipulation, the government, regardless of whether utilizing land owned by individual indigenous persons or traditional lands, has rarely respected the IPBL's stipulation and consulted with indigenous tribes or villages in advance.

The density of indigenous people in the Hualien-Taitung region is the highest in Taiwan (about one third of the residents of Hualien and Taitung counties). In the past, the traditional lands of various indigenous tribes covered virtually all of the territory in the Hualien-Taitung region, but since the implementation of the official land registration system, most of these traditional lands have been delineated as state owned land. As a result, numerous policies concerned with developing or utilizing public lands in these areas have profound linkages with indigenous peoples. For example, the draft Statute for the Development of the Hualien-Taitung Region was submitted by the Cabinet to the Legislature in February 2010. The provision in the drafts submitted by the Cabinet and KMT lawmakers for the "sale of public lands" triggered sharp controversy, resulting in their being dropped from the final version approved by the Legislative Yuan in June 2011 and promulgated on 29 June 2011. The purpose behind the attempt to enact such a policy of selling land in the "Eastern Zone Development Statute" appears to have been to encourage enterprises to make long-term investments and utilization for the sake of economic development.

This kind of large-scale development can sometimes squeeze the space for survival of the people and harm the environment, but the government often selectively guarantees the interests of investors instead of the rights of residents or the

environment. The most notorious case has been the Meiliwan Resort Hotel on the coast in Fulafulangan village of the Amei people in Taitung County. The Taitung County government asserted that some residents were occupying state-owned land and then decided to allow the hotel developer to begin construction and to demand that the residents leave. Even though the Kaohsiung High Administrative Court judged that the developers had violated the Environmental Impact Assessment Act and indigenous peoples' rights, and environmental protection organizations launched repeated protests, the Taitung County government issued an operating license to the developers. Only after the Supreme Administrative Court finally invalidated the environmental impact assessment on 19 January 2012 did the Taitung County government state that unless the EIA problem can be resolved, it would demand that the hotel cease construction and prohibit its operation. From 2008 through 2010, the Taitung County government consecutively lost suit after suit and stubbornly refused to issue an order to halt construction despite urgent calls by residents and environmental protection organizations.[11] During this period of time, the Meiliwan Resort Hotel added more facilities and continued to harm the environment.[12] The pattern of this case is similar to that employed by the Miaoli County government, which has applied to establish an urban renewal plan for the Tai'an Hot Springs Zone to allow several hot springs hotels to legalize facilities which were illegally developed and are harming the environment in indigenous peoples' traditional lands.

(7) Indigenous peoples' lands which are being applied for as reserved land are occupied: Response to ¶ 8 (p. 3) of the State Report

Since the related legislation on indigenous peoples' reserved lands has yet to be implemented, traditional lands of indigenous communities have been continuously subjected to infringement by state power and, as a result, the lives and livelihoods of indigenous communities have been constantly disrupted.

One noteworthy example concerns the struggle by indigenous communities in 2011 through 2012 against the Shihti Fishing Port, which is built at Fengpin Village in Hualien County on traditional land of the Amei people. The Amei people had registered this land with the township government as "reserve land" from 1990 through 1993, but the township government never processed the registration. In 1993,

[11] Lee I-chia, "Court orders construction on Meiliwan resort stopped," *Taipei Times*, 21 January 2012, http://www.taipeitimes.com/News/front/archives/2012/01/21/2003523735.

[12] Taiwan Environmental Information Center, "Huang Chien-ting orders Meiliwan to Immediately Cease Construction. Indigenous People: Construction Should Have Stopped Long Ago!" 8 February 2012, http://e-info.org.tw/node/74003 (in Chinese).

the National Property Administration of the Ministry of Finance allocated this land to the East Coast National Scenic Area Management Office of the Ministry of Transportation and Communications. After protests from the Amei community, the township government issued a document in 1997 stating that "due to high turnover among the staff responsible for this case, there had been no clear transfer of responsibilities and, as a result, application materials from 1980 through 1993 cannot be found. Please accept our apologies." In other words, the early application materials did not exist, but the land was already in the hands of the ECNSA office. From 1996 through 1999, the Amei community again petitioned the MOTC, but the MOTC's response was that the land in question had already been incorporated into the Shihtiping and Siouguluan River national scenic areas and thus legally "cannot be returned."[13]

(8) Lack of respect for the will of indigenous communities in post-disaster reconstruction: Response to ¶ 9 (p. 4) of the State Report

Typhoon Morakot, which struck Taiwan in early August 2009, inflicted grave harm on indigenous communities in southern Taiwan. The government was subjected to widespread criticism for its slow response to the disaster and delays in rescue efforts. Therefore, the Cabinet rushed to complete within a week a draft Special Act for Post-Typhoon Morakot Reconstruction in order to calm the people's anger. However, this special act excluded entirely all other existing laws and regulations, such as the Environmental Impact Assessment Act and the Soil and Water Conservation Act. Moreover, Articles 12 and 13 of the draft special act gave central government and local governments the power to compulsorily order the removal of villages without advance consultation with village assemblies or communities and without regard to laws regarding urban or rural planning, national park management, environmental impact, water or soil conservancy, or the Indigenous Peoples Basic Law. These stipulations sparked protests from environmental protection organizations and indigenous peoples' groups alike.[14]

Nevertheless, the Legislature hurriedly approved this special act with minor

[13] See Lu Shu-heng," Indigenous people struggle to regain Shihtiping Port," *Taiwan Lihpao*, 17 January 2012, http://n.yam.com/lihpao/garden/201201/20120117825980.html (in Chinese).

[14] For background in English see the *Taiwan News* editorial "Ma's 'shock plan' for southern Taiwan," *Taiwan News*, 26 August 2009, http://www.etaiwannews.com/etn/news_content.php?id=1040862&lang=eng_news&cate_img=logo_taiwan&cate_rss=TAIWAN_eng, and the *Taipei Times* editorial "Legislation that befits a disaster," 26 August 2009 http://www.taipeitimes.com/News/editorials/archives/2009/08/26/2003452041.

adjustments and thereby sowed the seeds for numerous post construction problems. These included the subcontracting by the government of tasks of the Cabinet-level Morakot Post-Disaster Reconstruction Council to private sector charities, thus creating a confusion of authority and accountability between the people, the State, and civic or private organizations. The government also insisted on only building so-called "permanent housing" instead of providing transitional housing for emergency settlement, and it demanded that indigenous communities must abandon their own land before they could move into "permanent housing." In fact, if the land where indigenous villages resided had already been hit by landslides and were danger zones, the indigenous communities would not insist on staying in such areas. However, the process of determining the "special delineated zones" (areas where indigenous people are not allowed to live) lacked sufficient dialogue or discussion with indigenous communities and therefore was subject to serious doubts and sparked protests from indigenous communities. For example, residents of the Laiji Community near Alishan in Jiayi County petitioned the Control Yuan in early February 2012 to investigate whether Jiayi County government officials had been negligent, given extended delays in the delineation process.[15]

Another example concerns Kochapongane (Haocha Village) of the Rukai people in Pingtung County, which had been destroyed during Typhoon Morakot on a site to which the community had been relocated in 1977. After suffering numerous large and small scale disasters, residents had repeatedly demanded that the government carry out river improvement projects, but were ignored. Therefore, since the government's negligence resulted in the Typhoon Morakot flood disaster and left the residents homeless, over 100 Haocha residents officially filed a lawsuit for national compensation in February 2012.[16]

The plan for permanent housing in the post-Typhoon Morakot reconstruction effort generated frictions between and among affected communities. First, the government planned to merge communities of different indigenous peoples into a single permanent settlement, citing a limited amount of available public land. Second, the differences between the religions of the indigenous peoples and a charitable

[15] Lu Shu-heng, "Indigenous People Protest to the Control Yuan over the Lack of Progress in Reconstruction," *Taiwan Lihpao*, 5 February 2012, http://www.lihpao.com/?action-viewnews-itemid-115052 (in Chinese), and Loa Iok-sin, "Aborgines protest delay in reconstruction," *Taipei Times*, 5 February 2012, http://www.taipeitimes.com/News/taiwan/archives/2012/02/05/2003524731.

[16] Tung Shu-chia, "The Haocha village indigenous community destroyed in the August 8 disaster wants national compensation," *United Daily News*, 5 February 2012, http://tw.myblog.yahoo.com/jw!FzXNONCbERrWcmVs0bP5_w--/article?mid=363 (in Chinese).

organization which had been subcontracted to carry out the related construction created tensions. Third, differences arose between members of affected communities who accepted the permanent settlement and those who insisted on returning to their original villages.

Moreover, people in indigenous communities which had not been destroyed or severely damaged by the typhoon and subsequent floods were commonly confronted with a lack of willingness on the part of the local governments to repair or improve the existing infrastructure such as roads and water and power supply systems; therefore, they faced difficulties in returning to their homes and maintaining their livelihoods.

In addition, the Atayal community of Hagay (Fuxing Village) in Taoyuan County have faced serious obstacles in the way of reconstruction after their village was destroyed after the collapse of the Baling Dam in the wake of Typhoon Aere in 2004.[17]

III. Conclusions and Recommendations

The Referendum Act was enacted to ensure the right of citizens for direct democracy. However, the current Referendum Act in Taiwan features numerous restrictions that severely obstruct the possibility of citizens actually exercising their right of direct democracy. Therefore, the government should immediately take remedial action in order to allow the Referendum Act to genuinely return power to the people and allow the people to exercise direct democracy and make their own decisions on major public matters.

In order to realize the right of self-determination for indigenous peoples, the government should immediately enact secondary laws related to the Indigenous Peoples Basic Law and ensure that each ministry and agency takes action to amend, draft or revoke related legislation and decrees in order to implement the IPBL. At the same time, the draft Indigenous Peoples Self-Governance Act should be re-drafted so as to prevent the enactment of a law that contravenes the spirit of the IPBL and the two Covenants.

[17] Please refer to the section in this Shadow Report on Article 11 of the ICESCR regarding the right to an adequate standard of living. Also see Also see Loa Iok-sin, "Atayal protest failure to fulfil rebuilding vow," *Taipei Times*, 15 April 2011, http://www.taipeitimes.com/News/front/archives/2011/04/15/2003500787, and "Hagay community protests against impacts of Baling Dam," "David on Formosa" blog, http://blog.taiwan-guide.org/2011/04/hagay-community-protests-against-impacts-of-baling-dam.

The government and the Council of Indigenous Peoples should provide a substantial re-examination regarding the issue of the relocation of indigenous people against their will in the process of reconstruction in the wake of the August 8 flood disaster and other natural calamities, In particular, the government should provide a comprehensive investigative report regarding the cases of Kochapongane (Haocha Village) of the Rukai people in Pingtung County, which was obliterated during the August 8 disaster, and the failure to reconstruct Fuxing Village of the Atayal people in Taoyuan County over a decade after its destruction in the wake of the collapse of the Baling Dam. Moreover, the Taitung County government and the CIP should submit a re-examination regarding the 2011 decision by the Taitung County government, in defiance of court judgments, to insist on authorizing a conglomerate to develop land traditionally inhabited by indigenous peoples. The government should also revoke public orders that have incorporated indigenous peoples' reserved lands into forestry zones or allocated such lands for use in construction of reservoirs or other such projects.

Articles 2, 3, and 26: Non-Discrimination and Equality[18]

I. Introduction

In the State Report, the sections on discrimination, equality, and respect for human dignity are limited to enumerations of laws related to the prevention of discrimination. Inadequate statistics are presented to gloss over to the inappropriate or insufficient protections provided by these laws. Furthermore, there is no reflection on the gaps between the laws and their implementation in practice, or how, as in the case of Harmony House (described below), the judiciary can also be an agent of discrimination, in that case violating the rights of persons with HIV.

This Shadow Report will cover ICCPR Articles 2, 3, and 26, in order to respond to the State Report. Areas where the implementation of state policy or the provision of remedies are inadequate include the lack of active realization of gender equality education, as well as racial discrimination and discrimination against persons with disabilities and persons with HIV.

II. Responses to the State Report

(1) Gender equality education: Response to ¶ 33 (p. 16), ¶ 35 (p. 17), and ¶ 47 (p. 22) of the State Report

Pursuant to the Gender Equity Education Act,[19] the Ministry of Education began to integrate a new gender equity education syllabus into elementary school and junior high school curricula in 2011. Part of the syllabus includes learning about different sexual orientations, gender traits, and gender identities according to students' different learning stages, and also making LGBT education a part of gender equality education.

1. The True Love Alliance Incident

In the "2008 Grade 1-9 Curriculum Guidelines,"[20] the Ministry of Education clearly states the objectives of gender equality education as follows: "Through the process

[18] This section was authored by Chen Ruei-yu (陳瑞榆), Chen Kai-chun(陳凱軍), Wang Hsien-han(王顯翰), Wu Meng-zi (吳孟姿), and Cheng Shi-yin (鄭詩穎), and translated by Susanne Ganz (金樹曦).

[19] This is the translation given in the State Report, although it would be better translated as Gender Equality Education Act.

[20] "2008 Grade 1-9 Curriculum Guidelines": In the two months between October and December 2007 the Ministry of Education's Grade 1-9 Curriculum Guidelines Review Committee established a review taskforce on the general guidelines, learning areas, life curriculum and other important issues regarding "Grade 1-9 Curriculum Guidelines." Working in subgroups, this taskforce reviewed and adopted a slightly amended version of the Curriculum Guidelines under the name "2008 Grade 1-9 Curriculum Guidelines." It also decided that the guidelines be implemented from 2011.

and methods of 'education' we hope to enable people of different gender or sexual orientation to develop their potential on an equal footing without being restricted by physiological, psychological, social, or cultural gender factors. Moreover we hope to use gender equality education to foster real gender equality in society among persons of different gender, so that they are able to thrive together with the nation and society as a whole as we jointly create a pluralist society that embraces gender equality." In other words, gender equity education aspires not simply for the equality of the "two sexes," but a gender equality that covers a more diverse spectrum of genders and sexualities.

Therefore LGBT education is an important and indispensable part of gender equality education. Originally the Ministry of Education was supposed to promote LGBT education in elementary schools and junior high schools across Taiwan from August 2011 as stipulated by law. However, the conservative religious group Taiwan True Love Alliance[21] launched a malicious campaign, claiming that education on knowing, understanding, and respecting diverse genders and diverse families (aside from learning about same-sex marriages, such education also includes step-parent led families, single parent families and other manifestations of diverse families) would confuse the gender awareness of children and encourage and tempt elementary and junior high school students to engage in sexual behavior and develop diverse sexual desires. These claims triggered panic and misunderstanding among some sectors of society. As the media subsequently fanned these claims, several lawmakers were misled to believe the statements of the Taiwan True Love Alliance, including Chen Shu-huey, Cheng Chin-ling, Kuan Bi-ling, and Chu Fong-chi. They demanded that the Ministry of Education implement the 2008 Curriculum Guidelines and related teaching materials only after canvassing once more the opinions of people of all walks of life and after reporting to the Legislative Yuan about the matter. This move ruined the efforts of the Ministry of Education's gender equity education curriculum review panel, which had convened 10 times and held two public hearings. The Department of

[21] Taiwan True Love Alliance (http://tulv.tw/): From the very beginning this organization appeared via an official website, but did not post on the website the name of an entity or individual to take responsibility for its statements. Since the organization maintained anonymity its motives for the establishment of an official website against education on homosexuality were strongly questioned by educators. Moreover, the website also created a fake debate: By spreading a great deal of distorted or negative news such as "We oppose the Ministry of Education encouraging sexual liberation in gender equality education in elementary and junior high schools," it misled the public into believing that the future education about homosexuality in schools equaled the advocacy of sexual liberation. When Chi Ming, a researcher at the Human Life Ethics Center Faculty of Theology of Fu-Jen Catholic University, was subsequently exposed as the alliance's responsible person, his capacity attracted particular attention. It also led to misgivings about the meddling of religious groups in politics given that the Human Life Ethics Center, the Bread of Life Christian Church, Top Church, and other religious groups were behind the alliance.

Elementary Education and the Student Affairs Committee under the Ministry of Education were thus forced to hold another eight public hearings in northern, central, southern, and eastern Taiwan.

Regrettably, however, although in the eight public hearings a number of participating local organizations, people working at the frontline of education, and parents voiced support for education on homosexuality, the Ministry of Education nonetheless surrendered to the false claims of the Taiwan True Love Alliance. Not only did the Department of Elementary Education begin to make minor adjustments to the competence indicators for gender equity education in the curriculum guidelines, but the Student Affairs Committee handed two of the three teacher's manuals that were originally slated for release – *Teaching Gender Well*, a reference manual for junior high school teachers, and *This is how Gender can be Taught*, as reference for elementary school teachers - to scholars and experts for further review. As a result, teaching material for a diverse gender equity education, scheduled to be used from August 2011, was delayed. The government has failed to look into the problem of discrimination against gender minorities, but bowed to pressure from conservative religious organizations so that all gender education curricula must be reviewed and approved by religious organizations before they are implemented. The state has failed to promote the ideas of educational professionalism, improvements in human rights, and diverse gender equality.

2. The Lujiang Junior High School Incident

In the evening of 30 October 2011, a young man surnamed Yang, a student at New Taipei Municipal Lujiang Junior High School, jumped to his death at his home because he was no longer able to put up with peer exclusion and bullying over his gender traits. Reports described Yang as an introverted person with a small and slim build who had been excluded and ridiculed as a sissy by his male classmates throughout his entire school career. Since the suicide happened just one day after Taiwan's annual gay street parade, this news immediately triggered an outcry from the gay and lesbian movement as well as gender equality activists. On 5 November they held a commemorative event outside the entrance of Lujiang Senior High School. Because education about homosexuality, which is only a small part of gender education, does not take place in elementary and junior high schools, students with different gender traits suffer from bullying, while the bullies unwittingly become victimizers because they have not received a diverse gender education. At the same time teachers and parents are at a loss as to how to face students with different gender traits because they don't have the necessary and appropriate teaching materials.

(2) Violation of privacy of people living with HIV and AIDS undermines right to work: Response to ¶ 44 (p. 22) of the State Report

With regard to the protection of the rights of people living with HIV and AIDS, the State Report merely states that Article 4 of the HIV Infection Control and Patient Rights Protection Act stipulates that the dignity and the legal rights of the infected shall be protected and respected; there shall be no discrimination, no denial of education, medical care, employment, nursing home, housing or any other unfair treatment. In addition, according to this law, in the event of unfair treatment the infected individual may file a complaint within one year of the incident. In the four years between the proclamation of the amended HIV Infection Control and Patient Rights Protection Act in July 2007 and July 2011, just seven complaints were filed over the violation of the rights of infected individuals. This exceptionally low figure reflects the big gap between legal guarantees and their actual enforcement. The law is actually vastly insufficient when it comes to finding resources and avenues for relief and protection.

Concrete cases of discrimination in employment
Mr. Huang, an HIV carrier, was invited for a job interview upon introduction by a friend and was hired. When the company subsequently arranged for a medical check-up Mr. Huang was shocked to find out that the health check items included an HIV test. Since Mr. Huang was afraid that his infected status would be exposed and also found out by his friend, he sadly left the medical check-up clinic and also gave up the job that he had just landed. He was agonizing over whether he would face the same situation at his next job, too.[22]
Xiao Yu, who is in her twenties, is an HIV carrier. In late November 2009, she successfully applied for a cleaning personnel position and was dispatched to work at a hospital. After finishing her first day on the job, she received a medical check-up form from the cleaning services company, which included an HIV test. On the following day she told the company that she was infected with HIV. Much to her surprise the company demanded that she immediately return all work equipment. After just one and a half days on the job she found herself fired because of her HIV infection. In this case a complaint was successfully filed with the Department of Health of the Taipei City Government. The cleaning services company was eventually fined NT$300,000 because it failed to reach an out-of-court settlement with the complainant within a given deadline.[23]

[22] Case provided by Wu Meng-tzu of the Taiwan Love and Hope Association

[23] "Taiwan's First Penalty for Discrimination Based on AIDS," *Apple Daily* report of 19 July 2010.http: //tw.nextmedia.com/applenews/article/art_id/32671531/IssueID/20100719 (in Chinese).

The HIV Infection Control and Patient Rights Protection Act clearly states that the right to work of HIV infected persons is guaranteed and that they may not be discriminated against. Article 23 of the Act also stipulates that once a complaint has been substantiated individuals or institutions in violation of the Act shall be fined NT$300,000 up to NT$1,500,000. Art. 7 of the "Regulations Governing Protection of the Rights of HIV Patients," a subordinate law to the Act promulgated in 2008, clearly spells out the complaint procedure and mechanism. However, when it comes to the actual handling of such cases, the yardstick for punishment is whether the complainant has agreed to an out-of-court settlement. Therefore the Department of Health will not impose a fine, even if a complaint has been substantiated, on the grounds that the two sides have reached a settlement. In the early stages of the implementation of the said Act, in some cases local authorities refused to inform the complainant of the outcome of the complaint. The original intention of the Regulations is to establish whether discrimination has occurred. If it is impossible to impose due punishment on violators, then efforts to achieve the goal of equal rights for HIV infected people are doomed.[24] For people living with HIV/AIDS, the protection of privacy is the most fundamental and most important issue. At the workplace, people living with HIV/AIDS do not only face discrimination or are fired when their infected status is exposed. Even when a company decides not to lay off the infected person, he or she may face rumors and slander within the company and feel compelled to resign at his or her own initiative. Therefore, companies must first of all be prohibited from insisting on unnecessary medical examination items if the right to work of people living with HIV or AIDS is to be truly protected. While the Act currently in force clearly states the protection of the right to work, it remains ambiguous in terms of how to ensure such protection, and is difficult to apply. When a company demands that its employees take an HIV test and labor-management relations are severely unequal, infected persons will hardly be able to refuse testing. Their infected status is even more likely to be exposed due to inappropriate handling of medical check-up information, which in return will affect their right to work.

We do not only face the problem of how people living with HIV or AIDS, whose status has not been exposed, can protect their privacy to prevent repercussions on expanded human rights such as family unity, work, education, and medical assistance. Civic groups that assist the disadvantaged HIV patients also often encounter misunderstandings and rejection from among the general public, as becomes evident in the following incident involving the Harmony Home Association Taiwan.

[24] Monthly newsletter of the Persons with HIV/AIDS Rights Advocacy Association of Taiwan, September 2011 issue

Concrete case of discrimination in right to residence – **The Harmony Home Association Taiwan Incident**
In June 2006 the Harmony Home Association Taiwan (herein called Harmony Home) rented a house in the Zaixing Community in Taipei City's Wenshan District as home for more than 20 HIV patients. Police carelessly let the news slip, which triggered protests from the community's residents. They demanded that Harmony Home move away from the community within three months on the grounds that the community bylaws stipulated that "no one may engage in the business of sheltering or settling persons with statutory communicable diseases."After Harmony Home rejected the demands, the community's management committee filed a lawsuit with the Taipei District Court in October 2006. The court ruled in the same month that the said bylaws only restricted residents from "engaging in the business of sheltering or settling" but did not restrict the HIV patients' freedom to choose a residence. Therefore, the court ruled that Harmony Home must move away from Zaixing Community in order to ensure that the physiological and psychological health of the residents was not endangered by the HIV patients, which meant that Harmony Home had lost the lawsuit in the first instance. In 2007 the HIV Infection Control and Patient Rights Protection Act was revised. In line with the intention of this Act, the High Court recognized in the second instance that the bylaws of Zaixing Community violated the HIV patients' legally protected rights because it ruled out sheltering patients with the statutory communicable disease AIDS, thus ruling against Zaixing Community. Although Harmony Home won the lawsuit, it had already relocated the severely ill patients before the ruling was final, in order to protect their right to live in peace instead of being treated like social outcasts, and it had converted the premises into a shelter for single mothers and children living with HIV or AIDS.[25]

(3) The Discrimination Complaint Review Board turning a blind eye to discrimination: Response to ¶ 50 (p. 24) of the State Report

Taiwan has always been a multiethnic state. Due to a policy of opening and globalization, a large number of foreign immigrants have entered Taiwan in recent years. In order to protect immigrants from discrimination, in 2008 the National Immigration Bureau under the Ministry of the Interior promulgated the "Regulations Governing Discrimination Complaint Filing Procedures for Residents of the Taiwan Area" and the "Guidelines for the Establishment of the Review Panel for People Residing in the Taiwan Area Filing Complaints against Discrimination." The number

[25] Chen Ching-fang: "Harmony Home Wins Lawsuit, Severely Ill Already Relocated," *The Epoch Times*, 7 August 2007, quoting the Central News Agency. Retrieved from http://www.epochtimes.com/b5/7/8/7/n1794905.htm (in Chinese).

of discrimination complaints accepted and reviewed stood at one case each in 2009, 2010, and 2011. In all three cases the complaints were filed over "verbal or written discrimination," but during review none of the complaints was substantiated. Two of the three discrimination complaints handled by the National Immigration Bureau were filed by the Trans Asia Sisters Association Taiwan (TASAT). Yet in both cases the review found: "The discrimination complaint was not substantiated because the rights of the complainant were not infringed upon."

Concrete cases
In 2010 a teacher at Kaohsiung Municipal Lin Yuan Senior High School, when disciplining a student whose mother hails from Indonesia, made statements such as "Are you a barbarian? You want to go back to Indonesia with your mother during the winter break, then just get out of here and live as a barbarian in Indonesia!"The said student felt discriminated and offended. When hearing this news other female immigrants were quite enraged, feeling that the teacher's statements would only aggravate discrimination and misunderstandings in Taiwanese society toward new immigrants and negatively affect the relationship between the girl and her mother. Therefore they filed a complaint.
In 2011 an article proliferated on the Internet that strongly discriminated Vietnamese women. Its headline read: "Vietnam – a Country that Makes Money with Female Genitals." The article left a Vietnamese woman who read it very uncomfortable. She thought that such discourse could imperceptibly influence the Taiwanese public, thus undermining the good relationship and mutual trust between her and her Taiwanese husband. So she filed a complaint.

III. Issues Neglected by the State Report

(1) Taiwan lacks a dedicated institution at the national level handling affairs of persons with disabilities

In line with the Organic Act of the Executive Yuan, the government will implement the new organizational structure of the government in 2012. As part of the streamlining, the Department of Health and the Ministry of the Interior's Department of Social Affairs, Child Welfare Bureau, and Domestic Violence and Sexual Assault Prevention Committee will be merged into the new Ministry of Health and Welfare. Originally the Department of Social Affairs had a Welfare of Persons with Disabilities Section and an Institutions for Persons with Disabilities Section. These two sections serving disabled persons will be scrapped in the government restructuring. Their operations will be merged with the Department of Social Care and Development and the Department of Social Affairs, which means that the new organizational structure will not include any dedicated organ serving disabled persons.

The amended People with Disabilities Rights Protection Act of 1997 already defined the authorities and responsibilities of the agencies overseeing each sector, but while it clearly distinguished among their operations, it failed to do the same for the needs of disabled persons. For many years the welfare services and welfare rights of disabled people have been hampered by a lack in policy transition, coordination, and integration across various cabinet agencies such as labor affairs, social affairs, health affairs, and education. Therefore Chen Chieh-ju, member of the Executive Yuan's Social Welfare Promotion Committee, submitted a proposal at the 12th committee meeting, suggesting that the Executive Yuan establish an inter-ministerial working group to hammer out a clear direction and objectives for policy planning with regard to whole-career and whole-person services for disabled persons. She also proposed that the current resource allocation and service delivery be increased or adjusted to meet the needs of the disabled.

Meanwhile the central and local governments have set up a liaison and response mechanism that allows governments at all levels to use the Coordinating Office for the Protection of Rights and Interests of Persons with Disabilities to coordinate and handle matters if it is impossible to reach consensus among various government agencies regarding welfare measures or if they encounter matters that need to be solved urgently. However, actual practice shows that it is difficult to effectively coordinate and integrate policy in the absence of a dedicated government organs, personnel, and budgets for disabled affairs.

In order to protect the principle of statutory government organization and to prevent the state from arbitrarily establishing administrative organizations without the consent of the people by using administrative action, and to achieve a clear distinction between authorities and responsibilities, Article 5 of the Basic Code Governing Central Administrative Agencies Organizations stipulates, "…[W]ith the exception of this Code and organic laws and regulations of various agencies, no other laws or regulations may be used to govern the organization of agencies." Therefore, given that the government does not make efforts to establish a coordinating or dedicated department for disabled affairs, and also that it is not possible under the current Organic Act of the Executive Yuan to use administrative action or other administrative laws and regulations to flexibly create a new body, the coordination, integration and execution of policies and resources for disabled people will yield limited results.

IV. Conclusions and Recommendations

(1) Gender equality and education about homosexuality must consist of more than the active promotion and delivery of a diverse gender equality education on school campuses and must not be limited to students who are attending school. The general public should also be given an opportunity to familiarize themselves with diverse concepts of gender equality.

1. Lawmakers and religious groups need a diverse gender equality education even more, considering the obstructive role they played against the promotion of gender equality education during the controversy over the Taiwan True Love Alliance. While the incident demonstrated that many people are still very unfamiliar with gender equality education, it also proved that such education should definitely target not just elementary and junior high school students, but should be expanded to the Legislative Yuan and religious circles to let them understand the needs of groups who are socially disadvantaged because of gender, as an important basis for the realization of gender equality.

2. Cease repeating slogans about friendly schools while failing to put diverse gender equality education into practice

Numerous suicides ranging from that of junior high school student Yeh Yung-chih in April 2000 to that of student Yang of Lujiang Junior High School in October 2011 were caused by discrimination and bullying in school due to their gender traits. The victims in these incidents were students, but the victimizers were certainly not only the peers of these youngsters. Many involved in our education system – the teachers who call into question gender-variant students, education authorities that turn a blind eye to the existence of bullying, and groups and individuals that obstruct the implementation of gender equality education - lack an environment that instills in them an awareness of gender equality. As a result, the majority of students might turn into bullies because they never have a chance to learn to respect and tolerate diverse genders, while a minority of students with diverse genders will never be able to experience a friendly school environment.

(2) Avenues for discrimination complaints by persons with HIV/AIDS should be broadened.

In terms of employment discrimination, priority should be given to reducing unnecessary testing, in order to strengthen the protection of the right to privacy.

The objective of filing complaints and punishing persons who discriminate against people with HIV/ADIS lies in substantiating and preventing discriminatory acts. This should be unrelated to whether the victim of discrimination and the person who engages in discriminatory actions settle out of court. Whether the two sides settle the matter in private should not interfere with the review and decision of the case. At the same time, the progress of a complaint and the way it is handled should be made transparent, so that the complainant can check its progress and the outcome of the ruling, in order to realize effective remedies. That the number of complaints is extremely small could be due to the fact that the infected persons do not understand their own rights and the complaint regulations. Therefore the competent authorities at the central and local government level should inform the public about the complaint channels and mechanisms when conducting anti-discrimination campaigns.

(3) The difficulty of establishing discrimination based on ethnic origin or nationality

Current review of discrimination complaints requires the victim of discrimination to provide documents showing that his/her "rights have been illegally infringed upon." Furnishing such proof is difficult and amounts to an excessively harsh requirement which makes it difficult to substantiate discriminatory actions in defiance of the good intentions behind Article 62 of the Immigration Act. This makes it even harder to achieve the protections called for in ICCPR Articles and 20 for persons of different color, gender, language, religion, social status, etc. or to legally prohibit discriminatory hate speech. Dedicated government institutions should have a high degree of sensitivity, they must be aware of how demeaning and damaging discrimination and spoken or written hateful language are to the human dignity of different races, ethnic cultures, and victims of discrimination. In order to provide the victims with an efficient channel for relief, it is inappropriate to require as a condition that the person suffering discrimination must furnish evidence that his "rights have been illegally infringed upon."

In recent years Taiwan has seen a massive influx of new immigrants and foreign nationals. Therefore there should be a high degree of sensitivity with regard to any discrimination based on race or ethnic origin. The Discrimination Complaint Review Board should therefore apply broader standards for identifying discrimination so that damage to the human dignity of an interested party is already viewed as an infringement of it. Then victims of discrimination would then have an efficient channel for relief, in keeping with Articles 2 and 20.

(4) A dedicated institution to eliminate discrimination against persons with disabilities should be established.

Under both the ICCPR and the ICESCR, the person is the subject of rights. Therefore the rights of each individual need to be protected, rather than treating individuals as disadvantaged persons that passively receive welfare. The government should establish a Commission for Persons with Disabilities, which should not be a subordinate unit of the Health and Welfare Ministry, in order to avoid the conception that the government's work for disabled persons is confined to the provision of social welfare. The Commission should be granted higher status by placing it directly under the Presidential Office or the Executive Yuan. Only then can the rights of persons with disabilities be guaranteed and can the promotion of disabled people's affairs be coordinated across various government units.

Article 6: The Right to Life[26]

I. Introduction

In the first State Report on the implementation of the ICCPR published by our government in April 2012, the section on Article 6 concerning the right to life dealt with most major issues including the case of the wrongful execution in August 1997 of Air Force private Chiang Kuo-ching (see below), which had attracted considerable interest in 2011. However, besides a cursory review of the current situation, the official report did not put forward any substantial or clear policy plans or any concrete and feasible proposals to deal with the institutional shortcomings in realizing the requirements of this article.

Therefore, this section of the Shadow Report will provide responses on questions such as how to reduce the use of the death penalty, the principle of prohibition of disadvantageous alteration, the standards for death sentences, the right of petition for amnesty of death row convicts, key issues in major death penalty cases (including the cases, to be described below, of Su Chien-ho or the "Hsichih Trio", Chiang Kuo-ching, Chiou Ho-shun and Chiu Hsing-tseh), the controversy over the contribution of body organs by executed convicts, and the implementation of the powers of office of military and police agencies. Questions involving other articles related to the death penalty, such as torture and fair trial, will be discussed in other sections of the Shadow Report dealing with Articles 7 and 14 of the ICCPR.

This report will also take the initiative to raise two other issues, namely the treatment of convicts sentenced to capital punishment and the issue of the sentencing and implementation of the death penalty on persons with mental disabilities or retardation.

II. Responses to the State Report

(1) On the meaningless policy of "gradual elimination of death penalty": Response to ¶ 79 (p. 38) and ¶ 92, ¶ 93, and ¶ 94 (pp. 42-43) of the State Report

On 17 May 2001, Justice Minister Chen Ding-nan of the then governing Democratic Progressive Party (DPP) announced the government's administrative goal

[26] This section was authored by Chen Hsun-tzu (陳壎慈), Lin Hsin-yi (林欣怡), Weng Kuo-yen (翁國彥), Kao Jung-chih (高榮志), and Lee Ai-lun (李艾倫), and translated by Dennis Engbarth (安德毅).

to achieve "gradual elimination of the death penalty." Afterward, there was a second transfer of power in May 2008 back to the Chinese Nationalist Party (Kuomintang or KMT), but regardless of which party was in power, each has expressed support for the long-term goal of "gradual elimination of the death penalty," but neither has issued a concrete timetable.[27] There were four years from December 2005 through March 2010 during which the death penalty was not implemented in Taiwan. In March 2009, Taiwan ratified the ICCPR and the ICESCR, and, in December 2009 the "Act to Implement the ICCPR and the ICESCR" took effect. Nevertheless, the government on 30 April 2010 resumed implementation of death sentences. This action was undoubtedly a fundamental transgression of the ICCPR's Article Six which guarantees the right to life!

Article 6 Section Six of the ICCPR clearly states: "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." Based on this principle, after a State party has ratified the ICCPR and has already ceased implementation of death sentences, it is right and proper for that State party to adopt more proactive and concrete policies and actions to realize the objective of abolishment of capital punishment. However, with regard to the controversial issue of abolishment of capital punishment, the actions of the Taiwan government have been entirely contrary to the spirit of the Covenant.

1. The commitment to reduce use of capital punishment has turned into empty rhetoric

Although the State Report repeatedly reaffirms the government's stance to gradually eliminate the death penalty, it does not include any substantive discussion on how the reduction in the use of the death penalty will be achieved. Based on the material provided in the official report, a total of 15 death sentences were confirmed in 2011, the highest total since 2000, when 22 were confirmed.[28] It is apparent that the policy of urging "prosecutors to refrain from asking for death sentences and judges to reduce issuance of death sentences" has not been realized in judicial practice. In addition, regarding the claim that "the government has already issued a draft plan to eliminate death sentences for several crimes which do not involve the taking of life," it should be noted that the expected revisions to drop the death penalty all concern

[27] Taiwan Alliance to End the Death Penalty (TAEDP), "A Blow to Human Rights: Taiwan Resumes Executions - The Death Penalty in Taiwan, 2010." March 2011. http://issuu.com/taedp/docs/taedp_report2010_en?mode=a_p

[28] However, month by month tracking by the TAEDP indicates that there were 16 death sentences confirmed in 2011, while the MOJ statistics list only 15. For the 2000 figure, see Taiwan Alliance to End the Death Penalty (TAEDP), "A Blow to Human Rights: Taiwan Resumes Executions - The Death Penalty in Taiwan, 2010." p.10.

articles that no longer are in accord with the current social conditions and have long gone unused. Hence, these proposed changes will be of no use in actually reducing the use of the death penalty.

"In no event was the death penalty to be provided for crimes of property, economic crimes, political crimes or in general for offences not involving the use of force."[29] This principle can be considered to have become a consensus among human rights professionals in setting a suitable scope for the strict restriction of capital punishment to the most heinous crimes. Moreover, Paragraph Six of General Comment No. 06 on "The Right to Life" issued on 30 April 1982 states that States parties are obliged to limit use of the death penalty and to abolish it for other than "most serious crimes" and Paragraph 7 emphasizes that "the expression 'most serious crimes" must be read restrictively to mean that the death penalty should be a quite exceptional measure." Based on the principle of Article 6 of the ICCPR mandating gradual abolishment of the death penalty, the above General Comment and the requirement of Article 8 of Taiwan's Implementation Act for the ICCPR and IESCR that "(a)ll 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 existing laws, abolition of laws, and improved administrative measures," the government was obliged to revise related laws and regulations within two years after the Implementation Act entered force and restrict the scope of the use of the death penalty. In December 2009, the Taiwan Alliance to End the Death Penalty (TAEDP) provided the Ministry of Justice with proposals for relevant revisions. Nevertheless, after the passage of two years, the government had only "proposed revisions"[30] to two articles and was clearly far behind schedule. Moreover, there were no signs of any re-examination of the continued application of the death penalty to property or economic crimes, political crimes and ordinary offences that do not involve the use of violence. It is apparent that the government's actions are contrary to the requirements of Article 6 of the ICCPR to gradually abolish the death penalty and to strictly restrict the scope of its use.

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[29] Manfred Nowak (1993), *U.N. Covenant on Civil and Political Rights: CCPR Commentary*; Publisher: N P Engel, p.118.

[30] Chart 17 in the third draft of the State Report on Human Rights covering the ICCPR listed revisions (promulgated in November 2011) to Article 7 Section One and Section Three of the Statute For Controlling Firearms, Ammunition, and Weapons which dropped death penalties for manufacturing, selling, or shipping various types of firearms, ammunition, or weapons without permission (Number 56) and to Article 4 of the Statute for the Punishment of Smuggling (approved by the Legislative Yuan on 29 May 2012, which dropped the death sentence for causing the death of another person while engaging in armed smuggling (No. 57). However, these listings were absent from the final State Report, evidently because the relevant legal revisions have been completed.

Table 1:

Applications of the Death Penalty to Property, Political and Ordinary Offenses

Number	Law	Article	Offense
1	Civil Aviation Act	Article 110 Paragraph 2	Manufacture or maintenance with unapproved aviation products, appliances, and parts that danger to flight safety to the extent of causing death to another.
2	Criminal Code	Article 103, Paragraph 1	Treason (Collusion with a foreign state with intent to start war on ROC)
3		Article 104, Paragraph 1	Treason (Collusion with a foreign state to subject ROC to such state or other state)
4		Article 105, Paragraph 1	Treason (Serving in the armed forces of an enemy against the ROC or its ally)
5		Article 107, Paragraph 1	Treason (Major assistance to the enemy or causing severe injury to the military interests of the ROC)
6		Article 120, Paragraph 1	Abandonment of territory by public official
7	Criminal Code of the Armed Forces	Article 17, Paragraph 1	Rendering Direct Assistance to the Enemy
8		Article 18, Paragraph 1	Rendering Indirect Benefit to the Enemy
9		Article 19, Paragraph 1	Rendering Assistance to the Enemy
10		Article 20, Paragraph 1	Disclosing of military secrets in wartime
11		Article 24, Paragraph 1	Capitulation
12		Article 26, Paragraph 1	Initiating war without cause
13		Article 27, Paragraph 1	Disobeying orders in the face of the enemy
14		Article 31, Paragraph 3	Disclosing of military secrets in wartime
15		Article 41, Paragraph 1	Absence without leave with arms in wartime
16		Article 42, Paragraph 3	Absence from post without leave by an officer in wartime that causes injury to the

			military
17		Article 47, Paragraph 2	Insubordination in wartime
18		Article 48, Paragraph 2	Instigation to resist orders in wartime
19		Article 58, Paragraph 3	Direct sabotage of military installations in wartime
20		Article 65, Paragraph 1	Unauthorized manufacture, sale or transport of military munitions
21		Article 65, Paragraph 2	Unauthorized manufacture, sale or transport of military munitions for criminal purposes
22		Article 66, Paragraph 2	Forging military orders in wartime
23	Statute for Narcotics Hazard Control	Article 4, Paragraph 1	Manufacture, transportation or sale of Schedule 1 controlled drugs

2. The disappearing policy of abolition of the death penalty

Even though the Taiwan government has touted a policy of "gradual abolishment of the death penalty" for over a decade, the abolition of capital punishment has remained a highly sensitive and controversial issue. The majority of people apparently believe in the necessity of the death penalty, based on concepts of retributive justice and faith in its effect as a deterrent against crime. The "Public Opinion Survey on the Question of Abolition of the Death Penalty in the Taiwan Region" published by the Ministry of Justice conducted from 19 December 2007 through 15 February 2008 showed that 79.7 percent of those polled do not agree with abolition.[31] However, as many as 56 percent of those polled expressed support for abolition if "life imprisonment without possibility of parole" were offered as a substitute for the death penalty. Although we have some reservations on the substitution of life imprisonment without possibility of release as a replacement measure, this figure should be sufficient to show that over half of the people agree that the death penalty can be abolished if appropriate complementary measures are implemented. Although the State Report reaffirmed that "abolition of the death penalty is a long-term objective," it utilized the claim that "there is still a considerable number of people who cannot accept abolition of the death penalty" to shirk the issue and avoid substantive

[31] See <http://www.moj.gov.tw/ct.asp?xItem=259538&CtNode=30968&mp=001> (in Chinese).

discussion or explanation of the government's death penalty policy. In fact, the above mentioned opinion poll indicates that the so-called "majority public will" is by no means unshakeable. Instead, the truth is that the government is unwilling to frankly face the question of abolition of the death penalty and is instead simultaneously hoisting the high-sounding slogan of "building a human rights state" and evading its obligation to explain its policies.

3. Only a moratorium can realize reduction of the use of capital punishment

In October 2010, the MOJ established the "Task Force for the Gradual Abolition of the Death Penalty." In addition, the MOJ itself is the agency responsible for overall planning of the government's "Great March Forward in Human Rights Plan" for the realization of the ICCPR and ICESCR.[32] However, regarding the controversy over whether the death penalty violates the international human rights covenants, the MOJ maintains that it must implement death sentences based on the principle of "administration based on law." The MOJ has unilaterally interpreted the content of the ICCPR to maintain that Article 6 does not require States parties to abolish the death penalty. In response to questioning by legislators, Justice Minister Tseng Yung-fu even stated: "The current policy on the death penalty is to 'reduce use of the death penalty as much as possible' and not to abolish the death penalty. This policy has not changed, but death sentences confirmed by the courts must still be carried out. In addition, we ask prosecutors to refrain from asking for the death penalty as much as possible."[33] In response to further questions by reporters, Tseng Yung-fu again clarified that "the MOJ hopes to reduce the use of the death penalty but it does not want to abolish the death penalty." It is apparent that Tseng's statement takes no heed of the requirement affirmed by the United Nations Human Rights Committee (UNHRC) that States parties must gradually phase out the death penalty based on the objectives and principles of Article 6. Instead, the MOJ has adopted a position that negates the abolishment of the death penalty as government policy.

(2) The principle of prohibition of disadvantageous alteration: Response to ¶ 80 (p. 38) of the State Report

Paragraph 80 of the State Report states that "cases in which death sentences have

[32] The MOJ serves as the staff organization for the Presidential Advisory Commission on Human Rights and the Executive Yuan Task Force to Promote Human Rights, and it also has its own internal human rights task force.

[33] "Death Penalty Policy Remains Unchanged - Justice Minister," Central News Agency, 27 October 2011.

been issued in the first and second trials do not need to await a request by the defendant before being sent to a higher court for review." The original intent of this regulation was to guarantee the right of the defendants to appeal, but in actual trial practice, there have been cases in which defendants who had originally been sentenced to life imprisonment were given death sentences after prosecutors filed appeals to higher courts. Usually, the failure of a prosecutor to file an appeal would signify that the state accepts the original judgment of a life sentence, but in the case of Taiwan, the perfunctory exercise by prosecutors of their official powers can end up infringing on the right to life.

(3) Lack of standards for death sentences: Response to ¶ 81 (p. 38) of the State Report:

Paragraph 81 of the State Report mentions the "guidelines for sentencing" for the determination of death sentences by the Supreme Court but does not explain what the so-called "sentencing standards" are based upon. In 2011, the Judicial Yuan began to study the formation of a sentencing guideline information system in hopes of establishing a fair and rational set of standards for sentencing. However, at present this program is only dealing with offenses such as "infringement on sexual autonomy" and "driving while intoxicated" and has not yet engaged in planning for the creation of sentencing guidelines for crimes which involve the death penalty, the sentence which most infringes on the rights of the people.

In at least one case, the Supreme Court has revoked judgments of lower courts for failing to hold argument on sentencing guidelines. In accepting an appeal to a High Court conviction and death penalty judgement in a murder case heard in 2011, the Supreme Court returned the case to the High Court. The Supreme Court found that High Court judges had no heed to the motion put forward by defence lawyers for investigation of evidence in order to conduct needed clarification for arguments on sentencing, but had only asked defence counsel to submit a supplemental brief on their opinion on sentencing guidelines and maintained that such a procedure was sufficient to meet the demand for "sentence guideline argument." In addition, Paragraph 92 of the State Report related that the Judicial Yuan had already proposed draft revisions to Article 289 of the Code of Criminal Procedure. However, while the proposed revision would state that there should be argument on sentencing, it does not substantively delineate the procedure for such argument. If the practice of argument on sentencing guidelines is conducted in the "convenient" and perfunctory manner above, the original intended guarantees for the rights of the defendants and the

admirable goal of realizing justice in individual cases will become merely empty rhetoric.

(4) The right to apply for amnesty, pardon, or commutation of death sentence cases has been repeatedly obstructed: Response to ¶ 83 and ¶ 84 (p. 39) of the State Report

Based on Article 6 (4) of the ICCPR and Paragraph 7 of the UNHRC's General Comment No. 06, it is clear that applying for pardon or commutation of the sentence is a "right" of persons whom have been sentenced to capital punishment and that the State party has the "obligation" to set in place a clear and comprehensive legal system to guarantee the exercise of this right. Executions of death sentences carried out while the State party lacks a robust system for pardon or commutation violate the requirement of the ICCPR for procedural guarantees in death penalty cases.

1. The current "Amnesty Act" does not grant persons sentenced to death the right to petition for pardons.

In 1991, Taiwan revised the "Amnesty Act." The act, which has a total of only eight articles, is silent on the procedures defendants or convicts should follow for the submission of amnesty petitions, the methods by which the responsible administrative agencies should handle such petitions, what procedural guarantees should be possessed by convicts, the standards for approval or rejection of petitions, and remedial procedures in the case of rejection. The government tends to consider pardons to be acts of special favor or kindness to be unilaterally bestowed by the ruler and to believe that convicts do not have the right to take the initiative to petition for pardon or commutation of sentence. In this State Report, the government did not provide any re-examination or plans for the improvement of the amnesty system and thus has violated the ICCPR's requirement that persons under sentence of death are bearers of a right to seek pardon or commutation of sentence.

2. Executions have been carried out before petitions for pardon have been answered.

The shortcomings of Taiwan's amnesty system have been outlined above. As bearers of the right to petitions for pardon or commutation, convicts sentenced to death should have the right to take the initiative to submit such petitions. Therefore, the government has the obligation to respond to such petitions and must not carry out executions before it has provided a response to approve or reject such a petition and notified the petitioner. On 29 March 2010, the TAEDP assisted 44 death row convicts

to submit petitions for amnesty, pardons, or commutations to President Ma Ying-jeou. However, on 30 April 2010, the MOJ carried out the executions of Chang Chun-hung, Hung Chen-yao, Koh Shih-ming, and Chang Wen-wei and on 4 March 2011 carried out the executions of Chung Teh-shu, Kuan Chung-yen, Wang Chih-huang, Chuang Tien-chu, and Wang Kuo-hwa. Before these executions were carried out, no notification was received by the convicts themselves, members of their immediate families, their defence lawyers, or the TAEDP regarding the response of the president and whether the president had approved or rejected the petitions. This situation manifestly contravened the requirements of Article 6 (4) of the ICCPR and Paragraph 7 of General Comment No. 06.

Paragraph 83 of the State Report also stated that its handbook of procedures for executions requires that the entire process should be carried out in secret and that families of the persons to be executed cannot be notified in advance.

(5) Is it impossible for judges to make wrongful judgments in major cases? Response to ¶ 89, ¶ 90, and ¶ 91 (p. 41-42) of the State Report

The State Report discussed two particular death penalty cases. One was the case of Air Force private Chiang Kuo-ching, who was executed in August 1997 for a child rape-murder, but was exonerated in a retrial by a military court in September 2011. The other was the case of the so-called "Hsichih Trio" of Su Chien-ho, Chuang Lin-hsun, and Liu Bing-lang who had been sentenced to death in February 1992 for a rape-murder that occurred in March 1991 and, after 21 years, received a final "not guilty" verdict by the Taiwan High Court on 31 August 2012. The State Report pointed out that there were shortcomings in the investigation and trial processes in these two cases and also discussed the findings of the Control Yuan in two separate investigations that both cases had grave errors. However, the State Report did not put forward any re-examination regarding the judicial problems in these two cases or any plans for improvement.

With regard to the Chiang Kuo-ching case, the State Report mentioned that the Ministry of National Defence (MND) and President Ma Ying-jeou had issued public apologies, and that the MND had in November 2011 granted NT$131.9 million (approximately US$4.4 million) in compensation to Ms Wang Tsai-lien, the mother of the victim. However, the government's pursuit of administrative responsibility for the delinquent officials has so far been limited to the filing of a criminal suit by the MND in April 2012 to recoup NT$91.2 million (approximately US$3.1 million) from Chen

Chao-min and five other unrepentant former subordinates and revoking the commendations and rewards given them for "cracking" the case.[34]

With regard to the pursuit of criminal responsibility for the abuse of official powers, torturing a suspect, and causing an innocent person to be sentenced to death and executed, the Taipei District Court Prosecutors Office resolved in May 2011 not to indict any of the officials, based on the "expiry of the statute of limitations" for the offenses of "coercion" and "intimidation and endangerment," without consideration of whether other charges would be more appropriate.[35] This decision was overturned by the Taiwan High Court Prosecutors Office in July 2011 and the Taipei District Prosecutors Office was ordered to continue its investigation. However, on 24 August 2012, the Taipei District Prosecutors Office again decided not to indict Chen Chao-min and the other eight officers on grounds similar to the May 2011 determination. On 6 September 2012, lawyers for Chiang's mother again applied to the Taiwan High Court Prosecutors Office for a "reconsideration".[36] In addition, there has been no clarification of the administrative responsibility that the delinquent officials should bear based on their status as public servants or for their neglect of legal procedures. There has also been no sign of acknowledgement of error on the part of the government or related agencies and no sign of re-examination and the adoption of remedial measures to prevent the future recurrence of any similar tragedies.[37]

Regarding the case of the Hsichih Trio case, the State Report also acknowledged that there had been numerous shortcomings in the trial process. On 12 November 2010, the Taiwan High Court for the second time issued a judgment of "not guilty" for the trio and for the first time in a written judgment acknowledged that the three defendants had been tortured. Nevertheless, in April 2011, the Supreme Court again rejected the High Court's "not guilty" verdict and caused the trial process to begin

[34] See Ministry of National Defence, "News Release on Northern Region Military Court Announces Demand for Compensation for Chiang Kuo-ching Case from Chen Chao-min et al," http://www.mnd.gov.tw/Publish.aspx?cnid=67&p=52113 (In Chinese).

[35] For example, charges of murder or "causing death through abuse of the power of prosecution" or "taking another person into custody with without authority or by illegal means resulting in death," are subject to a statute of limitations of 20 years, which has not yet expired.

[36] The Taipei District Prosecutors Office determination on 24 August 2012 was similar to the May 2011 decision, but added an explanation that Chen Chao-min and the other suspects had only "cracked the case" could not be indicted for murder since they could not have known that Chiang Kuo-ching would have been executed and thus there was no "cause and effect" relationship. Lawyers for the Chiang family filed an application for "reconsideration" on 6 September 2012 maintaining that Chen Chao-min and other officers in the "September 12 Task Force" were aware that a confession of rape-murder would lead to mandatory death sentence in military court. For an English-language review, see Inter Press News, "Taiwanese officials Get Away with Murder, Legally," 31 August 2012 http://www.ipsnews.net/2012/08/taiwanese-officials-get-away-with-murder-legally/.

[37] For news articles in Chinese on the Chiang Kuo-ching case, please refer to the website of the Judicial Reform Foundation <http://www.jrf.org.tw/newjrf/RTE/myform_detail.asp?id=2912>.

again. The Supreme Court was thus evidently blind to the requirements of Article 14 of the ICCPR for both "the right to be presumed innocent" and for a "fair trial."

Besides those two cases, there are other death penalty cases not mentioned in the State Report which this report wishes to raise here, notably the cases of Chiou Ho-shun and Cheng Hsing-tseh. In 1988, Chiou Ho-shun was accused of involvement in the murders of Lu Cheng and Ms Koh Hung Yu-lan. He was under detention for 23 years before his death sentence was certified in July 2011, and now he is in danger of being executed at any time. Besides a confession extracted through torture, there is no concrete evidence that proves Chiou Ho-shun committed these crimes. On the other hand, there is evidence that the police engaged in torture and that Chiou Ho-shun was not at the crime scene. After their release from prison, many of the other defendants in the same case also declared that Chiou Ho-shun had been wrongfully convicted.

In 2002, Cheng Hsing-tseh and a friend went to a karaoke parlor and unexpectedly became entangled in a shooting case in which the victim was a police officer. Cheng Hsing-tseh was taken as a suspect and was unable to bear torture and confessed. In 2006, after 21 court sessions, Cheng's death sentence was confirmed by the Supreme Court and he also is in danger of being executed at any time. This case also has numerous points of doubt, including the fact that the murder weapon did not bear Cheng Hsing-tseh's fingerprints. Moreover, the investigation in this case did not include an official forensic report certified by a professional corner, but only verbal testimony delivered by the corner as a witness based on his observation of the three fatal wounds and bullet paths at the crime scene. The main evidence supporting the guilty judgment was the confession extracted from Cheng Hsing-tseh through torture and self-contradictory testimony from other witnesses.

Considering the cases of Su Chien-ho et al., Chiang Kuo-ching, Chiu Ho-shun and Cheng Hsing-tseh together, we can see that cases of wrongful convictions in Taiwan have a common element: confessions extracted by torture. This despite Article 156 of the Code of Criminal Procedure, which clearly mandates that confessions extracted by torture cannot be used as evidence. Nevertheless, under current judicial practice in Taiwan, cases still occur in which the determination of guilt for a defendant is based on testimony extracted through torture. Such cases clearly contravene Article 14 (2) of the ICCPR which mandates that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law" and Article 14 (3) which states that defendants have the right "not to be compelled to testify against himself or to confess guilt." Moreover, based on Paragraph 59 of

General Comment No. 32, a death sentence based on a confession extracted from a defendant through torture constitutes a violation of the Covenant (For more discussion of the question of fair trials, please refer to the section in the Shadow Report on Article 14 of the ICCPR.).

(6) The lack of defence counsel in third-level trials on death penalty cases is unconstitutional: Response to ¶ 92 (p. 42) of the State Report

According to Article 388 of the Code of Criminal Procedure, trials of the third instance held by the Supreme Court are not included in the system of compulsory defence counsel. This regulation results in the inability of defendants to secure complete and effective defence and thus conflicts with the constitutional guarantee for the right to life and the right to trial. In 2010, the TAEDP petitioned to the Council of Grand Justices for an interpretation on the constitutionality of this article, but the Council did not accept this petition. In fact, seven of the nine persons executed in April 2010 and March 2011 did not have defence counsel in their third-level trials. According to Paragraph 38 of General Comment No 32 issued by the UNHRC on Article 14 of the ICCPR, "(i)n cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings." Paragraph 59 of the same document states: "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." Based on these documents, given the lack of defence counsel in the trials of the third instance for these seven persons whose cases involved capital punishment, these trials substantively violated Article 14 of the ICCPR's guarantees for the right to fair trial. As a result, the Supreme Court's finalization of death sentences in these cases also constituted violations of Article 6 of the ICCPR.

Paragraph 92 of the State Report mentions that "the Judicial Yuan has already drafted legal revisions to include the trial of the third instance in the application of compulsory defence and is also considering the feasibility of compulsory oral argument hearings as well as to require the defence to appoint licensed lawyers."[38] The TAEDP issued calls for these changes long ago but its appeals were ignored by the MOJ. At the same time, the Constitutional Court declined to hear the TAEDP's petition and evaded its responsibility to interpret the Constitution, evidently in hopes

[38] Translator's note: the English translation of the State Report renders this sentence as: "The Judicial Yuan has planned to amend the laws to allow compulsory advocacy also during the third instance proceedings and the feasibility of a compulsory debate court with a selected lawyer to serve as the defender." The translation provided here is preferred for clarity.

of dumping this "hot potato" into the hands of the Legislative Yuan. However, as a result, the individual cases in which there was no defence counsel in the trials of the third instance forever lost their opportunity for redress.

(7) The ethical controversy over organ transplants: Response to ¶ 85 (p. 39) and ¶ 96 (p. 43-44) of the State Report:

There is no legal buying or selling of human organs in Taiwan. All organ transplants must follow strict legal procedures and must also obtain the assent of the person donating organs or his or her immediate family members. The most controversial issue regarding organ transplants in Taiwan involves the complex ethical questions surrounding the donation of organs by death row inmates since Taiwan is one of a handful of countries in which donations of organs by death row inmates is considered legal. According to a study of the death penalty in Taiwan conducted by the International Federation for Human Rights (FIDH) and the TAEDP in 2006, "given the coercive nature of the death penalty, in most if not all circumstances it will be impossible for prisoners on death row, facing imminent execution, to give genuinely full and free consent to the removal of their organs for transplants."[39]

The Transplant Society of Taiwan has also publicly stated that it neither supports nor encourages the donation of organs by death row inmates. "Because organ transplants are a matter of human life and death, the medical behavior and ethics of doctors conducting transplants must be subject to a high level of monitoring and be required to ensure respect for justice, fairness and human dignity," wrote TST Chairman and National Chengkung University Professor of Surgery Lee Po-chang in an opinion article published by the *Apple Daily* on 9 March 2011.[40]

(8) The lack of appropriate restrictions on the use of force by the military and police: Response to ¶ 97 (p. 44) of the State Report:

The State Report explains that there exists a definite framework for the use of force by military or police and acknowledges that this framework should be completely re-examined based on the "Basic Principles for the Use of Force by Law Enforcement

[39] International Federation for Human Rights (FIDH), "The Death Penalty in Taiwan: Towards Abolition." <http://www.fidh.org/IMG/pdf/tw450a.pdf>, p.35.
[40] Lee Po-chang, "Donations of Organs by Death Row Inmates and Donations of Organs by Brain Dead Persons," *Apple Daily*, 9 March 2011 http://www.appledaily.com.tw/appledaily/article/headline/20110309/33234740 (in Chinese).

Officers." However, the "Statute Governing Special Services" approved by the Legislative Yuan in January 2011 has numerous problems of inadequate clarity in both legal principles and practice.

First, regarding the delineation of the scope of activity by Special Services activity, Article 12 of the Statute Governing Special Services authorizes broad powers of control, searches and surveillance to the National Security Council in order to ensure the security of the president and vice -president but lacks any restrictions of these powers in terms of procedures, organization or the principle of proportionality. Moreover, given the lack of any clear legal status of the National Security Bureau itself, this law also lacks a framework for the pursuit of accountability for "questionable" actions.

In addition, Article 13 authorizes Special Service personnel to use firearms only "when subject to violence or intimidation or when circumstances are sufficient to justify concern for immediate danger." With regard to these key conditions, we can examine the language in the Article 11 of the "Assembly and Parade Act" which permits responsible authorities to refuse to give permits for assemblies if there are "sufficient facts to support concern over the existence of threats to national security, social order or public welfare" and "the likelihood that public safety or freedom will be jeopardized or that there will be serious damage to property." In its Interpretation No. 445 issued on January 23, 1998, the Constitutional Court judged such clauses of the Assembly and Parade Act to be unconstitutional due to their lack of specificity and clarity. If such is the case for the Assembly and Parade Act, why should same logic not pertain for the use of firearms and the exercise of force by public authority that possesses the potential to directly endanger the lives and health of the people and why should there not be more rigorous and strict regulation of such powers? The degree of authorization of the use of firearms in the existing Statute Governing Special Services is excessively broad and liable to subjective judgment and features an inappropriately broad scope for the use of firearms, thereby creating a high risk of infringement on the people's right to life.

III. Issues Neglected by the State Report

(1) The treatment of death row inmates

The TAEDP and the Taiwan Association for Human Rights (TAHR) began to collect petitions by death row inmates or their family members and friends urging the

MOJ to replace the system utilizing incarceration for death row inmates in detention centers instead of prisons through the use of repeatedly renewed "detention warrants" with "administrative orders." Under the current arrangements, convicts with finalized death sentences are treated as Category Four inmates under the "Prison Act" subject to "demarcated custody," which imposes stricter restrictions on the prisoner's rights of correspondence and visitation. This treatment has no legal foundation and violates the principle of clarity of legal authorization.

(2) The Imposition of Death Sentences on or the Executions of Mentally Impaired Persons

The "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty" issued in 1984 by the United Nations Economic and Social Council (ECOSOC) clearly mandate that mentally impaired persons cannot be subject to the imposition of the death sentence nor shall the death penalty be carried out on mentally impaired persons.[41] In Resolution 1989/64 issued on 24 May 1989, ECOSOC reaffirmed its call to member states for "eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution." Moreover, with regard to the ICCPR, the UN Commission on Human Rights in April 2005 adopted Resolution 2005/59, which urged all member countries which retain the death penalty "not to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute any such person."[42]

Article 19 of the Republic of China Criminal Code mandates that an offense should not be punishable if it is committed by a person who has mental disorders or defects when such disorders impair judgment and that punishments in such cases must be reduced. From the standpoint of the regulation of law, there should be no room for the imposition of the death penalty on persons with mental disorders or defects (including psychological or intelligence handicaps). However, there still exist in Taiwan situations in actual judicial practice that are not in accordance with international human rights standards:

1. Whether the defendant should not be sentenced to death because he or she had mental disorders or defects at the time of the offense is frequently the focus of the

[41] See "Safeguards guaranteeing protection of the rights of those facing the death penalty" <http://www2.ohchr.org/english/law/protection.htm>.
[42] Office of the High Commissioner for Human Rights, "The question of the death penalty: Human Rights Resolution 2005/59," 20 April 2005 <http://www.unhcr.org/refworld/pdfid/45377c730.pdf>.

review of such cases. The courts also heavily rely on the results of mental evaluations carried out by professional doctors. However, the current Code of Criminal Procedure is silent on what kind of process should be followed when a mental hospital carries out a psychological assessment, the object and scope of such evaluations, the assessment method to be followed, the scope of reference material that a doctor should list, the required form and content of the assessment and the guarantees for the rights of the defendant in the process of such evaluations (Examples include the questions of whether a defendant has the right to remain silent or whether he or she has the right to have a lawyer present during psychological testing.). The result of the existence of numerous legal loopholes is that psychological assessment reports are frequently overly crude and are cavalier and judgmental in their evaluation of the defendant's capability to accept responsibility and therefore frequently cause defendants who may actually have mental disorders to be assessed as mentally normal.

2. Whether a defendant needs to be referred for an assessment of mental disorders requires the prior agreement of the judges. However, judicial personnel in our country generally have only a superficial and conservative understanding of persons with mental disorders or disabilities and frequently reject petitions by defendants or defence lawyers for mental competence assessments if the outward appearance of the defendant seems normal. Research by mental health professionals in our country has found that the proportion of cases in which defendants are referred to criminal responsibility assessments by judges based on their personal observations in the courtroom is far higher than the share of applications approved by judges for such evaluations submitted by defence lawyers. The rate of referrals for persons who suffer from split personalities, which are relatively easily noticed in speech, action, and appearance, was also higher than for defendants suffering from less visible depression.[43] These results indicate that judges are accustomed to seeing themselves as psychiatrists who are capable of deciding through observations in the courtroom whether to refer defendants to psychiatric assessments. However, this practice can easily cause defendants whose symptoms of mental illness or disorders are not obviously apparent to be blocked from referral to psychiatric assessments of their capability to bear criminal responsibility.

3. Psychiatric research in Taiwan indicates that, in most cases where court judgments

[43] Chen Chun-chin and Chien Chin-piao, "Forensic Psychiatric Assessment in the Determination of Criminal Responsibility in Taiwan," Taiwanese Journal of Psychiatry, Volume 17 Issue 3, September 2003, pages 215-224. English abstract at http://www.sop.org.tw/publication/Upload_files/17_3/13.pdf. Chinese original is at <http://www.sop.org.tw/publication/Upload_files/17_3/12.pdf>.

were not consistent with psychiatric evaluations, psychiatric evaluations determined that the defendants were insane but the court ultimately judged that they bore "diminished responsibility" or "full responsibility," or else psychiatric evaluations determined that the defendant bore "diminished responsibility" but the court maintained that he or she did not suffer from any mental impairment and bore "full responsibility."[44] In addition, if one compares the psychiatric assessment reports with court judgments, the conclusion is that the degree of consistency reached with assessments of "full responsibility" or "diminished responsibility" was 95 percent. However, when the result of the assessment was that the defendants had not been of sound mind or insane at the time of the offense, the degree of court judgement concordance with such findings fell to 83.6 percent. Moreover, the possibility of refusal of the result of forensic psychiatric assessments rose along with the severity of the mental disability of defendants determined by the assessments. Some judges even unconsciously "adjusted downward" the determination of the forensic psychiatric assessment for the benefit of justifying severe sentences and manifesting their tendency toward "dealing heavily with doubtful crimes."[45]

Finally, as noted above, the UN Commission on Human Rights and ECOSOC have consistently and repeatedly called on states which retain the death penalty to refrain from imposing death sentences on persons with mental disabilities. Nevertheless, on 23 April 2012, the Banqiao District Court sentenced a Mr Chen, a person with mental disability, to death in a murder case. During the trial, Chen was found by a psychiatric assessment to have been in a "responsible" mental state at the time of the offense even though Chen has suffered from split personality (dissociative identity disorder) for over 10 years and also possessed an "Employment Handbook for the Mentally Impaired." Even if Chen's behavior did not reach the degree of lost or diminished criminal responsibility mandated in Article 19 of the Criminal Code, he is objectively still a person who suffers from mental disabilities and the death sentence imposed by the Banqiao District Court still violates the afore-mentioned international human rights legal principles.

IV. Conclusions and Recommendations

[44] Ibid.

[45] Yu Jeng-ming, Yang Tien-wei, Chou Jen-yu, Hsu Shin-wei Hsu, Lu Hui-hua, Chen Chiao-Chicy and Hu Wei-herng, "Analysis of Discordance between Conclusions of Forensic Psychiatric Evaluation and Court Decisions (I): Mental Status at the Time of Offense," Taiwanese Journal of Psychiatry, Volume 19 Issue 3, September 2005 pp.225-236. http://www.sop.org.tw/sop_old/psych_book/9/94/940912.htm and http://www.airitilibrary.com/searchdetail.aspx?DocIDs=10283684-200509-19-3-225-236-a].

If, as the State Report indicated, the Taiwan government has already adopted a policy position of gradual phasing out of the death penalty, then it should not only clearly affirm that abolition of the death penalty is a national policy but should also put forward concrete policy content for abolition of the death penalty and timetables for realization of this policy in the short, medium and long term along with appropriate implementation plans and complementary measures. Such measures should include a moratorium on the execution of death sentences, the promotion of comprehensive dialogue and discussion in society, the study and drafting of substitution measures, and reparations and guarantees for victims. In addition, Shadow Report offers the following recommendations with regard to this article of the Covenant:

(1) Standards for Death Sentences

Relevant legal changes should have a concrete timetable and re-examine whether the criminal procedures for finalized death penalty cases are in accord with the ICCPR's procedural guarantees. Death sentences in cases in which the procedures were not in accordance with the ICCPR's requirements should not be carried out. In addition, a remedial mechanism should be established and the content of draft revisions to the criminal code regarding argumentation on sentencing guidelines should be revamped.

(2) The Right of Death Penalty Inmates to Petition for Pardons

During a meeting of the MOJ "Task Force for the Study of the Gradual Abolition of the Death Penalty" in May 2010, the Chinese Association for Human Rights offered draft revisions to the "Amnesty Act."[46] However, the MOJ has not considered these revisions as a priority task and has not made any concrete response. Therefore, we urge the government to engage in a revision of "Amnesty Act" as soon as possible in order to allow related procedures for amnesty or pardons to fulfil the spirit of the ICCPR.

(3) Proposals for the Treatment of Death Row Inmates

1. The government should review the legality of the current "temporary" procedure of using either "detention warrants" or "administrative orders" for death row inmates

[46] These revisions are discussed on the Chinese Association for Human Rights website. http://www.cahr.org.tw/lawtalk_detail.php?nid=340 (in Chinese).

and should formulate legally grounded and consistent methods of treating death row inmates.

2. Given the fact that death row inmates live under circumstances of facing execution at any time, the government should consider liberalizing their rights of communication and visitation as much as possible for humanitarian purposes.

(4) Regarding the Imposition of Death Sentences and the Execution of Capital Punishment on Mentally Impaired Persons

1. The government should re-examine and revise related sections of the Code of Criminal Procedure covering forensic psychiatric assessments carried out by mental hospitals in order to clearly and substantively regulate the procedures, objectives, scope, and data that doctors should consider in their evaluations; the required format and content of such assessments; and the guarantees for the rights of defendants.

2. The government should bolster training for judicial personnel to understand the patterns of criminal behavior by mentally impaired persons.

Article 7: Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment [47]

I. Introduction

The State Report on the ICCPR published by the ROC government primarily conducts a review of human rights issues from 2007-2011 and the Shadow Report will also cover the same period of time. The section on Article 7, which prohibits torture and inhumane punishments, is mainly composed of a formalistic enumeration of related regulations and statistics. It fails to provide substantive explanations or re-examination of the huge gap between the content and implementation of related laws and regulations or the insufficient guarantees contained in those laws. Therefore, the report by no means constitutes a comprehensive or profound review of the situation regarding torture in our country.

II. Responses to the State Report

(1) The definition of torture is too narrow: Response to ¶ 99 (p. 44) of the State Report

Paragraph 99 of the State Report defines torture as "treatment intentionally inflicted upon people under the control of public power that leads to physical or mental pain or fear and is meant to punish certain unlawful acts or to obtain specific information, such as...." This definition in the State Report which emphasizes that the purpose of torture is to "punish certain unlawful acts or to obtain specific information" is basically capable of distinguishing acts of torture (which is aimed at a specific purpose) from cruel, inhumane, or degrading treatment (which do not necessarily have a specific purpose).

However, it is worth noting that Article 7 of the ICCPR does not only deal with the problem of torture but also encompasses "cruel, inhumane or degrading treatment" which may not entail such intense suffering. In international human rights law, the United Nations Human Rights Committee (UNHRC) has already defined actions such as State orders to blindfold detainees and force them to stand for 35 hours, denying detainees food for several consecutive days, and deceiving family members on the

[47] This section was authored by Weng Kuo-yen (翁國彥), Sun Pin (孫斌), Wellington Koo (顧立雄), Su Hsiao-lun (蘇孝倫), and Chiou Yi-ling (邱伊翎), and translated by Dennis Engbarth (安德毅).

date of execution for death penalty prisoners and the location of their burial as cruel or inhumane treatment and not as torture. Therefore, "cruel, inhumane and degrading treatment" is defined as all other State actions which cause intense suffering but which cannot be determined to be torture. The fact that such cases account for a considerable share of the appeals filed to the UNHRC under Article 7 of the ICCPR demonstrates that such a definition is necessary and important. Regrettably, the definition of torture offered in Paragraph 99 of the State Report overlooks the possible and even more common use of state public authority in inflicting other types of "cruel, inhumane and degrading treatment" which impose similar levels of suffering. Therefore, this definition is insufficient in its scope.

(2) The rare pursuit of responsibility for public officials engaging in torture: Response to ¶ 100, ¶ 101, and ¶ 104 (p. 45-46) of the State Report

These paragraphs of the State Report delineate the criminal and administrative legal responsibility that should be borne by public officials who engage in torture. However, the State Report only lists statistics on the number of public officials whom in recent years have been indicted, tried, or convicted for committing such crimes. It does not provide any further explanation about the results of pursuing administrative responsibility, such as referral for punishment or orders to make reparations. In addition, the State Report lists only one case, from 2005, of public service officials convicted for crimes of violence or cruelty to a person in custody (Article 126 of the Criminal Code), and only three convictions (one in 2002 and two in 2003) for officials for abuse of authority and causing injury with regard to incidents of torture against criminal suspects (Articles 134 and 277 of the Criminal Code). Such figures are extremely low, leading observers to doubt whether these laws and regulations are actually manifesting any substantive effect or are merely decorative statutes that look impressive but are stored high on the shelves and have no genuine binding force.

Another matter is even more grave. The Criminal Code of the Republic of China has always had penalties for public officials who are implicated in using torture to extract confessions, but the use by prosecutors and police of torture against defendants or suspects during investigations has long been known and severely criticized in our society. Nevertheless, the regulations mandating such penalties have had scant substantive effect in either deterring or affixing responsibility for such crimes. An example is the case of the wrongful execution of Air Force private Chiang Kuo-ching in August 1997 in the wake of being tortured. A military court confirmed

in September 2011 that Chiang Kuo-ching had not been the actual culprit in the child rape murder of which he was accused and clearly stated in its judgement that military personnel, including then Air Force Combat Operations Command (AOC) Commander in Chief Chen Chao-min,[48] were implicated in the illegal use of torture and cruelty to extract a confession from Chiang. Nevertheless, in May 2011, the Taipei District Prosecutors Office decided not to indict the implicated military officers in a decision that stunned Taiwan society. Even though the Taiwan High Court Public Prosecutors Office revoked the decision not to indict the implicated officers and issued an order to the Taipei District Prosecutors Office to launch a new investigation, this affair exposed the realities that judicial and investigative officers do use torture against suspects and that they can frequently be immune from criminal and administrative responsibility.[49]

With regard to this issue, the UNHRC in its General Comment No 20 on Article 7 of the ICCPR in February 1992 required all States parties to ensure that persons who violate Article 7, whether by encouraging, ordering, tolerating or perpetrating torture, must be held responsible and that responsible agencies must carry out prompt and impartial investigations into incidents or complaints of torture. In its communication on the case of Rodriguez versus Uruguay issued in August 1994, the UNHRC clearly stated that "States parties have the responsibility to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity,"[50] and that the content of such protection includes the responsibility to fully investigate allegations of torture, to ensure that persons who perpetrate torture are held responsible and that the victims can receive effective remedy and reparations. In light of the Chiang Kuo-ching case, it should be evident that, despite the aim of our country's legislation to punish persons who perpetrate torture as a criminal offense, the administrative and judicial systems are neither forceful or prompt in their pursuit of responsibility for persons who perpetrate torture and that victims can only expect to travel a long road before justice can be realized. The government must engage in thorough re-examination as it has evidently not realized the "obligation to protect concerned persons from torture" and as the result of its handling of the Chiang Kuo-ching case has transgressed the ban on torture in Article 7.

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[48] Chen Chao-min later became Air Force commander and chief and was appointed by President Ma Ying-jeou appointed as his first minister of national defence in May 2008.

[49] The Taipei District Prosecutors Office again declined to indict Chen Chao-min and the other eight former Air Force officers on 24 August 2012. See Inter Press News, "Taiwanese officials Get Away with Murder, Legally," 31 August 2012 <http://www.ipsnews.net/2012/08/taiwanese-officials-get-away-with-murder-legally/>.

[50] Available at http://www1.umn.edu/humanrts/undocs/html/vws322.htm.

In addition, Article 7 of the ICCPR and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) have established the principle that State parties have an active obligation to prevent torture, including the institution of preventative measures, such as carrying out education and training for public officials, establishing mechanisms for effective investigation and the pursuit of responsibility after the occurrence of instances of torture, and providing victims with channels to secure remedy. However, this State Report only delineates the content of the administrative and criminal responsibilities that should be borne by public officials implicated in acts of torture. It does not explain in substance how the types of channels that the government has established for investigation, the pursuit of responsibility, or possible remedies for victims, as well as the actual operational experience of these institutions and channels, nor does it offer concrete examples illustrating their effect. However, examples such as the Chiou Ho-shun case, in which law enforcement officials implicated in torture have already been convicted and sentenced but the defendant has yet to receive commensurate remedy, and the Chiang Kuo-ching case, in which the implicated officials whose use of torture caused the government to carry out a wrongful execution have been identified but have yet to be bear any administrative or criminal responsibility, expose the reality that the provisions in the legal framework to realize the government's obligation to "prohibit torture" are excessively superficial and cannot effectively assign responsibility or provide redress.

Finally, General Comment No. 20 on the ICCPR requires that "in their reports, States parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by Article 7 as well as appropriate redress." Whether the result of our government's handling of the Chiang Kuo-ching case was in accord with the requirement for "effective guarantees" is already open to considerable doubt. Regrettably, the State Report's treatment of the first case in Taiwan in a half of a century certified as a wrongful imprisonment and execution resulting from torture was limited to a brief description of the case and the current progress of remedial measures in the section on Article 6 of the ICCPR concerning the right to life. This brief description did not substantively discuss whether the government's preparations to pursue the responsibility of the officials implicated in the use of torture against Chiang Kuo-ching to extract a confession and his wrongful execution are in accord with international human right standards.

With regard to the case of Su Chien-ho and his two co-defendants whom similarly

were definitely tortured by police officers, the explanation offered in the State Report was even more sketchy and crude, while the important cases of Chiou Ho-shun and Chi Fu-jen were not mentioned at all. The responsible agencies have not taken any initiative whatsoever to re-examine the use of torture that has existed in their operations. In sum, the State Report fails to review benchmark cases clearly and thus does not meet the requirements set out in General Comment No. 20 of the ICCPR.

(3) Testimony obtained through torture does not possess the weight of evidence: Response to ¶ 102 (p. 45) of the State Report

The State Report discusses the question of the weight of evidence of testimony obtained through torture in the Code of Criminal Procedure. However, as mentioned above, the State Report only lists the formal laws and regulations and is unable to engage in substantial re-examination of whether evidence obtained illegally through torture can actually be used as evidence that the defendant was guilty and, whether allowing such evidence would be in violation of the State party's obligation to protect the defendant and other third parties from being subject to torture.

In its General Comment No 20, the UNHRC clearly stated: "It is important for the discouragement of violations under Article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment." In other words, even if domestic law prohibits public officials from perpetrating torture against defendants, suspects, or other third parties, such prohibitions will be rendered meaningless if courts subsequently admit testimony obtained through torture or other illegal treatment into trial proceedings and such admission could even be considered a violation of the important international human rights principle of "fair trial" enshrined in Article 14 of the ICCPR.

As related in the State Report, our county's Code of Criminal Procedure does indeed prohibit the use of violence or threats in examinations or interrogations (Article 98) and mandates that confessions of an accused which are extracted by violence, threats, or other improper means cannot be admitted as evidence (Article 156). However, the State Report does not collect or analyse related judicial judgments and fails to offer substantive discussion on questions such as how confessions obtained by torture are treated in current practice; whether the spirit of the ICCPR, the CAT, or other international human rights standards are utilized in decisions; and whether confessions obtained from torture are still used in court judgments. Hence,

the review provided in the State Report is clearly deficient in both depth and scope and is little more than a formalistic recitation of the legal code.

Moreover, cases of wrongful judgments resulting from the use of torture to obtain confessions from suspects have never ceased in recent years and have become the focus of observation, rescue, and legislative reform efforts by civic human rights and judicial reform organizations. In the past, examples included the case of Wang Yin-hsien, who confessed to robbing a bank in the wake of being tortured by Taipei City police during the investigation of the Lee Shih-ko case in 1982 and ultimately committed suicide on May 7, 1982, shortly before the real criminal was apprehended. In more recent years, there have occurred several benchmark controversial cases such as those of Chiou Ho-shun (which will be analysed below), the Su Chien-ho trio, Chiang Kuo-ching, and Chi Fu-jen. In the case of Chiang Kuo-ching, the Air Force private repeatedly declared during his trial that he confessed only because of being tortured by his interrogators. However, even through other objective evidence did not match the forensic evidence at the crime scene, the military courts did not believe him and accepted his confession as the foundation of their decision to sentence him to death. In the case of Chi Fu-jen, the defendant was fixed in the minds of prosecutors and police as the serial sexual rapist known as the "Tunghai Wolf" in Taichung and was believed to have been subjected to torture by investigators to procure his confession and forced to go down on his knees to apologize to the victims. Chi was wrongfully detained by order of the court for 269 days, but was finally found to have been innocent after DNA forensic tests proved to be negative.

With regard to the benchmark case of the Su Chien-ho trio, the defendants Su Chien-ho, Liu Bing-lang, and Chuang Lin-hsun were all subjected to numerous instances of torture by police investigators after being arrested in August 1991 and ultimately confessed to the March 23, 1991 murder of Wu Ming-han and his wife Yeh Ying-lan. Besides the accusations of blood and tears raised by the three defendants, the Control Yuan in 1995 approved a motion calling for corrective action from the Ministry of Justice (MOJ) and the National Police Administration (NPA) of the Ministry of the Interior (MOI), based on its finding that the two agencies had failed to fulfill their supervisory duties in the case of the torture carried out against the three defendants. Nevertheless, even though the facts that the confessions had been obtained from the three defendants through torture were quite clearly established, prosecutors decided not to indict the implicated Hsichih Precinct police officers and the High Court has even repeatedly accepted the confessions as evidence to justify

death sentences.[51]

From the above major cases it can be seen that even though current laws prohibit investigators from using torture to obtain confessions from suspects, maintain that confessions obtained through torture cannot be admitted as evidence, and mandate that personnel implicated in torture should bear criminal responsibility, investigative and judicial agencies continue to grant weight as evidence to confessions obtained through torture to justify guilty verdicts. For example, prosecutors or judges may take no notice of counter-pleas of torture issued by the defendant and not bother to carry out any in-depth investigation (such as in the cases of Chi Fu-jen and Chiang Kuo-ching). Alternatively, even if it is determined that the defendants were subjected to torture, they may persist in finding that the confession obtained through torture proved that the defendant was the guilty party (as in the Su Chien-ho trio case) or, if the tape of the examination displays indications of the defendant being tortured, use confession or testimony obtained through torture that was not recorded as evidence of guilt (as in the case of Chiou Ho-shun). In this regard, the current criminal judicial practice still falls far short of the standard set down in General Comment No 20 on the ICCPR that "the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment." However, the State Report only offers formalistic citation of relevant legal articles and does not offer substantial reexamination regarding how to exclude confessions obtained through torture or other illegal methods from court judgments, and it is therefore gravely deficient.

(4) The difficulties of petitioning for redress or reparations: Response to ¶ 103 (p. 46)

This section of the State Report discusses the process by which people can file complaints about torture or inhumane treatment, related legal regulations, and the state of implementation. With regard to the results of this process, the statistics offered in the report show that correctional institutions received did not receive any complaints or requests for reparations for torture or inhumane treatment from 2006 through 2010 and that police agencies also did not receive any complaints from suspects for torture or improper treatment by police during criminal proceedings. In the past five years, a few persons have filed petitions for reparations under the Article 13 of the State Compensation Law, but all of these petitions were rejected by courts.

[51] On 31 August 2012, a panel of three Taiwan High Court judges overturned the murder convictions and capital sentences against the "Hsichih Trio" after 21 years of legal battles. See Inter Press Service, "Taiwan Verdict Exposes Death Penalty Dangers," 2 September 2012, http://www.ipsnews.net/2012/09/taiwan-verdict-exposes-death-penalty-dangers/.

Although the above data indicates that neither prison or police agencies received any complaints from inmates or suspects of torture or improper treatment, there actually are doubts as to whether there have not been any cases of illegal treatment. For example, in August 2010, Taiwan media reported that Taipei Prison inmate Chen Chin-yi, who suffered from diabetes and had only one leg when he entered prison, was nonetheless was forced to wear shackles while serving his sentence. After the infection of an open wound and a relapse of diabetes, he had to undergone another amputation and, because of this situation, the Control Yuan filed a resolution for corrective action against the Taipei Prison (details will be discussed below). This kind of treatment of inmates by the Taipei Prison may not constitute torture and, because the inmate later had another amputation, also might not constitute inhumane treatment. Nevertheless, regardless of whether Chen Chin-yi was unwilling or was unaware that he could file a complaint or petition for compensation, it must be noted that the State Report made no mention whatsoever of this case in which an inmate and his health rights suffered serious harm and appears to be immersed in self-satisfaction because "responsible agencies did not receive any complaints." This state of affairs not only indicates that the State Report did not rigorously carry out an examination of whether there were instances of torture or cruel, inhumane, or degrading treatment among inmates or suspects. Moreover, this situation also exposes the grave degree of insensitivity on the part of the government and its resulting failure to perceive the problems that still exist in its operations and its inability to ensure that inmates and suspects are not subject to torture or improper treatment.

With the handling of petitions for compensation from suspects who have been victims of torture, the use by the State Report of petitions filed under Article 13 of the State Compensation Law as the basis for its data may suffer from insufficient scope. For example, the Taichung District Court rejected the petition for state compensation by Chi Fu-jen (who was detained for 269 days in connection with the "Tunghai Wolf" case but ultimately judged to have been innocent) on the grounds that that Chi had confessed to having committed the crimes while under questioning by prosecutors; therefore, the court determined that Chi's wrongful imprisonment was due to his own grave error. Chi appealed to the Judicial Yuan Wrongful Imprisonment Compensation Appeals Committee, but his appeal was also rejected.

From this case, it can be seen the scope of the State Report is too narrow, since the handling of compensation cases involving torture is not limited to petitions filed directly by the persons affected under Article 13 of the State Compensation Law, but

also include petitions for compensation for wrongful detention or imprisonment. The rejection of the petition for compensation for wrongful detention filed by Chi Fu-jen also shows that the standard actually used for evaluating petitions for wrongful detention or imprisonment for persons who have been victims of torture is also too severe. Even the current Code of Criminal Procedure acknowledges torture's "derivative effect": after a suspect is arrested or detained and remains under the actual control of police agencies, it is possible that because the psychological state of coercion from being previously tortured by police has not yet lifted, a suspect may, when being later questioned by prosecutors, remain in an unfree mental state and offer testimony or a confession that is untrue even though prosecutors do not employ improper methods of questioning. At this time, based on the theory of the "derivative effect" of torture, the confession obtained during questioning by prosecutors may have to be excluded. Hence, even though Chi Fu-jen confessed to the crimes while being questioned by prosecutors, this confession probably would fall into the scope of testimony resulting from the impact of the previously suffered torture. Not only should such a confession be excluded as evidence, but it should also not be seen as a grave error made by Chi Fu-jen. After all, many defendants under similar circumstances may be likely to confess crimes to prosecutors out of fear of the threats by police.

Therefore, the result of the handling of the petition for compensation for wrongful detention in the Chi Fu-jen case shows that our country has still not fulfilled the requirement of the UNHRC's General Comment No. 20 that States parties should ensure that victims of torture have appropriate and effective redress. Instead, it shows that an excessively severe threshold for applications for compensation by torture victims has been adopted. The failure of the State Report to offer any re-examination about this phenomenon is even more regrettable.

(5) Treatment of death row inmates: Response to ¶ 107 (p. 46) of the State Report

The State Report states that responsible agencies annually carry out training of correctional personnel to avoid improper behavior or administration. The MOJ dispatches staff to carry out monthly inspections to prevent mistreatment of inmates and also holds regular discussions with inmates and provides channels for complaints.

However, these statements by the MOJ may well be suspected of being dogmatic official propaganda. For example, we can review the above mentioned case of Taipei

Prison inmate Chen Chin-yi who was subjected to compulsory shackling by prison authorities which led to his second leg amputation. The resolution for corrective action issued by the Control Yuan quoted the views of MOJ Correctional Affairs Department Director-General Wu Hsien-chang, who stated that prison staff had adopted outdated and excessively rigid views about the use of disciplinary instruments and that there was room for re-examination. Taipei Prison Chief Warden Chan Cheh-feng also related that first-line prison guards were sticklers for rules and said the use of shackles on Chen's remaining leg was incomprehensible. The Control Yuan also found that the Taipei Prison had committed a major error by compulsorily shackling Chen Chin-yi's leg, since Chen had only his right leg when he entered prison and thus could not possibly escape.

The Chen Chin-yi case, which shows that the training given to correctional staff by the responsible agencies is clearly deficient, exposes the reality behind the statement in the State Report regarding "preventing the mistreatment of inmates." Through a news conference held by parliamentarians, Chen Chin-yi related how his leg had swelled like a loaf of bread by the time he was allowed to receive medical treatment, but the prison authorities still took no heed of his protests and again put shackles on his remaining leg. This fact shows that the statement in the State Report regarding "the provision by responsible agencies of channels for complaints" merely paints an empty shell from which the views or complaints of victims will not receive any attention. This section of the State Report exposes the degree to which the responsible agencies themselves feel fine but do not perceive that the inadequacy of staff training causes numerous cases of mistreatment and the necessity for deeper re-examination.

III. Issues Neglected by the State Report

(1) Grave Infringement on the Health Rights of Inmates and Detainees

Major examples
Before finalization of his sentence, death row inmate Wang Chun-chin was detained in the Tainan Prison. He felt pain in his sciatic nerve, but the prison delayed treatment, resulting in the paralysis of his lower body.[52]
Inmate Chen Chin-yi had only one leg when he began his sentence at Taipei Prison due to his affliction with diabetes. Nevertheless, the prison authorities

[52] Statement by Wang Chun-chin himself, conveyed by defence lawyer Kao Yung-chang.

cited prisoner safety and the prevention of escape as reasons to forcibly put shackles on his remaining leg and wrap the chain twice around his right foot. Ultimately, his remaining leg had to be amputated due to repeated infections of wounds and a relapse of diabetes. As a result, Chen Chin-yi had no legs at all by the time he was released. Due to its handling of this case, the Taipei Prison was subjected to a correction order by the Control Yuan.[53]
Defendant Mr. Chen, whose case is still being tried is now detained in the Kaohsiung Prison, suffers from a severe case of schizophrenia. Thus, Chen has no awareness of being ill and insists that he is of sound mind and refuses to take medicine or receive medical treatment. Although there are now two regional hospitals which have issued psychological forensic reports which determined that Chen has an extremely grave case of mental illness and requires medical attention, the Kaohsiung High Court continues to refuse to order the prison to release the defendant for medical attention on the grounds that "the defendant himself says that he is not ill." The prison has cited the lack of any documents from the court and the fact that the defendant himself does not want medical attention as reasons to refuse to provide psychological treatment.[54]

The poor quality of medical care and lack of related resources in our country's prisons and detention centers has long been a target of criticism. Defendants and inmates have expressed the need for medical care and frequently are unable to receive appropriate responses, but instead often find that their requests are directly rejected, ignored, or refused because the type of medicine needed is not available. With regard to requests by inmates or detainees to be referred to hospitals for further examination, prisons often cite a lack of custodial personnel or assert that the case doesn't meet the "proper care cannot be provided within the facility" threshold as reasons to delay or pay no heed to such requests.

If the state is unable to provide suitable medical care to defendants in custody or inmates, it may already be in violation of violation of the ICCPR's Article 7's ban on torture and the obligation of State parties to provide humane and dignified treatment

[53] The correction order issued by the Control Yuan can be viewed here (in Chinese): http://www.cy.gov.tw/AP_HOME/Op_Upload/eDoc/%E7%B3%BE%E6%AD%A3%E6%A1%88/99/099000242%E5%B0%8D%E5%8F%B0%E5%8C%97%E7%9B%A3%E7%8D%84%E7%B3%BE%E6%AD%A3%E6%A1%88%E6%96%87991110.pdf. The case was reported, also in Chinese, in the *Apple Daily News* on 10 August 2010 (http://www.appledaily.com.tw/appledaily/article/headline/20100810/32726290).

[54] Information provided by defence lawyers Chen Shun-kui and Weng Kuo-yen.

to persons under detention mandated in Article 10. Moreover in General Comments Nos. 7, 8, 20 and 21, the UNHRC has mandated that States parties must adhere to the CAT, the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the UN Basic Principles for the Treatment of Prisoners.

Article 24 of the Standard Minimum Rules for the Treatment of Prisoners and Principle 24 in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment both mandate that a detainee be offered a professional and independent medical examination as soon as possible after being admitted to the place of detention and that regular health examinations take place to ensure his or her health during the period of detention. In addition, Articles 22-26 of the Standard Minimum Rules and Principle 24 of the Body of Principles require that detainees have the right to request and immediately receive proper medical attention. In a report submitted to the UN General Assembly on 3 July 2003, UN Special Rapporteur on Torture Theo van Boven pointed out that improper conditions of imprisonment may exceed the bounds of Article 10 of the ICCPR and become an issue for discussion under Article 7 as a form of torture and inhumane treatment.[55]

"Improper conditions of imprisonment" naturally includes the failure by detention centers to provide proper medical care that leads to a worsening of the health of the detained defendant. The responsible agencies in our country should improve the quality of medical care in detention centers and prisons based on the aforementioned international standards and properly respond to the need of detained defendants or inmates to receive medical treatment, as well as to requests to be transferred to hospitals.

With regard to the quality of medical treatment, prisons currently have long-term and fixed cooperation contracts with physicians to employ doctors in prison clinics, but the MOJ has yet to carry out a review of whether the quality of medical care provided by these doctors meets professional standards (including whether they have the capability of providing in prisons medical care equivalent to the medical treatment services and medicine available in nearby outside facilities), or inspect the state of such clinics (including whether they pay attention to requests by inmates). One of the

[55] Theodore van Boven (2003), "Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, in accordance with Assembly resolution 57/200 of 18 December 2002," submitted to the United Nations General Assembly 3 July 2003, p.8 (Paragraph 18).

core principles in the protection of the human rights of inmates should be that after being imprisoned, besides the necessary reduction of rights in the wake of being incarcerated (such as the freedoms of movement and choice of residence), other rights should remain as close to those of non-inmates as much as possible. Therefore, the MOJ should as soon as possible establish recruitment and evaluation mechanisms in order to ensure that contracted doctors provide medical care that is similar to that provided in ordinary clinics. With regard to medical resources, the MOJ should also cooperate with the Department of Health to ensure that the provision of medical resources and medicines in prison clinics is as similar as possible with ordinary medical institutions to protect the health rights of inmates.

Regarding the issue of hospitalization, prisons should proactively handle and give timely and appropriate responses to requests by defendants or inmates for treatment by doctors. In the case of serious illnesses that cannot receive suitable treatment in prisons, prison authorities should take the initiative to report the situation to higher authorities, the court, and prosecutors. If there is a genuine need for hospital treatment, the detention center or prison should take the initiative to explain to the court and prosecutors the request by the defendant for hospital treatment or the necessity of hospitalization and actively make arrangements for necessarily custodial staffing. Judges and prosecutors should set aside traditional notions of "taking avoiding escapes as the top priority" and order the detention center to contact with the medical institution and confirm whether the health condition of the defendant is so serious as to meet the threshold of "proper care cannot be provided within the facility" and avoid delays. The MOJ should also promptly resolve the chronic problem of deployment of personnel and resolve the long-term problems of shortage of custodial manpower in prisons and its passivity in handling requests by defendants for medical care.

Former UN Special Rapporteur on Torture Manfred Nowak, currently professor of law at the University of Vienna, pointed out in his work *CCPR Commentary* that Article 10 of the ICCPR mandates that all persons deprived of their liberty shall be treated with humanity. Therefore, excessively poor conditions of detention or imprisonment such as overcrowding of prison cells, substandard sanitary conditions or inadequate food and medical resources, will violate Article 10 of the ICCPR; moreover, grave conditions may also contravene Article 7 of the ICCPR, which is to say that the conditions of detention constitutes torture or inhumane treatment. In this light, prisons in our country have never offered an appropriate response to the question of how they handle the right of detained defendants or inmates to receive proper medical care and all of the above cases may simultaneously contravene Article

7 and Article 10 of the ICCPR. Nevertheless, the State Report did not provide any explanation of the controversy over the actual degree of implementation. This state of affairs indicates that the responsible agencies lacked awareness of the consensus in international human rights law that "improper conditions of detention may constitute torture" and did not explain the situation regarding the protection of the health rights of detained defendants and prison inmates. In this respect, the content of the State Report needs further re-examination.

(2) A confession obtained through torture used to determine guilt – the case of Chiou Ho-shun

Without any direct evidence sufficient to prove Chiou Ho-shun was implicated in the Lu Cheng child kidnap - murder, the defendant's confession constituted a major basis for the court's guilty verdict. However, this confession came from testimony that originated in torture by investigating police and not from the free will of the defendant. The use by the court of testimony obtained through torture as the foundation for its death sentence judgment contravened Article 7 of the ICCPR as well as the statement of General Comment No 20 that "the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."

Case Details

The Chiou Ho-shun case is widely known as the "Lu Cheng case" which erupted on December 21, 1987 when Lu Cheng, a nine - year old student at Tungmen Elementary School in Hsinchu City, vanished after leaving a cram school class. The Lu family subsequently received a telephone call by the kidnapper demanding a ransom. Although the ransom was paid, Lu Cheng never reappeared. Over nine months later, the Taipei City Criminal Police Department announced that it had solved the case and that a total of 12 persons including Chiou Ho-hsun had been arrested as defendants. Besides the Lu Cheng case, Chiou and the other defendants were charged with the murder of Ms Koh Yu-lan, an insurance agent in Miaoli County. Prosectors ultimately combined the two cases when they issued indictments.

The accusations made by prosecutors against Chiou Ho-shun and the other defendants were based mainly on confessions by the defendants and not direct evidence. To this date, Lu Cheng's body has never been discovered. The defendants declared that they had confessed only because they had been tortured by investigators. An investigation into the case undertaken by Control Yuan commissioner Ms Wang Ching-feng discovered a voice tape of police torturing Chiou and other defendants and that police had discovered a body which appeared to

be that of Lu Cheng, which had vanished due to cavalier handling by prosecutors. On September 29, 1994, the Control Yuan issued an impeachment against 10 police officers and two prosecutors. Three officers of the criminal police section of the Taipei City Police Department were eventually were convicted on criminal charges and sentenced to short prison terms on July 30, 1998 for charges of using violence to beat and intimidate one of the suspects in the Lu Cheng case, Yu Chih-hsiang (then 17 years old), into confessing to involvement in the Lu Cheng case.

Although the tape could prove that the defendants had been tortured, and even though there was no direct evidence of commission of a crime, judges for the district, high, and supreme courts all maintained that the torture recorded on tape was only one day in duration and that while the testimony given by defendants on that day could be excluded, the rest of the testimony was admissible as evidence. The case ultimately went through 11 retrials ordered by the Supreme Court until the Taiwan High Court finally on May 12, 2011 judged Chiou Ho-shun to be guilty and sentenced him to death, sentenced fellow defendant Lin Kun-ming to 17 years imprisonment, and Ms Wu Shu-chen to 10 years. Although defence lawyers immediately helped the defendants file appeals, the Supreme Court promptly rejected their appeals on July 28, 2011 and confirmed all of the verdicts in the case.[56]

The Chiou Ho-shun case exposes numerous weaknesses and deeply rooted maladies in Taiwan's criminal judicial system. These include the lack of scientific investigative spirit among police officers, the habitual use of torture against criminal suspects, frequent slipshod investigations and hasty indictments filed by prosecutors under pressure from public opinion, the inability of courts to shake off the inclination of "presumption of guilt" in trial proceedings, widespread lack of interest in clarifying facts, reluctance to challenge the opinions of judges in previous trials, and the persistence of cynical attitudes such as "even if the case is wrongful, it won't be finalized in my court." In addition, this case has also manifested another major controversy: the fact that prosecutors, police, and the courts would still indict and convict Chiou Ho-shun, despite the absence of any direct evidence to prove that he was implicated in the murder of Lu Cheng, based primarily on confessions by defendants in the same case that were obtained through torture by investigators and not provided by their own free will.

During the investigation, police recorded 288 statements made by the 12

[56] For a more detailed analysis of the Chiou Ho-shun case (in Chinese), please see http://chiouhoshun.blogspot.com//. Video and sound recordings regarding the torture of Chiou and other defendants have been posted on the website of the Judicial Reform Foundation. See http://www.jrf.org.tw/newjrf/RTE/myform_detail.asp?id=3259.

defendants. After recurrent use of torture, intimidation, and severe physical abuse against several defendants, the content, direction, and details of the confessions converged in a story that matched the story created by police. In trial proceedings conducted during over 20 years afterward, all judges refused to believe the protests by defendants that they had been tortured and continued to deliver guilty verdicts until their finalization. The method of handling adopted by the courts was to "saw off the arrow" by determining that, since the Control Yuan investigation had disclosed two testimony statements which had been obtained through torture, the remaining 286 statements could still be considered to have been provided by defendants out of their own free will. In simple terms, the implication of the court verdicts was that the defendants and defence lawyers had to provide evidence that the remaining 286 statements were obtained through torture before the court would admit that there had been torture; otherwise, without such evidence, the remaining 286 statements were still valid as evidence and could be used to justify guilty verdicts.

The conflicts of the Chiou Ho-shun case with the ICCPR can be grouped into two levels. First, General Comment No. 20 on the ICCPR mandates that prolonged solitary confinement may constitute acts prohibited by Article 7. Former UN Special Rapporteur on Torture Professor Manfred Nowak in his book *CCPR Commentary* also stated that solitary confinement without contact with the outside world for up to a year constituted inhumane treatment under Article 7 of the ICCPR and contravened the requirement of Article 10 that detained persons have the right to receive humane and dignified treatment. During a visit to Taiwan in November 2011, Nowak publicly observed that before the issuance of the final verdict in July 2011, Chiou had been detained for a total of 23 years, including 18 years during which he had to wear foot shackles at all times and four years in solitary confinement. During these 23 years, the shadow of death always followed and threatened Chiou Ho-shun and thus caused extremely intense sense of insecurity. This kind of treatment constituted "inhumane treatment" as defined by Article 7. Therefore, our country's conditions of imprisonment of Chiou Ho-shun should also be seen as violating simultaneously Article 7 and Article 10 of the ICCPR.

In addition, General Comment No 20 also clearly states: "It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment." The term "the law" means that that States parties not only must create legislation that excludes testimony obtained through torture from admissibility as evidence but also must substantively ensure that such

confessions and testimony do not become the basis of guilty verdicts in order to effectively realize the ban on torture in Article 7 and the right to a fair trial embodied in Article 14 of the ICCPR.

The fact that Chiou Ho-shun had been tortured lacked supporting evidence from interrogation tapes and forensic reports, but Chiou Ho-shun's description of the methods by which he was tortured was very similar to what Yu Chih-hsiang and other defendants in the same case experienced. The methods of torture employed by the police in this case did not leave direct scars or other physical signs on the bodies of the persons tortured; furthermore, when Chiou Ho-shun and the other defendants were moved from the detention center during the period of investigation, the legally required physical inspection records were not made. It would therefore be difficult to directly affirm that torture had not taken place. In this light, the decision by the courts, under the premise of the lack of direct and objective evidence, to utilize confessions obtained through torture as evidence and the basis to sentence Chiou Ho-shun to death clearly contravened the ban on torture in Article 7 and the mandate for fair trials in Article 14.

IV. Conclusions and Recommendations

Based on the above analysis, the Shadow Report offers the following recommendations:

(1) Ensure that the State fulfils its obligation to prohibit corporal punishment and torture

The understanding of Article 7 reflected in the State Report should not narrowly focus on "torture" but should be broadened to include "cruel, inhumane, and degrading treatment." Such treatments frequently cause degrees of suffering that are no less terrible than torture but may not yet be recognized fully as torture in international human rights law. Nevertheless, it is still necessary to refer to Article 7 to review whether a State party is violating its obligation to realize and implement the content of this article, especially with relation to the conditions of detention of detained persons and physical punishment. In addition, the review conducted in the State Report regarding torture and other forms of inhumane treatment appears to be limited to only Article 7 itself. However, international human rights legal documents relevant to the question of torture also include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, the UNHRC General Comments Nos.

7 and 20 on the ICCPR, the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the UN Basic Principles for the Treatment of Prisoners. Consideration of these fundamental international human rights documents would be helpful to ensure a broader and more comprehensive review of whether State behavior has contravened Article 7.

In its explanation of the issues of the involvement of public officials in inflicting torture or inhumane treatment, the State Report should not only engage in a formalistic listing of the scope of criminal or administrative responsibility that public officials should bear but should conduct a substantive re-examination of benchmark cases. For example, the extremely controversial case of the torture and wrongful execution of Air Force Combat Operations Command (AOC) private Chiang Kuo-ching is essentially a case in which government officials used physical and mental torture against a criminal suspect and thereby violated his right to be free of torture and to have a fair trial and, ultimately, directly abrogated Chiang Kuo-ching's right to life. However, the State Report made no mention whatsoever of this benchmark case in this section, a fact which displays that the responsible agencies have no intention of engaging in any substantive re-examination of the past existence of practices of torture in Taiwan.

With regard to cases in which torture has been used against criminal suspects in judicial investigations, international human rights law has consistently required States parties to ensure that all persons who ordered, condoned, or directly engaged in acts of torture must bear criminal responsibility and has required that competent agencies must carry out fair and just investigations into such incidents or complaints. However, in recent years numerous cases have emerged in our country in which torture caused wrongful convictions or imprisonments, including the cases of Chiang Kuo-ching, Chiou Ho-shun, the Su Chien-ho trio, and Chi Fu-jen. Nevertheless, the judicial and investigative personnel who commanded or conducted torture have remained exempt from any pursuit of criminal or administrative responsibility. The State Report itself admits that less than five public officials have been convicted of engaging torture during the past decade. The government should take the initiative to investigate and prosecute persons who inflicted torture on defendants or suspects in order to realize its obligation under international human rights law to ensure that "no one shall be subjected to torture."

The Code of Criminal Procedure prohibits the use of violence or threats in

examinations or interrogations and mandates that confessions of an accused that are extracted by violence, threats, or other improper means cannot be admitted as evidence. However, in actual practice, it allows courts to exercise discretion to allow confessions to be used as the basis for verdicts after a cost-benefit evaluation. As a result, in cases such as those of Chiou Ho-shun and the Su Chien-ho trio, the courts have admitted confessions obtained from suspects through torture as the basis for death sentence verdicts. This type of situation clearly contravenes the standard adopted in General Comment No 20 on the ICCPR that "the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment." The government should acknowledge the reality that the use of confessions obtained through torture as the basis for court verdicts gravely infringes on the rights of defendants to be free from torture and to receive fair trials and should not only immediately cease their use and exclude such confessions from consideration as evidence. Moreover, the government should conduct a comprehensive re-examination of how to evaluate the weight as evidence of confessions obtained through torture in order to meet the standards of international human rights law.

(2) Review the systems for complaints and reparations for victims of torture

With regard to complaints and reparations for people who have been subject to torture or inhumane treatment by the State, the State Report only laconically notes that correctional institutions and police agencies have not received any such complaints or applications in recent years. However, in 2010, an instance of a grave infringement on health rights occurred in the Taipei Prison, when a prisoner suffering from diabetes who was forced to wear leg shackles and ultimately suffered the amputation of his leg due to the infection of open wounds caused by the shackling. In addition, there was the case of Chi Fu-jen, widely reported to have been the "Wolf of Tunghai," who was wrongfully convicted and imprisoned after confessing under torture and was nevertheless subsequently denied reparations by the court. Both cases would appear to show that the existing process of complaint and reparations is dysfunctional and incapable of protecting the rights of the people. The government should carry out a comprehensive examination of the effectiveness of the complaint systems in correctional institutions and detention centers and the existing hearing procedures for applications for reparations for cases of wrongful imprisonments and conditions for reparations in order to guarantee the rights of victims of torture or inhumane treatment to smoothly file complaints and receive reparations.

(3) Improve the quality of medical care for inmates and detainees

Regarding the health rights of inmates and defendants under detention, there are at present numerous cases which indicate that the amount of medical resources and manpower deployed is insufficient. As a result, the responsible agencies are unable to ensure the doctors in correctional institutions can provide medical care similar in quality to that of nearby hospitals or, if a defendant or inmate asks for treatment by a doctor, provide sufficient custodial personnel to allow a defendant or inmate to be sent to a hospital. The MOJ has the obligation to ensure that all prisons have the capability to provide medical resources and medicines that are similar in quality to those of nearby hospitals and to be able to respond appropriately and promptly to requests by defendants or inmates to receive care by doctors. It must also resolve as soon as possible the passive responses to the medical needs of inmates caused by the chronic shortage of custodial manpower in order to protect the health rights of incarcerated persons and thereby ensure that the lack of adequate prison health and medical resources do not lead to violations of Article 7 and Article 10.

Article 8: Prohibition of Slavery, Servitude, and Forced Labor[57]

I. Introduction

According to the annual "Trafficking in Persons Report" issued by the United States Department of State, in 2010 and 2011 Taiwan was ranked in the highest category, apparently giving Taiwan a very high evaluation on its efforts in the prevention of human trafiicking. In its discussion of Article 8, the State Report explains the Human Trafficking Prevention Act and other labor-related laws and regulations and the state's efforts to prevent human trafficking, as well as the protection of child labour and student apprentices. However, it does not give a review of the work that has been done to prevent human trafficking or to improve the student apprentice system, and it does not describe the actual situation in these matters. For this reason, this Shadow Report will provide real experiences and case studies on the three issues: the student apprentice system, the exploitation of workers, and measures related to the prevention of human trafficking. Finally, it will provide some concrete suggestions as regards government policy on these issues.

II. Responses to the State Report

(1) Student apprentices as slave labor: Response to ¶ 115 (p. 51) of the State Report

According to Article 64 of the Labor Standards Act (LSA), "For the purposes of the Act, the term apprentice shall refer to a person whose objective is to learn technical skills in a job category prescribed by the competent authorities for apprentice training, and who receives training from an employer in accordance with the provisions of this Chapter [LSA Chapter VII, Apprentices]. The provisions of this Chapter shall apply, mutatis mutandis, to foster workers and interns of a business entity, students under any business-education cooperation project, and other persons similar to apprentices in nature."

The system of business-education cooperation projects was begun in 1969. A business-education cooperation project must be arranged with the collaboration of a school and a business entity. Students will study the regular curriculum of the school as well as a professional course, and at the same time they will go to the related business or industry to get technical instruction and practice. It is a programme of

[57] This section was authored by Weng Chia-hung (翁嘉宏), Lee Li-hua (李麗華), and Wu Jia-zhen (吳佳臻), and translated by K. A. Kearney (慷凱靈).

vocational education to prepare one for employment, and there is a contractual training agreement between the apprentice and the training unit, which is not considered a relationship between a worker and an employer. According to the content of the training agreement of the business-education cooperation agreement, the money that the student receives is a living allowance, not wages. For this reason it is not governed the minimum wage regulation in the LSA. The apprentice in this business-education cooperaton has a joint status as student and worker. Thus, although the LSA contains specific rules and regulations on working hours, rest days and holidays for workers in general, there are none specifically directed at apprentices, and this could lead to a violation of the apprentice's rights.

Case Study

In April 2010, the Taoyuan County Labor and Human Resources Bureau, after an an inspection of the Yanghua Photovoltaic factory, discovered that there was one child worker who was not yet 16 but working more than eight hours a day, and reported that the bureau had referred the case to the District Prosecutors' Office for investigation.[58] At the same time, it was discovered cases of underpaying of overtime pay, excessive overtime, and other issues, and the bureau fined the company for these breaches of the law. The employees' union of Yanghua Photovoltaic also revealed that the company was exploiting its apprentices, including giving them work that was complicated and hazardous and asking them to work the nightshift and to work overtime, all in violation of existing labour laws and regulations. The response from the Ministry of Education (MOE) was as follows: "A special committee will be set up quickly to look into this, and if it is confirmed that there has been a violation of the law, then it will be necessary to halt operations…:" However, until now no follow-up steps have been taken.

Case study

In 2011 in Pingtung County, a student trainee at the Huachou Industrial and Home Economics Vocational School was found to have been exploited by the Tokyo King of Japanese Ramen Noodle Shop. When the MOE investigated the situation, it discovered that the shop had not yet been accepted as a qualified establishment for work experience. Thus, it determined that the school had violated the "Regulations on senior vocational schools using rotating style of education and work in the

[58] "Yanghua Employees' Union and the Self governing Labor Association accuse Ministry of Education of turning a blind eye to the exploitation of student trainees" by Hu Ching-hui, Chen Wen-cheng, Chen Mei-ying, and Hung Su-ching. *Liberty Times*, 9 April 2010, available at http://www.libertytimes.com.tw/2010/new/apr/9/today-life8.htm (in Chinese).

business-education cooperation" and might be penalized by having its assistance funds cut or face a reduction in the number of students enrolled in the school.[59]

In 2010, in the name of protecting apprentices, the MOE planned to draft special regulations governing these students in order to raise the threshold of students entering such programs. However, it asked that the relevant articles of the LSA be revised, including relaxing the limit on the proportion of apprentices among total employees from one-fourth to one-third. Civil society groups opposed the relaxation of the current upper limit, which is intended to prevent enterprises using the apprentice system as a means to replace the normal labor relationship between employer and employees. Instead, they advocated that the MOE and the Council of Labor Affairs (CLA) should establish standard contracts to be used as the business-education cooperation contract and the training contract; in addition, there should be unnannounced inspections of the companies participating in business-education cooperation programs and reviews of the content of the training program according to the training schedule. The training periods of these apprentices should be limited to eight hours per day, such that apprentices would have the right to refuse to work longer periods without being subject to dismissal or a cut in his allowance/wages; moreover, if apprentices volunteer to extend the training period, they should be paid overtime pay equivalent to the pay other workers would receive in accordance with the LSA.

II. The actions of employers and government force migrant workers to asbcond: Response to ¶ 117 (p. 52) of the State Report

In June 2009, the Republic of China brought into force the Human Trafficking Prevention Act (HTPA). Article 2 of that act defines human trafficking as follows:

> "To recruit, trade, take into bondage, transport, deliver, receive, harbor, hide, broker, or accommodate a local or foreign person, by force, threat, intimidation, confinement, monitoring, drugs, hypnosis, fraud, purposeful concealment of important information, illegal debt bondage, withholding important documents, making use of the victim's inability, ignorance or helplessness, or by other means against his/her will, for the intention of subjecting him/her to sexual transactions, labor to which pay is not commensurate with the work duty, organ harvesting; or to

[59] "Student-trainees exploited, school faces reduction in student enrollment" by Lin Hsiao-yun, *Liberty Times*, 16 November 2011.

use the above-mentioned means to impose sexual transactions, labor to which pay is not commensurate with the work duty, or organ harvesting on the victims."

At present most of the migrant workers in Taiwan come from Southeast Asian countries, and the jobs that they perform can be basically divided into manufacturing and social welfare work. This last category can be broken down into two categories, namely domestic helpers and nursing aides (which includes both those working in homes or in institutions such as nursing homes, etc.). Of these, the working conditions of domestic helpers and home nursing aides are the worst in terms of protection from exploitation, etc.

Many employers will confiscate the passport, residence permit, and any other documents of the foreign domestic helper, ostensibly for "safekeeping," but in fact to prevent the worker from running away. Another commonly used tactic is for employers to deduct approximately NT$3,000 each month from the helper's salary as a form of insurance against him or her running away. According to Articles 54 and 57 of the Employment Services Act (ESA), it is stated that the employer is prohibited from "Illegally withholding the passport(s)/ residence certificate(s) of foreign worker(s) or embezzling belongings of foreign worker(s)." However, when foreign workers have brought cases in the past, if the employer returns the items no fine is assessed. In 2010, in a notification clarifying these regulations, the CLA said that, when a foreign worker requests the return of such articles and the employer refuses to return them with no legitimate reason, then a fine of between NT$60,000 and NT$300,000 will be imposed on the employer and his or her qualifications for employing foreign workers will be cancelled. However, in addition to the insufficient ability of many foreign migrant workers to communicate, the risk of being dismissed by asking the employer for the return of the documents is very high. Thus, most migrant workers do not dare to do this, and we seldom see cases of the CLA fining employers who have confiscated workers' documents.

It is common for foreign nationals working in the home as nursing aides in Taiwan to be asked to do work other than nursing, and the result is the foreign migrant home nurse working overtime and at very low wages. The HTPA defines exploitation of the worker as "labor to which pay is not commensurate with the work duty." At the present time, the relevant regulations of the LSA are not applied to those working in the home, and they are not afforded the protections of minimum wage, holidays and rest days, etc., in addition to being subjected to the common practices of

confiscating their passport and other documents and restricting their movements. This type of treatment constitutes a crime under the articles of the HTPA. For this reason, civil society groups have made a strong appeal to the government, demanding legal amendments to realize the protection of the labor rights of domestic workers.

Case study

In 2011, Jacqueline Liu Hsien Hsien, director of the Taipei Economic and Cultural Representative Office in the state of Kansas in the United States was charged by a US magistrate with forcing her Filipina domestic helper to work overtime, paying her only one-third of the contracted salary, prohibiting her from leaving the residence on her own, monitoring her with surveillance cameras, allowing her no holidays in a year, confiscating her passport, and threatening her with dismissal and repatriation. As the main person involved in this human trafficking incident was a diplomat posted to the United States at the time, the case attracted a lot of attention.

After being detained in the United States for two months, Liu entered a plea baragain agreement, under which she pled guilty to foreign labor fraud in exchange for being sentenced to time served and repatriated to Taiwan. However, after returning to Taiwan, the Taipei District Prosecutor's Office dropped the case against her after determining that she had no case to answer under Taiwanese criminal law.[60] This demonstrates the relatively low level of concern for such issues among Taiwan's judicial authorities.

According to statistics from the CLA, 42.4% of all migrant workers working in the home do not get any holidays or rest days in a given year; furthermore, only 5.6% of migrant workers are allowed a day off on all official public holidays, while 52.0% get some of the days off. Foreign nationals working as home nurses on average work 12.9 hours a day and receive a monthly salary of NT$18,341.[61] Quite a few employers in Taiwan take the foreign worker's passport, residence permit and any other documents for "safekeeping" to prevent the workers from running away, and whenever there is any dispute, the victim are always threatened with deportation. In 2009 and 2010, respectively, 118 cases and 115 cases of human trafficking were

[60] See "Prosecutors drop charges against Jacqueline Liu," *Taipei Times*, 26 May 2012, available at http://www.taipeitimes.com/News/taiwan/archives/2012/05/26/2003533776.

[61] These data are taken from the 2010 survey of foreign workers' use and management by the Bureau of Employment and Vocational Training of the CLA.

brought before magistrates in district courts in Taiwan, but very few of these cases resulted in convictions.

There is an advantage for the Ministry of Justice if the law enforcement officer recognizes the victim of human trafficking, and takes action to put him or her in a secure place and offer protection. In 2007, a notification titled "Principles for the determination of victims of human trafficking" stated: "Uncertain concepts which exist under the law regarding the determination of exploitative work and wage disputes, such as the lack of a standard by which to judge whether the reward is equal to the work performed; whether or not there is a case of exploitation; whether or not force and threats are involved, and the understanding and recognition of these factors by the staff of the relevant government units carrying out the law, from the inspectors of the local government office of the CLA to the police, prosecutors and judges are all different." For these reasons, the CLA must get all the concrete details of the cases and examples of judgements in other cases, and submit these to the administrative and judicial branches of government for review to find clearer standards for judgement. In addition, the CLA and the National Immigration Agency (NIA) have set up flow charts designed for official to use in the prevention of human trafficking. However, because of the delays and mistakes by administrative units in carrying out the procedures, and because inter-agency coordination and communication is inadequate, cases of human trafficking almost always require a long period of investigation.

Case Study

Migrant worker 'J' from the Philippines came to Taiwan to work as a home nurse. In addition to her usual work of taking care of the employer's elderly mother every day, she was also expected to take care of the employer's young children and to go to the employer's seven houses to do cleaning work every week. Before and after this incident, she approached her labor broker agency and told them that she would like to change employers. However, the employer threatened to send her home and refused to release her so she could change employment. In 2010, J developed a boil on her body and took the opportunity when she was getting treatment to ask the doctor to certify that she had been bitten and scratched by the employer's mother. When the employer learned of this, and thinking that the reason she wanted this certification was in order to sue him, he kicked her out of the house immediately. 'J' finally found a shelter and settled down there. Later, with the help of a civil society group, 'J' submitted a plea to the court for protection as a victim of human trafficking. However, the Taoyuan District Prosecutor's Office determined that there

was no case to answer in her petition and the Taiwan High Prosecutors Office also rejected her appeal. When the NIA received the decision made by the district court, they notified 'J' that her temporary residence permit would be revoked. For its part, the CLA asserted that a worker must decide between applying to change employers and applying for protection under the HTPA, they cannot proceed with both procedures. At first 'J' chose the latter, but as her employer was not charged under the HTPA, she was not viewed as a victim of human trafficking and must leave the country. Furthermore, as her temporary residence permit would be revoked, her work permit would no longer be valid.[62]

The main goal of the HTPA is to protect the victims, to avoid their being exploited in their work, or in sexual exploitation. Once foreign workers begin the process of bringing a case of human trafficking to court, they are taken into a protection system; however, if the accusations of human trafficking do not result in prosecution, they cannot regain their original status of foreign worker and find another employer. This is a deprivation of their original legal labor rights. This is also the reason why that foreign workers fear bringing a case to court, because it is most likely to result in repatriation. Instead, many workers will choose to quietly bear the exploitation, whether at work or sexual exploitation. For these reasons, we request the CLA to review the current practices of "Requesting a change of employer" and "application for protection from human trafficking" so that a worker may apply for both at the same time, rather than the current "either or" method.

In cases of human trafficking involving foreign workers working as home nurses, two issues frequently arise. First, when prosecutors decide not to indict an employer due to insufficient evidence, this does not mean that the worker is not a victim; in such cases prosecutors must seek assistance from social workers, the shelter, etc. to determine independently whether or not the worker is in a precarious situation or is a victim. Secondly, according to Article 28 of the HTPA, if a victim does not have a valid entry or residency permit, a temporary entry permit of up to six months can be issued by the NIA to enable an investigation or trial to continue, and persons with such permits may also apply for work permits during this period. In the case study presented above, 'J' in fact should not have needed to apply for a temporary entry permit, since her original residency permit was still valid, she should have only needed to apply for work permit, because she had already severed her connection with

[62] Information about this case was supplied by the New Immigrants' Labor Rights Association (NILRA).

the original employer, and there should not have been restriction on the occupation that she could engage in.

In addition, many foreign workers who overstay and work illegally do not dare to the fight for their rights because of their illegal status; however, often this status is the result of having been exploited in some way by their original employer. Then once they are caught or if they decide to give themselves up to be repatriated, they will be detained. Thus, the employer is secure in the knowledge that he has strong backing and can continue to exploit his foreign worker, confiscate his or her documents, and confiscate his or her valuables. We believe the CLA should liberalize the regulations regarding overseas workers' right to change employers; only in this way can the incidence of foreign workers running away from their employers be effectively reduced and their labor conditions be protected. In addition, the NIA should carry out detailed investigation of the foreign workers who have overstayed and been detained, in order to determine which are in fact victims of human trafficking and to guarantee and protect their rights.

(3) A protection hotline that is unable to provide protection: Response to ¶ 116 (p. 51) of the State Report

The State Report mentions that in addition to the setting up of inspectors at various levels of government, the government has set up a special telephone line, with the number 1955, which is a 24-hour, free bi-lingual hotline for help and inquiries to prevent foreign workers. However, the New Immigrants Labor Rights Association (NILRA) reports that, when they applied to the "1955" hotline seeking help for a foreign worker, the hotline staff said they had already received a call about this case, but that the worker had not sent a written complaint, but only expressed his desire to leave Taiwan and to apply for occupational injury compensation, and therefore the staff at the hotline did not send the case to the relevant labor authority for investigation. Foreign workers often lack understanding of the legal procedures for handling cases of labor exploitation, legal language, and the rights guaranteed by the law; thus, the staff of such a hotline must take the initiative to ask the details of the situation and inform the worker of his rights, and not passively wait for workers to lodge formal complaints.

(4) Layers of problems in the administration of human trafficking prevention: Response to ¶ 118 (p. 52) of the State Report

1. The good and the bad aspects of shelters for victims of human trafficking

At present Taiwan has a total of 19 shelters which have been specifically set up to give refuge to victims of human trafficking and which receive varying degrees of support or oversight by the government. Some are funded by the government but managed by non-governmental organizations.[63] In those shelters that are set up by the NIA and the CLA, according to the "Guidelines for the operations of temporary shelters for aliens," workers employed under the ESA Article 46, Paragraph 1, Items 8-11 (i.e. blue collar or domestic workers) who are housed in such shelters "shall receive a maximum of NT$500 a day for a full day and a maximum of NT$250 for each half day." A second type of shelters are set up by local governments with CLA funding, usually by commissioning a labor services group to manage the shelters.

In addition to providing safe accommodation for victims of human trafficking, shelter staff are often called upon to act as a go-between, to help the victims find work, medical care, an interpreter, legal assistance, or psychological consulting, accompany them to find information on their cases and other services. Only in this way can they really claim to protect the victims of human trafficking. This kind of assistance usually requires professional social workers on staff in the shelter. In the shelters set up directly by the CLA, the funding of NT$500 per resident is truly insufficient, making it difficult to provide all the services that the victims of human trafficking require, and even the professionalism of many of the shelters has been a point of contention. Moreover, the government does not have a system of oversight of the shelters. Finally, most of the nation's 19 shelters for victims of human trafficking are located in the northern part of the island and more should be added in the eastern, centralm and southern regions. Since both the quality of service in the shelter system and the quality of the staff should be improved, the responsible government departments should allocate resources more effectively.

Table 2: Shelters for human trafficking victims in Taiwan

Sponsor	Location	Operator
NIA	Ilan County (1)	ECPAT Taiwan
	Hualien County (1)	Taipei Women's Rescue Foundation
	Nantou County (1)	Good Shepherd Social Welfare Services

[63] US State Department, *Trafficking in Persons Report (Taiwan), 2011* (27 June 2011), available at http://www.state.gov/j/tip/rls/tiprpt/2011/164233.htm.

CLA	Taipei City, Xinbei City (7)	Xinbei City Government, Islamic Society of China, Chun-Hui Center, Hsin Shih Social Services Center (Seewa), Indonesian Economic and Trade Office, Manila Economic and Cultural Office, Taiwan International Workers' Association
	Taoyuan County (4)	Hope Workers' Center, Vietnamese Migrant Workers and Brides Office (Taiwan Alliance to Combat Trafficking), Indonesian Economic and Trade Office (x2)
	Hsinchu County (2)	Bethlehem Mission in Taipei, Asia-Pacific Labour Rights Association
	Taichung City (1)	Indonesian Economic and Trade Office
	Kaohsiung City (2)	Stella Maris International Center, Islamic Society of China

2. Too few interpreters, excessive restrictions on factfinding assistants

According to the CLA's "Guidelines for persons from not-for-profit organizations accompanying foreign workers undertaking information gathering as set out by municipal and county governments," a person who acts as a factfinding assistant and who is fully bi-lingual will be paid NT$2,000 for each trip in each individual case; if the interpreter is not fully bi-lingual, they will be paid NT$1,500 for each trip in each case; if the person only acts as an interpreter, they will be paid NT$500. Moreover, the NIA merely adopts the payment standard for interpreters set by the respective local agencies who need their services, such as the police, social welfare department, health departments, labor departments, etc. The interpreters' fees are too low, and thus obtaining better quality interpretration is difficult, which strongly impacts the provision of assistance to victims of human trafficking, especially since a good knowledge of the law is also needed to be able to appropriately translate and protect a victim's rights. In addition, there are significant gaps in the pool of currently available interpreters; for example, there are very few who speak Tagalog, only about 2.01 percent,[64] but according to the CLA, as of November 2011, there were 83,087 migrant workers from the Philippines in Taiwan,

[64] Yang Chin-man, Yeh Nian-yun, Sha Hsin-hui, "Research into the operation of platform for the roster of interpreters, NIA (2010).

which is about 19.62 percent[65] of all foreign workers in Taiwan. At present English is used in handling these cases.

As for those professionals accompanying the victim in the investigation of his/her case, the important points are similar to those described above. Lawyers, social workers, and psychologists involved must be licensed in their profession and have documents showing employment in their specialization. All those working in labor affairs, civic groups, law, and psychology must be at least university graduates in a related field with at least one year of experience in related work. Those in civil society groups concerned with the rights of migrant workers believe that limiting the eligibility of the person assisting in the investigative work in this way means that most of those doing the real work in these cases of abuse of the rights of migrant workers are not eligible to apply for payment. For this reason, we recommend that the CLA revise the "Guidelines" to relax the qualifications on those assisting in the investigative work to allow those with one year or more of related work experience and registration from a civil society group working on migrant worker rights to be eligible to receive payment for their work. In fact, many of those who do the real work to prevent human trafficking are themselves new immigrants; although they usually do not have professional qualifications or licenses (and even when they do, for the most part Taiwan does not recognize their academic credentials from their home country), they understand the culture and language of the victims' home countries, they are familiar with Taiwan, and they are concerned about human trafficking issues. Letting them take up this work in human trafficking prevention is in fact more appropriate than engaging many who have all the professional licenses.

3. Strengthen training on-the-ground of staff involved in prevention of human trafficking

Currently the CLA holds a seminar on human trafficking at the central government offices once a year, aimed specifically at training the staff directly involved in cases of human trafficking within the CLA, the Ministry of Interior, and local labour affairs agencies. However, the content of the training programme is mostly about notifying the staff of government policies and little about how to communicate and work with civil society groups, making it difficult for the government staff to make contact with those working in preventing human trafficking and understand the entire situation. For this reason, we recommend that each year seminars be held in the three regions – north, central, and south – using an informal

[65] Data available at http://www.evta.gov.tw/content/list.asp?mfunc_id=14&func_id=57

roundtable style and invite members of civil society groups to participate, which would improve the communication between these groups and the government units working on these issues. We also recommend that the professional training of the relevant government units (e.g., the police, social workers in government and the courts and prosecutors) be strengthened. Improvements to the training would include information on evidence collection, investigation, taking of witness statements, and other skills, all should be strengthened and improved. In particular, those migrant worker inspectors and labor inspectors who are the first responders should receive instruction in the collection of evidence.[66] Most of the migrant worker inspectors are contract employees of local governments. We believe they should be given a higher rank, at least be elevated to central government employees, and their training strengthened. This would have the benefits, first, of enhancing the guiding role of the central government and, second, of improving the standard and rank of these inspectors.

III. Conclusions and Recommendations

Summarizing the analysis above, this Shadow Report makes the following recommendations:

1. The work day of the student apprentices should be limited to eight hours, and the student should be able to refuse to work a longer period without any penalty from the companies such as dismissal or deducting his or her salary; moreover, if apprentices volunteer to work longer hours, the company should pay overtime pay equivalent to the pay regular employees would receive in accordance with the LSA.

2. Civil society groups are opposed to any relaxation of the law which limits the number of apprentices that a company may employ to no more than one-fourth of its total labor force, in order to avoid the company using the apprentice system as a substitute for establishing normal labor relations with its workers.

3. The MOE and the CLA should examine the current "Business-Education cooperation agreement" and the training agreement for student apprentices and set a standard agreement; then they should make unscheduled inspections of those companies that take on student apprentices, and they should inspect and review the content of the training programme to ensure its compliance with the agreed plan.

[66] Translator's note: Regular labor inspectors are all employees of the central government, through the regional field offices of the Council on Labor Affairs, and they are usually civil servants. Migrant worker inspectors are employees of local governments, usually without civil service status.

4. The CLA should severely penalize those employers that confiscate the documents and valuables of their employees, putting into practice the regulation stated in the ESA.

5. The relevant government departments should work closely with civil society groups, study a sufficient number of cases, and uncover the legal and administrative questions and difficulties, in order both to develop a clear set of legal standards for administrative organizations to use in carrying out the law and also to prevent such cases from receiving widely differing verdicts from the courts.

6. The staff at the detention centers run by the NIA should carry out detailed investigations of all the migrant workers found to be overstaying their visas to see if they are victims of human trafficking, and this should also be thoroughly carried out by related government organizations involved in these matters.

7. Staff manning the "1955" hotline should proactively ask for details about a situation when receiving a call and tell the caller his rights and not be passive and wait for a written complaint to be lodged.

8. The laws governing the employment of domestic workers must be revised, to truly protect the labor rights of domestic helpers.

9. The CLA should review the current practice regarding application for a change of employers and application for protection from human trafficking, such that workers may pursue cases against the first employer while seeking and securing new employment.

10. The rules regarding migrant workers changing employers must be liberalized, to allow migrant workers the right to freely choose their employers and improve their working conditions, and thereby reducing the incidence of migrant workers absconding.

11. The number of shelters for trafficking victims outside the northern region must be increased, the quality of service and the quality of the personnel in the shelters should be improved, and the government units involved should balance their resources better to strengthen the functioning of these shelters.

12. Adequate income for interpreters assisting migrant workers and trafficking victims should be guaranteed through setting of a standard, uniform rate. We should not let interpreters become low-priced and exploited workers.

13. The CLA must revise the relevant guidelines, relaxing the qualifications requirements for those doing investigative work to assist victims, such that one year of experience and registration on a roster submitted by a related organization be sufficient for eligibility.

13. Local government migrant worker inspectors should have their status elevated to central government employees and improved training, and relevant government units (e.g., the police, social welfare agencies, the judiciary) should have specialized training, including an understanding of evidence collection, investigation, and taking of witness statements, etc.

Article 9: The Right to Liberty and Security of Persons[67]

I. Introduction

In current practice, cases of deprivation of personal liberty are most often seen in cases where the accused awaiting trial has been detained. Regarding this issue, the State Report only clarifies the detention procedure under national laws and gives the number of those detained after a court hearing. However, it does not discuss whether the review procedure applied in the decision to detain a person is in essence in violation of the standards of the ICCPR. The State Report then enters into a review of other national practices, such as the compulsory hospitalization of those suffering from mental illness and the detention of illegal migrants, and only provides information on related laws and statistics but does not engage in an examination or explanation as to whether those procedures are in compliance with the covenant's standards on the legality and rationality of the deprivation of personal liberty. Truly, there State Report has many deficiencies.

This Shadow Report, in addition to adding to the content of the State Report, will also raise some topics that were not included in the State Report. It will point out aspects in which, under the operations of the current system, the exercise of state authority violates the covenant's standards. These include important points regarding the detention of an individual, the review of an appeal of one's detention, the time limit on the period of detention as given in the Criminal Speedy Trial Act, detention under the Act of Punishment of the Armed Forces, compulsory isolation and quarantine under the Communicable Disease Control Act, and the forced placement of children and youth.

II. Responses to the State Report

(1) Inability of persons of unsound mind to receive an effective defense in court: Response to Paragraph 124 (p. 54) of the State Report

Although the State Report discusses the Code of Criminal Procedure and the Juvenile Delinquency Act, it does not give sufficient treatment of the issue of the duty to inform a person who has been detained or arrested of his or her rights, thus this

[67] This section was authored by Wellington Koo (顧立雄), Luo Shih-hsiang (羅士翔), Weng Kuo-yen (翁國彥), Li Ai-lun (李艾倫), and Chen Hsun-tse (陳壎慈), and translated by K. A. Kearney (慷凱靈).

should be revised. It also does not address the issue of informing those that are of unsound mind. In current practice, when the accused or the one under suspicion is of unsound mind and does not have the ability to fully understand the official statement of his or her rights by the investigative authorities, the duty to inform the person then becomes a mere formality. This harms the right of such persons to a fair trial.

Although Articles 27, 29, and 31 of the Code of Criminal Procedure require that, when the accused cannot completely explain themselves, the judge or the prosecutor must assign a lawyer to argue on his or her behalf. However, in the actual proceedings of the court, judges and prosecutors usually interpret "cannot completely explain" as "cannot explain anything," such that many of those with mental handicaps cannot receive an effective defense and must face an unfamiliar courtroom setting and undergo investigations or trials all on their own. In Decision No. 376 of the Ilan District Court in 2009, it was said that there could arise the necessity to standardize the manner in which the accused was informed to protect the rights of persons of unsound mind.

The accused in that case was a person with moderate physical and intellectual disabilities, and the prosecutor had charged the person with involvement in 12 counts of robbery. However, at the inquest, when the court reviewed the video recording of the police questioning of the accused, it was discovered that the accused did not have the ability to understand the questions that were put to him, and that the police officer even needed to use simple, easy to understand words and sentences to explain the situation. Moreover, during the questioning of the accused on his previous criminal record, and relevant facts in the current criminal case, such as the place the crime took place, the time, and the names of the items that had been stolen, it was only when the police officer proactively said them, that the accused answered in simple language "Heih""Hunh" (i.e. sounds generally taken to indicate agreement). It is clear that the accused had no way of completely understanding. The police officer that was conducting the interrogation and making notes of it told the court during the hearing that he believed the accused could not completely understand what he was told, but that he did not stop the interrogation and find a defense counsel for the accused. From this case, we can see that although the Code of Criminal Procedure requires that the one who "cannot completely explain" should have a defense counsel appointed, the interpretation of this point by the judicial authorities is so narrow that its application is significantly limited.

This Shadow Report recommends that there should be a single, unified clarification of this rule by the Judicial Yuan, which asserts that it be compulsory that a person of unsound mind "who does not have the ability to completely understand and explain" have a lawyer appointed to handle his or her defense. It must be clarified that the requirement is not only triggered when the accused "does not understand anything" addressed to him or her. In addition to the right to a defense lawyer, the person may also require the help of a social worker and other support personnel. Article 84 of the People with Disabilities Rights Protection Act requires that the courts and the prosecutors provide necessary assistance. However, the act also states that the staff of the related local government agencies or social welfare institutions should apply to the courts to assist the accused. We recommend that it the courts and prosecutors should proactively apply for any necessary assistance according to the needs of the person, and not passively wait for a third party to make the application.

(2) Police and prosecutors exceed 24-hour period of restricting personal liberty: Response to Paragraph 125 (p. 54) of the State Report

In the section of the State Report dealing with the restriction of personal liberty for more than 24 hours by the police and prosecutors, they only explain that, in actual practice, police commonly carry out their investigation for 16 hours followed by 8 hours of investigation by the prosecutor. However, two situations frequently occur that cause the 24-hour period to be extended. First, a person has not been formally accused or charged with a crime may also be questioned after being notified to "appear in court for explanation" as a "related person" (i.e. a witness). Second, a suspect may be questioned when he or she or makes a "voluntary court appearance without arrest." In both situations, the starting point of the 24-hour period is delayed until after the questioning has in fact begun, so that total period in which the accused is deprived of his liberty exceeds the legally allowed limit of 24 hours.

Case Study

In 2006, Lin Chung-cheng, a member of the Financial Supervisory Commission of the Executive Yuan and Su Chun-chi, secretary and the legal counsel to Minjian Development Company, were subpoena-ed to appear at the Taichung District Prosecutor's Office for questioning, and they were questioned and searched. After questioning, the prosecutor's office arrested them and applied to the court for an writ of detention. However, the Taichung District Court decided that it did not have jurisdiction over the case, and transferred it to the Taipei District Court for the

hearing on the arrest warrant. The defense counsel argued that beginning with the beginning of the interview, the accused had already had their personal freedom restricted for more than 24 hours. However, the prosecutor believed that the 24-hour period only began when the pair were formally arrested by the Taichung District Prosecutor's Office. In the end the court ruled, in agreement with the prosecutor, that the detention had not exceeded 24 hours.

We believe that the investigative authorities have a duty to conduct an exhaustive investigation of the evidence and the facts, and thus the accused should be arrested only when there is sufficient evidence. If the investigative authorities have not yet determined the position of the accused, then they should not arbitrarily question the person as a "related person," then change the status of the related person to that of "the accused" and carry out an arrest. According to the ICCPR, the guarantee of proper procedure should be applied in any situation involving the curtailment of personal liberty. For this reason the marking of this 24-hour period should begin as soon as a person's liberty is restricted. In other words, if the investigating authorities first call the person for questioning as a witness, and if after questioning they then confirm the person should be arrested and there is a need to apply to the court for an arrest warrant, then the calculation of the 24-hour period should begin with the initial appearance for questioning as a witness. The State Report does not discuss this point and it is an omission.

(3) The Mental Health Act allows restriction of personal liberty without a court investigation: Response to Paragraph 137, Paragraph 138, and Paragraph 139 (pp. 61-62) of the State Report

The State Report explains that the government amended the Mental Health Act on 4 July 2008, and in that revision are stipulated the conditions upon which a person would be hospitalized, the investigation procedure, the relief framework, and other issues. It also explains the review procedure for emergency placement undertaken by the Department of Health's Review Committee for Involuntary Commitment (hereinafter the "Review Committee," as it is referred to in the State Report) and the judicial branch, as well as giving statistics of relevant cases of compulsory hospitalization. Moreover, it also relates the incident in November 2011 when a certain student protesting against the school was forcibly hospitalized under the Mental Health Act and explains that persons involved in that case did not fully understand the important points and procedures contained in the act, and that relevant relief procedure was not comprehensive enough, and even declares that the student's

rights were not fully guaranteed. However, the State Report does not give a clear examination of how the application of the Mental Health Act should be improved.

The methods of medical treatment included in Articles 41 and 42 of the Mental Health Act deprive an individual of personal liberty, and thus they must conform to Article 8 of the Constitution and Article 9 of the ICCPR. There can be no difference in this regard simply because these are not criminal cases. According to the current law, once a doctor has determined that one must be hospitalized, if the person objects, the doctor must submit the case to the Review Committee of the Department of Health. In other words, a person who by the appraisal of a medical specialist has been compulsorily hospitalized, and thus deprived of his or her personal liberty without the review or examination of any judicial body. Although the law does permit a person who objects to emergency placement or forcible hospitalization to seek assistance from the courts, the court is only a passive actor, and does not proactively examine such case. Thus, in practice only a very small number of cases receive any judicial review. According to statistics of the Judicial Yuan for the years 2008-2011, there were 81 cases of people who had been forcibly hospitalized seeking relief from the courts. Of these, 77 were rejected, and only in four cases did the court order the person to be released from the compulsory hospitalization. Meanwhile, the Review Committee of the Department of Health only conducts reviews of case files (i.e. the person does not have the opportunity to appear before a hearing), and each year the committee concurs with as many as 90% of the decisions for compulsory hospitalization.

Since the regulation on compulsory hospitalization in the Mental Health Act deprives a person of his or her liberty, the procedures should be handled more cautiously in at least a quasi-judicial manner. For example, the current requirement of an assessment of a specialist should be adjusted to require the assessment to be made by a physician from a different hospital. In addition, the Review Committee of the Department of Health should give the person involved an opportunity to explain and speak for himself or herself, and the other rights of the person to receive remedies should be strengthened.

(4) Administrative detention of foreign nationals: Response to Paragraph 140 (p. 62) of the State Report[68]

[68] Translator's note: The State Report uses the terms "shelter" and "placed in shelters." These are accurate translations of the Chinese terms used, but those are themselves euphemisms. The facilities concerned are special detention centers for foreign nationals, and the foreigners placed therein are without doubt under detention.

The State Report says that when foreign nationals are detained, they are provided with a written notification of the grounds for the punishment, and if a person refuses to accept the detention, he or she can first file an appeal to the National Immigration Agency (NIA), and if that is rejected he or she can file an administrative lawsuit. However, the standards for the processing of such administrative remedies are less strict then for other types of administrative remedies, since cases of detentions of foreign nationals are specifically excluded from the regulations of the Administrative Procedure Act, according to Article 3, Paragraph 2.[69]

According to the current law, the detention of foreigners is determined by the solely by the National Immigration Agency (NIA). However, the NIA does not have a specialized unit to carry out an investigation, and thus there are doubts about the strictness of its procedures. In addition, since detained persons can only obtain judicial remedies through ordinary administrative lawsuits, even when the detained person follows the procedures, it usually takes several months to obtain judicial review. This is certainly in violation of Article 9's requirement of a "speedy court hearing." The State Report does not mention anything at all about this issue.

According to Constitutional Interpretations 588 and 636 of the Council of Grand Justices, in all cases deprivations of personal liberty, even if they are not part of a criminal prosecution, the level of scrutiny for the action should be equal to that applied in a review of the detention of one accused of a crime.[70] In other words, a decision to deprive a person of his or her personal liberty for more than 24 hours should not be done on the decision of the administrative authorities alone. According to these interpretations, the current detention punishments administered by the NIA should not be decided by the NIA alone.

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[69] The Administrative Procedure Act , Article 3, Paragraph 2 states: "The procedure herein prescribed is not applicable to the following matters:
1. Acts in relation to matters concerning diplomacy, military and safeguard of the national security;
2. Acts in relation to the exit and entry permits for foreign nationals, recognition of refugees and naturalization; …."
In one recent case where a foreign national filed an administrative lawsuit against his detention (which lasted 276 days), the Supreme Administrative Court, in its judgment (2011 No. Pan-1958), cited this law to rule that his claim was without merit. See the discussion in Chen Chwen-wen, "The two covenants and the guarantee of personal liberty for foreigners," paper presented at the conference "The Significance and Impact of " held by the Taiwan Foundation for Democracy on 18 June 2012 (in Chinese).

[70] The full text of Constitutional Interpretations 588 and 636 are available at http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=588 and http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=636 respectively. These rulings did not specifically involve the detention of foreign nationals, but rather cases of administrative custody and of "reformatory training" (i.e. of gang members); however, they stated general principles of the application of Article 8 of the Constitution.

The State Report also omitted to discuss the right of detained foreign nationals to bring cases to court. According to Article 9(4), anyone deprived of liberty has the right to apply to the court to decide whether the detention is lawful. However, although Taiwan's current Habeas Corpus Act does not specify that it only applies to persons who have been arrested on suspicion of committing a crime, until today the courts have consistently refused to hear any case requested by a foreign national in detention, citing the reason that the person has "not been detained and arrested because of suspicion of having committed a crime."[71]

This explanation by the judicial authorities is not only in conflict with the fundamental spirit of the covenant's requirement that the decision to deprive a person of his liberty must be examined by a court. It is also absurd, because the detentions of foreign national are in fact criminal matters, since the person is accused of violations of immigration law. Therefore it is quite unreasonable that they are not afforded the protections of the Code of Criminal Procedure that are afforded to people accused of other crimes, even much more serious ones. For example, it is clear that they should be brought before a judge within 24 hours to rule on the validity of their detention. Of course they must also have the right to appeal for Habeas Corpus.

Thus, we believe that the Immigration Act and related laws should be amended again, to include the several measures to strengthen the system. First, an independent, neutral and professional review committee should be formed within the NIA, which would reduce the arbitrariness of the administrative decision-making and guarantee a level of strictness in the application of detention (the legal model of the Mental Health Act in this regard could perhaps be followed). Second, the Administrative Procedure Act should be amended to extend its coverage to this category of decisions of the NIA. Third, all detentions of foreign nationals, whether for immigration violations or regular criminal cases, must be reviewed by a court within 24 hours, and it should be clear that only a court has the power to order any detention of longer than this period. Likewise, all extensions of detentions must be approved by a court.

Regarding the periods of detention, the State Report notes that limits on the periods were introduced in the amendment to Article 38 of the Immigration Act that took effect in December 2011. The new law stipulates that a foreign national may be detained for up to 60 days, with the possibility of only one 60-day extension. This is a positive step, since until that time there was in practice no limit, which was a grave

[71] See Taiwan High Court judgment 2010 No. Kang-543.

violation of the rights of the detainees. However, even after this revision, there are still two significant gaps which the State Report does not mention. First, the detention of a person who for whatever reason is unable to obtain a valid travel document may be continuously extended until such time as the document arrives. For a stateless person (or a person from a particular badly-run country), this means they can be held indefinitely. Even more saliently for Taiwan, PRC nationals do not come under the purview of the Immigration Act, and the equivalent provisions in the Act Governing Relations between the People of the Taiwan Area and the Mainland Area have not yet been amended; in other words, indefinite extensions of the detentions of PRC nationals are still permitted, which is not only in violation of Article 9 but also discriminatory.[72]

III. Issues Neglected by the State Report

(1) Important points which the prosecutor seldom examines in detention cases

According to Article 9(1), when depriving a person of his or her liberty, the state must do so with procedures in accordance with the law and prohibit the carrying out of "disproportionate, unfair, or unforeseen" methods (arbitrary interdiction).[73] As can be seen in the reasoning accompanying Constitutional Interpretation No. 665 of the Council of Grand Justices, the Code of Criminal Procedure, Article 101, Paragraph 1, Item 3 states that, although a person has not yet been named as the accused, if the crime is a serious one and there exists a reason for detention by the court, the court may rule for detention.[74] It is still necessary that the crime that the accused is to have committed be a serious crime or that there is considerable suspicion of this person having committed it. In addition, there must be "suitable reasons" for suspicion that the person will abscond, or alter the evidence, or collude with other defendants or witnesses, etc.; and the court must consider whether any other less harmful means besides detention would be sufficient to ensure the smooth progress of the criminal case or investigation. Only when all these conditions have been met can the court decide to detain the accused without transgressing Article 23 of the Constitution on the principle of proportionality.

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[72] This paragraph draws heavily on Chen Chwen-wen (2012).
[73] See Manfred Nowak, *CCPR Commentary*, 2nd revised edition, Part 3, Article 9, Paragraph 30.
[74] See the reasoning section of Constitutional Interpretation No. 665, available at http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=665. .

In practice, however, in addition to the fact that prosecutors habitually and indiscriminately apply for detention of suspects, when the courts consider such applications, they only rarely considers the substantive issue of whether the applications meet these conditions. In ruling to detain someone, the courts very often simply assert "the crime that the accused is charged with is a serious crime, and according to the usual experience and rules, there is a great risk of someone who has committed a serious crime of fleeing, and therefore the accused is considered a flight risk." This becomes confirmation of the "suitable reasons" for the necessity of detention of the accused. In other words, as soon as one is accused of committing a serious crime, according to present practice, one is usually *ipso facto* declared to be one who needs to be put in detention, and there will be no examination of whether there are other reasons sufficient to determine the need for detention, or whether there exist other less harmful measures that are more suitable. In this kind of circular logic where "a serious charge is equivalent to flight risk, therefore requires detention," then the seriousness of the crime becomes the only basis to detain the accused. This truly turns standards for review of detention in cases of serious crimes enunciated by the Council of Grand Justices into a document for show only, and it violates both Article 23 of the Constitution and Article 9(1) of the ICCPR.

Furthermore, it is not true that the need for detention, even after being established by the court, never changes. Instead, usually it will decline over the course of a criminal proceeding. As evidence is uncovered in the investigation and grows more complete over time, the probability that the accused will tamper with the evidence falls; moreover as the time in detention passes, the accused grows more disconnected from society and his network with each day, and the probability of his fleeing also falls. At this juncture, is there not space to reconsider using the most extreme measure available, i.e., the restriction of personal liberty, to ensure the criminal lawsuit is carried out, that it is a basic necessity for the carrying out of all procedures and operations? At various stages during the course of a case, the court should review the basis of the decision in favor of detention in a substantive manner. If the court simply states "the court previously determined that the accused was charged with a serious crime and that without detention it will be difficult to bring him or her to trial; since the accused is still charged with a serious crime, the reason still exists, thus the period of detention should be extended," that is totally insufficient. The court must inquire as to the current situation of the accused, whether it is the

same as when he was charged and therefore still necessitates detention or not. Otherwise the courts will clearly conflict with the requirements of Article 9(1).[75]

This report recommends that the Code of Criminal Procedure Article 101, Paragraph 1, Item 3 (the regulation on detention for serious crimes) be eliminated: The type of crime of the accused should not become the only important criteria that the court uses to review whether or not there is the necessity for detention. Moreover, Article 101, Paragraph 2 should be amended to read "When the judge questions the previous matters, the police and the prosecutors should be present in court to explain the reasons for the application for detention and provide the necessary evidence." Having the prosecutor give the reasons in person in court for the application for detention and providing evidence is their clear duty and will increase the degree of strictness in the decision to detain someone.

(2) Unclear review period for appeal of detention rulings

After the court has approved a detention application, the accused may appeal this decision for review by a panel of judges. However, there is no regulation for the length of time for this review to proceed. In the meantime the personal liberty of the accused continues to be deprived, and even if in the end the panel rules that the appeal has merit, there is no way to undo the harm done to the personal liberty of the accused. According to Article 9(3), when a person has been arrested or taken into custody on a criminal charge, he or she should be brought promptly before a court for a review of the detention and should be either tried or released within a reasonable time. In most countries that are parties to the ICCPR, the law stipulates a clear time limit for this judicial review, but in our country, there is no clear time period for the examination and review of an appeal against a detention judgment. The Human Rights Committee has stated that the time the court takes to review and examine the case should not exceed several days. By not regulated the time period to be taken by the panel in its review of an appeal against detention, our country appears to be in violation of this provision of the covenant.

Some have argued that an immediate review by the legal authorities of the appeal against detention might not always be in the best interests of the accused as regards his personal liberty. However, we note that, if the first judge turns down the initial

[75] See the decision on detention in the 11th retrial of the case of Chiou Ho-shun, Taiwan High Court 2009 No. Zhu-shang-zhong-geng (11)-7.

application made by the prosecutor for detention, the prosecution is entitled to appeal. Under the current system, in such cases the accused continues to be held until the panel reviews the prosecutor's appeal. In addition to a serious harm to one's personal liberty, this practice impacts on the accused's right to a fair trial and violates the principle of the presumption of innocence.

In order to ensure that the review of the appeal against detention complies with the covenant's requirements for "within a reasonable time," and protect the personal liberty of the accused, we believe there should be different measures for different situations, and we recommend that the following regulations be added. When the judge rules in favor of detention and the accused brings an appeal, the appeal panel should immediately review the case. However, when the judge rejects the prosecutor's application for detention, the person should be released forthwith, while any appeal of the prosecutor should follow the usual procedure, with no application of the immediate review requirement.

(3) Unreasonable detention of eight years permitted under the Criminal Speedy Trial Act

According to Article 5 of the Criminal Speedy Trial Act, if the period of detention has exceeded eight years without a final judgment being reached, the detention shall be deemed cancelled and the court shall release the accused. While this regulation limits the period of detention, does the eight-year limit conform with the covenant's standard of "within a reasonable time"? In fact, according to the spirit of the covenant, we know that prior to coming to trial the deprivation of a person's personal freedom can only be based on substantive reasons, such as risks of suppressing evidence, re-offending, or flight. Thus, the use of detention should be restricted, but the question of defining a reasonable time period remains, there is no one standard or yardstick. One must consider all the circumstances in each case. By specifying a maximum period of eight years, and it is possible the law will encourage courts to use that as a standard for deciding if a detention period is excessive or reasonable. However, the "reasonable time" set by the regulation in the covenant is not only about the absolute length of time; one should also consider the conduct of the trial of an accused under detention: is the case being heard in a concentrated, focused manner. Article 5, Paragraph 1 of the Criminal Speedy Trial Act also states that, when the accused is held in custody, the court should give priority to hear his or her case. Therefore, the criteria for the determining the "reasonableness" of a detention should not be based solely on whether the detention period exceeds eight years or not.

We believe that the first, second, and third paragraphs of Article 5 of the Criminal Speedy Trial Act should be considered as a whole when determining whether the detention period of the accused is reasonable or not, and it should not be merely a question of the number of appeals against the detention, or that a detention period which has yet to reach eight years is defined as reasonable. Until the law is revised, we suggest that, before a court begins an expedited trial process of an accused who is in detention, an appeal for release from detention should be heard, and the court should substantively review whether the reasonableness of the detention period.

(4) Regulations on detention in the Act of Punishment of the Armed Forces do not meet proper legal procedures

Under the regulations on detention of the Act of Punishment of the Armed Forces, a soldier who is being punished can be locked up for 30 days; this is considered a deprivation of personal freedom.[76] However, the law does not provide the procedure to give the detained person sufficient protection and violates Constitutional Interpretation 588, the principle of legal reservation (*Prinzip des Gesetzesvorbehalt*), and the spirit of this covenant. According to Article 24, Paragraph 1 of the Act of Punishment of the Armed Forces, punishment of detention is decided on by a review council convened by the responsible military unit. This is clearly a measure which is taken by the administrative authority alone to deprive a person of his liberty for more than 24 hours, and the review procedure of the detention punishment is much different from the guarantees of proper legal procedure for detention in a criminal case. It can hardly be said to conform with proper legal procedure, and it violates the intention of Article 9.

We maintain that all detention measures which deprive a person of his or her liberty for more than 24 hours should be handled in accordance with the laws and regulations of our country. Therefore, the principle of legal reservation should be applied, so that the military court would take the first decision to confine a soldier. This would be more acceptable and would ensure one's personal freedom is not recklessly deprived. As regards punishment by imprisonment or confinement, the person being confined should also have the right to appeal to the judicial authorities to carry out a review. The present Act of Punishment of the Armed Forces permits the military unit to make its own decision, including the decision to detain its soldiers,

[76] Translator's note: The Chinese term differs from the term used for detention of criminal suspects, including suspects under the military criminal code. What is referred to here is a form of punishment by confinement or isolation.

and eliminates judicial review. Clearly this is in conflict with the spirit of the covenant. We recommend that the Act of Punishment of the Armed Forces should be amended as quickly as possible to permit the person who is being punished to present his objections within a certain time period to either a regular civilian court or a military court. Before the law is amended, it should be permitted that the soldier who is to be punished can seek a judicial review of the matter in accordance with the Habeas Corpus Act, and in this way ensure that the punishment receives a judicial review.

(5) Compulsory quarantine under the Communicable Disease Control Act is not a judicial procedure

Under Article 45 of the Communicable Disease Control Act, upon notification from the competent authority, a person infected with a communicable disease must undergo isolation and treatment at the designated isolation care institutions and he must accept the treatment and not depart at will. Under Article 48 of this law, persons who are suspected of having a communicable disease will be isolated in a designated place by the competent authority. That the competent authorities have the power under the law to force those designated persons to undergo compulsory treatment and be forced into quarantine, we believe is also a case of the deprivation of the people's personal liberty; however, people who are subject to this forced quarantine can only seek out administrative relief from those carrying out this action. As regards this practice of compulsory treatment and isolation, the legal procedure that is being carried out is contrary to judicial procedures, and this is therefore a violation of the standards laid out in Article 9.

In Constitutional Interpretation No. 690, the Council of Grand Justices ruled that there is a difference the deprivation of personal freedom in a case of compulsory quarantine under the Communicable Disease Control Act and that in criminal proceedings and for this reason there is no need for judicial procedures to carry out a review in the former case.[77] The ruling states: "Compulsory quarantine and other disease control decisions must be made by the specialized competent authority, based on knowledge of medical treatment and public health, follow stringent organizational procedures, balance seriousness of epidemic and surrounding circumstances, in order to form an objective decision and to ensure correctness. It differs from the case where an independent, impartial court determines whether or not to detain a person for trial

[77] The full text of Constitutional Interpretation 690 is available at http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=690.

and interrogation." In other words the justices believed that the isolation mandated in the Communicable Disease Control Act only requires the examination and acknowledgement of the competent authority for it to be carried out. Judgment of the need for compulsory isolation and treatment has been transferred to the public health specialists. Thus, the people are clearly lacking some procedural protection, since this ruling overlooks whether the procedures for determining isolation requires a judicial review or not. Moreover, in this ruling it seems that the Justices believe only criminal procedures which deprive a person of his or her liberty require judicial protection, whereas non-criminal cases do not. It is clear that this is in violation of the principle of Article 9 that it should apply to any instance of deprivation of personal freedom. And while Paragraph 122 on page 53 of the State Report states that although the quarantine and treatment are one kind of deprivation of personal freedom, it does not review the question of whether maintaining these procedures can conform to this covenant.

(6) Lack of compliance with the legal procedures regarding compulsory placement of children and youth[78]

According the regulations in Articles 15 to 18 of the Child and Youth Sexual Transaction Prevention Act and in Articles 56 to 59 of the Protection of Children and Youths Welfare and Rights Act, in special circumstances, such as those "found to be involved in sexual transactions or suspected of being involved" or who "did not receive proper maintenance or care" or "have been abandoned, abused, bought or sold, pawned, or forced or seduced into improper behavior or work" or "have suffered other cruelty, from which it is difficult to effectively protect him or her without immediate placement," the competent authority must take the child or youth into emergency care for 72 hours and only after 72 hours will the court review the case.

Even though this emergency placement system was set up to protect children, those care centers where they are placed clearly deprive the children of their personal liberty. According to Article 8 of the Constitution, the court must review and examine any case wherein a person has been deprived of his or her personal freedom for more than 24 hours. The standards regarding the protection of children and youths extend that time period to 72 hours, after which the court begins its review of the placement decision. For the persons involved, this clearly does not follow the legal procedure.

[78] Translator's note: Taiwanese laws often distinguish between "children" and "youth"; the term used for "youth" in the laws discussed in this section clearly indicates teens up to the age of 18 (it is a different term than that used, e.g. by the National Youth Commission, which is a much broader definition). Since both groups are under 18, by international law they are all considered children.

Moreover, the administrative assistance of emergency placement and disciplinary action of the authorities also does not conform with the covenant's standard of timely relief. The compulsory care regulations for the protection of children and youth deprive them of their personal liberty, violate Article 8 of the Constitution and the Article 9 of the ICCPR.

IV. Conclusions and Recommendations

This article of the covenant deals with the standards of personal liberty and security. The five paragraphs of Article 9 respectively require that the state deprivation of personal liberty and security should have "procedure established by law," "duty of notification," "right to be brought promptly before a judge," "right to take proceedings to a court," "right to compensation," and other guarantees. The State Report, as regards this article of the covenant, deals mainly with introducing the laws, regulations and procedures related to the deprivation of personal liberty but does not qualitatively review whether the related procedures comply with the spirit of the covenant, and it does not comprehensively provide any situations wherein organizations in this country have harmed a person's human rights through the deprivation of personal liberty. Paragraph 122 of the State Report simply states that the Code of Criminal Procedure, the Juvenile Delinquency Act, the Narcotics Abuse Prevention Act, the Mental Health Act, the Communicable Disease Control Act, the Immigration Act, the Child and Youth Sexual Transaction Prevention Act, and the Social Order Maintenance Act all may deprive a person of his or her liberty and should adhere to the standards of Article 9 of the covenant, However, the State Report has not reviewed the interpretations given in CCPR General Comment No. 8, and it has not reviewed and investigated whether the procedures which deprive a person of his or her personal liberty in these laws and regulations are in compliance with the norms of the covenant.

As regards the criminal detention procedure, we believe the present regulation regarding "detention in cases of serious crimes" should be eliminated. In addition, it should be mandated that the prosecutor should explain the need for the detention in court, and that there is a duty to provide factual evidence and thereby raise the level of strictness of the detention review. Furthermore, the courts should be required to review appeals of suspects against detention judgments in a timely manner, in order to minimize the period that the accused will be deprived of his or her liberty. Although the Criminal Speedy Trial Act stipulates that detention exceeding eight years will be revoked, it should not be assumed that any period less than eight years is a reasonable

length of time for the courts to complete a trial. This is something to consider carefully.

The detention of foreign nationals and the punishment of soldiers with detention are both examples of the deprivation of personal liberty to which the standards of Article 9 should be applied. The Immigration Act and the Act Governing Relations between the People of the Taiwan Area and the Mainland Area should be revised to ensure that foreign nationals (including PRC nationals) under detention are afforded the same protections as other persons detained in criminal cases. The Act of Punishment of the Armed Forces should also be amended, so that a court must review whether punishment by detention is reasonable.

For the regulations on prevention of communicable diseases, Constitutional Interpretation 690 has obviously left the decision-making authority on compulsory quarantine and isolation with the experts, which is not in compliance with the standards of the covenant. Likewise, the compulsory placement measures regarding children are also deficient in the protection of the rights of those children, and they should be re-examined.

In addition, in the spirit of Article 9, all state agencies should make every effort to inform persons of unsound mind of their rights. If a person does not have the ability to fully understand and explain himself or herself, a defense counsel should be appointed for that person. Finally, when a person is called to appear for questioning as a related person in a criminal case, this should be seen as a deprivation of his or her personal freedom, and the investigating authorities should included this deprivation along with any period of arrest or detention so that the total time of deprivation does not exceed 24 hours, and the intent of Article 9 will begin to be fulfilled.

Article 10: The Right of Persons Deprived of Liberty to be Treated with Humanity and Dignity[79]

I. Introduction

With regard to the current situation and measures regarding the humane and dignified treatment of persons deprived of liberty in our country, the State Report only provides a vague and abstract recital of the current situation and a listing of the names of related measures and regulations. The State Report does not provide a detailed description of the content of laws, regulations, and specific policies or of the situation and results of the actual implementation of such policies and regulations related to this section as required by General Comments No. 9 and No. 21.

Several examples may serve as illustration. First, the State Report does not provide substantial material or a full explanation of the separate method of detention and treatment "between persons accused or convicted of crimes" or "juvenile defendants or convicts and adults." Second, the State Report does not explain the content of instruction and training of personnel who have authority over persons deprived of their liberty and whether the principles in such training are strictly adhered to by such personnel in the discharge of their duties. Third, the State Report does not describe what specific measures the state has adopted with regard to monitoring and ensuring that the implementation of the related regulations and the current situation thereof. Finally, the State Report does not substantively re-examine the related laws and regulations and the current situation with regard to the treatment of detained persons to see whether such laws and treatment is in accordance with Article 10.

Besides responding to the State Report, this Shadow Report will discuss issues that were not dealt with by the State Report, including issues involving all kinds of treatment borne by persons in custody, the problems caused by allowing photographing and interviewing of suspects by news media, the use of shackles by police, and the problems of women caring for children in prisons.

II. Responses to the State Report

[79] This section was authored by Wellington Koo (顧立雄), Lee Yi-ting (李亦庭), Weng Kuo-yen (翁國彥), Kao Yung-cheng (高涌誠) and Lee Ai-lun (李艾倫), and translated by Dennis Engbarth (安德毅).

(1) Evading international standards for the treatment of detained persons: Response to Paragraph 142 (p. 63) of the State Report

The State Report recites the major laws and regulations governing the treatment of people held in custody for criminal offenses. Nevertheless, Article 10(1) of the ICCPR refers to "all persons deprived of their liberty" and this discussion should also comprise persons who are held in custody due to civil legal action or administrative responsibility, as well as persons held under observation or rehabilitation. Since the State Report fails to include persons who are held in these types of custody under various statutes or regulations, such as the Statute of Custody, Rules for Custodial Institutions, and the Statute for Execution of Rehabilitation Penalties, it cannot be considered complete.

In addition, as representatives of all countries have stressed during General Assembly meetings, interpretation of Article 10 should take as reference the UN Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the UN Basic Principles for the Treatment of Prisoners, and the UN Standard Minimum Rules for the Administration of Juvenile Justice.[80] Moreover, Paragraph 5 of General Comment No. 21 ("Concerning Humane Treatment of Persons Deprived of Liberty") on the ICCPR states that "States parties are invited to indicate in their reports to what extent they are applying the relevant United Nations standards." Although the State Report acknowledges that "general reflection is recommended to make sure that the said laws and regulations fall in line" with these UN standards regarding our country's treatment of persons held in custody, it obviously is deficient due to its lack of any further re-examination in depth and its lack of any explanation of how our country is applying the relevant UN standards based on General Comment No. 21.

(2) Excessive crowding and poor environments: Response to Paragraph 146 (p. 64) of the State Report

The State Report provides statistics that confirm the existence of overcrowding in prisons and detention centers. However, it should be noted that this problem has been chronic for many years. Over the past five years, with the exception of 2007, the total prison population has exceeded capacity by over 15% every year.[81] In addition, as

[80] Please refer to Manfred Nowak, *CCPR Commentary*, 2nd revised edition, Part 3, Article 10, Paragraph 6. N P Engel Publishing (February 1993).

[81] Correctional statistics are provided by the Ministry of Justice on its website (in Chinese), with the data as of September 2011 available at

noted in the State Report, the excess loading of the prison system reached 18.8% in 2011, and each prisoner only had 0.56 ping of space in which to move (as one ping equals 3.058 square meters, this means a space of 1.71 square meters). As the excess occupancy rate rose to 20.3% as of 30 September 2012, the available space for movement for each prisoner is now even less. Moreover, some institutions have excessive crowding rates far above the national average (such as the 49.0% level reached by Taipei Prison in October 2011), and the space available for activity by inmates may well have shrunk further.[82] Moreover, the "actual" room for movement for inmates in cells may be even less than that calculated by the State Report as there are many people crammed into small cells.[83] Therefore, given the grave overcrowding of prisons, the room for each prisoner to move around is tiny and the excessive crowding is unfavorable for the physical and mental health of the inmates.[84] This is aggravated by the excessive number of inmates combined with the shortage of guards and custodial staff.[85] The result is a deleterious detention environment that violates the stipulations of Article 10(1).

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http://www.moj.gov.tw/site/moj/public/MMO/moj/stat/%20monthly/m44.pdf. The percentage of overcrowding is listed in the last column on the right.

[82] See Ministry of Justice, *Monthly Bulletin of Justice Statistics*, October 2012, pp.91, Chart 45, "The Number of Persons Admitted to Correctional Institutions - By Institution" (in Chinese).

[83] See Chen Chieh and Lin Yun (2011), "Concern for Human Rights Transcends Prison Walls: A Record of Visits to See the Actual Conditions of Taipei Prison, Changhua Prison and Lungtan Women's Prison," *DISSENT Monthly* No.9 (April 2011), p.60-67 (in Chinese). Examples given in this article include the following. "The large seven ping cells in the Hsinchu Prison should have held only five persons, but there were 15 locked in the cell and the suffering of the prisoners was indescribable. The 'World's Best' Taipei Prison in principle holds inmates who have been convicted of grave crimes, who are repeat offenders or who are serving prison terms of 10 years or more as well as various inmates of foreign nationalities and has a total approved capacity of 2,705. However, according to statistics published by Taipei Prison in the middle of March [2011], Taipei Prison had a total number of 4,234 inmates plus 9 other detainees and is gravely overcrowded. For example, 'the king of protesting' Ko Szu-hai was released from Taipei Prison last year and sharply criticized the overcrowding of its cells in which a cell of three ping held 18 persons as simply 'Hell.' The authors interviewed an inmate who had been imprisoned for two months who related that small cells held 18 persons and, when sleeping at night, nine people slept on the left and right sides of the cell, respectively, and left only a small passage between. This inmate stated that the mats were put next to each together so that inmates "slept crowded together" and it was difficult to turn as the inmates were packed in the cell like sardines. He stated that if one had to go to the toilet very urgently he had to be very careful not to 'disturb' other prisoners and 'cause trouble for himself.' Sometimes on the way back from going to the toilet, he found the persons on the two sides of his mat had rolled over on it in his absence and 'my own sleeping space had vanished.' Moreover, the allocation of sleeping spaces after entering the cell based on seniority had become a 'moral ethic' among prisoners."

[84] See Lin Yu-sheng, Chang Yao-chung, Lee Mao-sheng, Bill Hebenton, Chien Chih-hung, Sun Yuan-fen, and Jou Su-hsien, "Effects of Prison Overcrowding in Taiwan - Results of an Empirical Study," published during "2011 Conference on Crime Prevention Studies: Criminal Correction and Restoration," Central Police University, Guishan, Taoyuan County, Taiwan, 30 May 2011, p.23. Available at http://www.academia.edu/576798/_Effects_of_prison_overcrowding_in_Taiwan_-_results_from_an_empirical_study_ (in Chinese).

[85] Lin, et al. (2011), pp. 34-35, 46. Please also refer to Control Yuan, "A Special Investigative Research Report to Re-examine the Treatment of Persons in Custody in Prisons and Detention Centers

(3) Channels for complaints and remedy are dysfunctional: Response to Paragraph 148 and Paragraph 149 (p. 64) of the State Report

The State Report only provides statistics on the number of complaints filed by inmates at correctional institutions in Taiwan, but it does not offer any substantive explanation of their significance. For the sake of understanding the actual effectiveness of complaint and remedy channels, the legitimacy and suitability of punishments, and the treatment of inmates in correctional institutions, as well as to judge whether humane and dignified treatment is being provided, the State Report should also furnish information on matters such as the process of handling complaints, the time required for handling, the results of complaints, the reasons for decisions on filed complaints, and a breakdown of the reasons for complaints. Moreover, the Council of Grand Justices (CGJ), in its Constitutional Interpretation No. 653 issued on 26 December 2008, found that Article 6 of the Detention Act and Article 14 of its Enforcement Rules which denied a detainee opportunity to litigate in court for judicial remedies to be "contrary to the intent of Article 16 of the Constitution," which guarantees that "the people shall have the right of presenting petitions, lodging complaints, or instituting legal proceedings." The CGJ stated that channels for complaint or appeal for inmates who do not accept the decision of the correctional institutions should not be restricted to only the complaint system, but that inmates must also be allowed to file legal action for redress or remedy in the courts.[86] The ruling required the government to make necessary revisions to the Detention Act within two years; however, this deadline was not met, and these provisions have still not been amended as of the time of writing of this Shadow Report.

Moreover, the actual situation in prisons is a matter of greater concern than just the number of persons who have filed complaints. For example, a paper entitled "Effects of Prison Overcrowding in Taiwan - Results of an Empirical Study," presented at the "2011 Conference on Crime Prevention Studies" related there were still cases in which inmates were subjected to illegal punishments and even violent assaults by guards.[87] This report indicated that about 20% of interviewed inmates had

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and the Problems of Overcrowding and Rehabilitation," May 2010, pp. 73, 145, 175, and 240. Available at http://humanrights.cy.gov.tw/dl.asp?fileName=011261010171.pdf (in Chinese).

[86] The full text of Interpretation 653 is available at http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=653.

[87] Lin, et al. (2011), p. 37. Interviewed prisoners related that "some authorities will beat prisoners who are disobedient" or "lock inmates who violate regulations in rooms and beat them." Similar accounts can be found in Jou Su-min, et al., "Correctional Review of Prison Services in Taiwan," report commissioned by the Research, Development, and Evaluation Commission of the Executive Yuan,

experienced violations of rules or punishments, and those with physical or mental disabilities were much more likely to have done so (35.78%), followed by ordinary male inmates (21.17%). In addition, about 46% of the interviewed inmates indicated that they had had no opportunity to explain or offer defense before the decision to impose punishment, with persons with physical and mental disabilities again posting the highest percentage (61.11%).[88] Moreover, over half of the surveyed inmates indicated that they had had no channels for complaint or appeal after the decision to impose punishments had been made, especially in the case of women inmates (82.76%).[89] All of these results indicate that the actual situation experienced by persons under custody does not meet the standards of humane and dignified treatment and instead has been in violation of Article 10(1).

(4) There is no clear regulation to segregate juvenile offenders from adult inmates: Response to Paragraph 150 (p. 65) of the State Report

According to Article 10(2) and 10(3), "accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication" and "juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status" (e.g. whether they are defendants or convicts). The categories of persons now held in custody in our country's prisons include convicts serving criminal sentences, defendants in criminal trials, persons under observation during drug rehabilitation, and other persons placed in custody. Since the State Report did not include persons who are placed under custody in its review, there is an obvious omission that requires supplementary explanation, which will be provided in Item (2) of Section III ("Issues Neglected by the State Report") below. Therefore, this section will only review the question of the failure to segregate juveniles under observation during drug rehabilitation from adult persons under custody and to provide differential treatment.

Based on the need to protect and provide correctional treatment for the physical and mental development of juveniles, juveniles during drug rehabilitation should be segregated from adults and given appropriate treatment based their age and legal status. At present, all drug abuse treatment centers for juveniles are set up as annexes to juvenile detention centers, all but two of which are themselves attached to regular detention centers. Some of these centers also have joint offices with the adult drug

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August 2011, p. 143. Available at http://www.rdec.gov.tw/public/PlanAttach/201108261956238405933.pdf (in Chinese).

[88] Lin, et al. (2011), p. 38. See also Jou, et al. (2011), p. 143.

[89] Lin, et al. (2011), p. 39. See also Jou, et al. (2011), p. 143.

abuse treatment centers (such as at the Changhua Detention Center whose grounds also host the Changhua Juvenile Detention House). Responding to doubts as to whether this situation fails to segregate juveniles and adults under treatment for drug abuse, the MOJ Department of Corrections on 8 June 2011 issued a news release in which it stated that "if juveniles under observation for drug abuse treatment are held in custody within detention centers, they are all separated and have different treatment from adults under treatment and it is absolutely impossible for them to be placed in drug abuse treatment together." However, the existing Statute for Execution of Rehabilitation Penalties does not explicitly exclude the possibility of juveniles and adults to be placed together in drug abuse treatment. Indeed, Article 15 of this statute only requires that persons undergoing drug abuse treatment be subject to the same treatment and does not provide specific and separate frameworks for the treatment of juveniles and adults. Hence, it is difficult to ensure the implementation of separation of juveniles and adults in drug abuse treatment until a clearer legal grounding is enacted.

(5) The treatment of detained juveniles lacks a regulatory framework for special protection: Response to Paragraph 151 (p. 65) of the State Report

Regarding the question of whether the treatment of juvenile defendants under detention should be separate from adult defendants, the State Report mentions the existence of guarantees for the rights of juvenile defendants under detention and states that the Juvenile Delinquency Act and the Statute on Establishment of Juvenile Detention Houses shall take precedence and that the Detention Act will also apply. Nevertheless, regarding the treatment of juvenile defendants during detention, the Juvenile Delinquency Act has no stipulations for the provision of special protections. Moreover, Article 93 of the Statute on Establishment of Juvenile Detention Houses states that: "With regard to the detention of juvenile defendants, when there are no special stipulations of the Statute on Establishment of Juvenile Detention Houses, the Detention Act and its enforcement rules should be applied." Since the Statute on Establishment of Juvenile Detention Houses has a framework for treatment of juvenile defendants which is almost identical to that of the Detention Act, it can be said that current laws and regulations do not provide a different framework regarding the treatment of juvenile defendants under detention. Therefore, they are not in accordance with the stipulations of Article 10(2).

(6) The operations of prisons do not sufficiently assist detainees to return to society: Response to Paragraph 152 (p. 66) of the State Report

The State Report related the types of opportunities for work currently provided to inmates by prisons. However, prisoners universally hope that the prisons can cultivate their capability to make a living after their return to society and not just have them engage in simple outsourcing operations or vacuous "rehabilitation activities." However, at present, most of the operations provided in Taiwan's correctional institutions are simple contract or outsourcing work with meager compensation and gravely insufficient opportunities and resources for vocational training.

The reasons offered for the excessively low compensation given to prisoners for such work include the following: (1) the quality of prison labor is generally not good; (2) the operations are carried out in the prison environment (including space and equipment, custodial requirements, and prison rules for work and rest) that make it impossible to engage in high value-added industries; and, (3) according to Article 4 of the Crime Victim Protection Act, a portion of payments made to prisoners for work must be transferred to the crime victims as compensation. At present, the rate of the funds to be transferred can be as much as 50%.

From the above three factors, it can be seen that the reasons for the excessively meager compensation for work are due to the limitations imposed by the character of prisons (e.g., the quality of labor or the environment) or due to improper policies (e.g., treating compensation for work conducted by prisoners as compensation for criminal acts is undoubtedly tantamount causing other prisoners who were not involved in inflicting that harm to bear linked responsibility for the obligation to provide compensation). These reasons cause prisons generally to be able only to engage in profitless outsourcing operations. In addition, a minority of prisons have also undertaken demonstration projects of developing their own business activities, under the slogan of "each prison has its own special character."[90]

(7) Useless prison rehabilitation measures: Response to Paragraph 153 (p. 66) of the State Report[91]

The State Report lists a number of rehabilitation measures and states that there are about 34 legislative, administrative, and substantive measures related to prison education, vocational training, and guidance. Nevertheless, the State Report overlooks

[90] Jou, et al. (2011), pp. 124-130, 170.
[91] Translator's note: The State Report uses the term "cultivation measures" to refer to rehabilitation measures.

the actual problems faced by these programs in prisons. For example, personnel expenditures are the prime component of the allocation of the budgets for correctional institutions, and rehabilitation-related spending is relatively small, making up less than one percent of the total correctional budget for 2010.[92]

Second, there is a grave shortage of available manpower for rehabilitation work, a situation that inevitably affects the effectiveness of rehabilitation efforts.[93] Moreover, although correctional institutions do promote rehabilitation measures, their effectiveness is not ideal, as manifested by the high rate of repeat offenders.[94] In addition, the most noteworthy feature of our country's correctional system with regards to rehabilitation is the frequency of linkages between prison administrations and the private sector, while the introduction of plans to professionalize rehabilitation operations has remained stalled.[95] From this situation it can be seen that, regardless of the claims in the State Report, the problems of rehabilitation measures in our country's correctional institutions are in dire need of improvement.

(8) The detention of foreigners does not meet the requirements for humane and dignified treatment: Response to Paragraph 157 (p. 67) of the State Report[96]

Senior prison authorities have chronically neglected the problems concerned with the treatment of persons of foreign nationality in custody, including the evident language barriers encountered by persons of foreign nationality, the shortage of beds, overcrowding, numerous difficulties in communications and meeting with family members, and unclear regulations regarding release. These conditions, which can be even more onerous than experienced by prisoners of Taiwanese nationality, have not been included for substantial discussion in the State Report. The fact that such conditions have not been corrected makes it difficult to sustain any claim by the state that persons of foreign nationality who are under detention receive humane and dignified treatment.[97]

Indeed, the credibility of any such claims are undermined by the admission in the State Report (page 67) that some immigration officials have been indicted and

[92] Jou, et al. (2011), p. 107.
[93] Jou, et al. (2011), p. 113. See also Control Yuan (2010), pp. 15, 82, 145, 288.
[94] Control Yuan (2010), p. 278.
[95] Control Yuan (2010), p. 283.
[96] Translator's note: This paragraph in the State Report consistently uses the term "shelter" to describe the facilities in question. This is an accurate translation of the Chinese term, which is however a euphemism used for the special detention centers that house foreign nationals (including PRC nationals).
[97] Jou, et al (2011), pp. 130-133, 171.

convicted of torture or violation of sexual autonomy with regard to kissing and fondling foreign females under their custody in 2007 and 2009. The admission that torture has occurred in Taiwanese correctional institutions is nothing less than shocking and marks a transparent violation of both Article 10 and Article 7 of the ICCPR. In addition, while the State Report relates that "the government has proactively reflected on and strengthened related supervisory mechanisms," it should be evident that such measures are insufficient and require stronger and more systematic preventative measures, including intense human rights training for custodial officials.

III. Issues Neglected by the State Report

(1) The treatment of persons under administrative custody is the same as that of defendants in criminal cases

In our country, persons who are placed under custody due to civil suits or administrative responsibility are treated almost the same as defendants detained for criminal charges. Examples include the following:

- Article 17 Section 12 of the Administrative Execution Act states: "Unless this act has other stipulations, the regulations of the Compulsory Enforcement Act, the Statute of Custody, and the Code of Criminal Procedure for regarding questioning, arresting, detention shall apply in the procedures of arrest and the taking into custody."
- Article 22-5 of the Compulsory Enforcement Act states: "Unless this act has other stipulations, the stipulations of the Code of Criminal Procedure regarding arrest and detention shall apply to the procedures for arrest or the taking into custody."
- Article 2 of the Statute of Custody states: "With regards to debtors, guarantors, or other persons who are arrested or taken into custody based on law, the regulations of the Code of Criminal Procedure regarding arrest and detention shall apply unless the Compulsory Enforcement Act or this statute require otherwise."
- Article 16 of the Rules for Custodial Institutions states: "The regulations of the Detention Act shall apply with regard to the property, correspondence, visitation, receipt of articles, health and sanitation, medical treatment, and death of persons in custody."
- Article 11 of the Rules for Custodial Institutions stipulates that "when there are concerns that the person under custody may escape, commit suicide, commit

violent acts or otherwise engage in behavior that disrupts order, the stipulations of Articles 22 and 23 of the Prison Act shall apply with regard to the use of preventative instruments [e.g. handcuffs and shackles] on the person in custody will be the same as for criminal defendants under detention." (see also Article 5, Paragraph 2 and Article 5-1 of the Detention Act).

- According to Article 14 of the Statute for Custody, persons under custody still must pay for food and drink and other essentials while they are in custody, an additional burden that is even more severe than for defendants in criminal cases.

From the above, it is evident that existing laws and regulations do not differentiate between the purposes of the custody or detention systems and the different responsibilities of persons under custody or detention, nor does it adopt different enforcement methods in these cases. Therefore persons under custody do not receive any different treatment than criminal defendants. This state of affairs contradicts the spirit of the stipulations of Article 10(2) and Article 10(3).

(2) Allowing news media to take photographs and interview suspects after their arrest and the use of shackles violates the personal dignity of suspects.

The "Guidelines for Prosecutors, Police and Investigative Agencies in Handing News Media during Criminal Investigations" permit spokespersons to "appropriately announce" related news before the conclusion of investigations. The conditions given in the "Guidelines" include that the announcement is deemed necessary for the public interest or legal rights to uphold the public interest, the facts of the crime are confirmed, and in the case of the arrest of a suspect caught *in flagrante delicto* or "quasi *in flagrante delicto*." However, in order to uphold the principle of confidentiality of investigation and avoid influence on the course of the judicial process by public prejudice, the "Guidelines" do not permit arbitrary permission of news media photographing or interviewing arrested persons, and they do not permit the private leaking of information to the media.

In reality, allowing any photography and interviews of suspects by the news media violates the principle of the confidentiality of investigation. Moreover, from the standpoint of the arrested persons, this practice constitutes an infringement of their personal rights (including the rights to control their likeness, reputation, and privacy) and violates the stipulation of Article 10(1) that all persons deprived of their liberty receive humane and dignified treatment.

Even more worrisome, the tacit permission given by police to reporters to question suspects has the potential to become a form of entrapment, since arrested person may not be fully aware of his or her right to remain silent and is usually bereft of advice or protection from counsel during the initial period of arrest. The frequent use of re-enactments of crimes by suspects before the media also gravely undermines the effectiveness of the principle of presumption of innocence. Last but not least, massive and full public exposure of suspects (or even witnesses) by the news media can makes the process of returning to society for a new start in life even more difficult.

Unfortunately, such human rights infringements are extremely common in Taiwan. To take a recent well-known example, a case of sexual abuse occurred in a national junior high school which the principal asked police to investigate. After hearing of the case, reporters waited at the police precinct office and intensely pursued inquiries about the incident, police officers leaked information, and media widely reported the story, including the name of the school and sufficient information to deduce the name of both victim and the alleged victimizer. These reports created panic and commotion on the school campus and caused both the alleged victimizer and victim to become fearful and to stay away from school, as well as inflicting damage to the school's reputation.

Therefore, the issue of how to ensure that arrested or detained persons (or even witnesses) are not arbitrarily filmed or subject to exposure of their personal information is a major problem that merits re-examination.

Regarding the use of handcuffs, the decision by police agencies whether or not to use handcuffs when arresting suspects, besides the regulations of the "Guidelines for the Use of Handcuffs when Police Agencies are Arresting or Detaining Suspects," police officers should consider the severity of the crime of which the suspect is being accused, the attitude of the suspect at the time of arrest, the physical state of the suspect, the relative superiority of the police force, the degree to which evidence has been collected, whether the suspect has any intention of fleeing, and the status and position of the suspect. In addition, the police should take into account the principles of Article 10(1) and the need to respect the personal dignity of the suspect when deciding whether to use handcuffs and give humane and dignified treatment to the suspect.

(3) Women inmates take infant children into detention, but prisons are not suitable places to raise children

The report "Correctional Review of Prison Services in Taiwan" notes that female detainees face unique problems, including the massive dilemma troubling correctional management of female inmates who are pregnant or are carrying children. Scholars in Taiwan have not conducted much research into the issue of women bringing children into prison with them. However, Huang Wei-nan and Lai Yung-lien (2003) discovered that when women prisons allowed small children to live together with their mother, the female inmates believed that the areas most needing improvement were the room for activity, the environment for studying, the provision of food and drink and dealing with contagious diseases. Moreover, the inmates also worried about the guidance concerning the interaction between mother and child and the subsequent development of the child's personality and physical and mental development.[98]

Based on interviews with 13 female inmates with experience of caring for children while imprisoned, the report "Correctional Review of Prison Services in Taiwan" also indicated that most (63.64%) agreed that prison staff took very good care of their children. However, with regard to the hardware and software conditions that the prisons could provide, most interviewees believed that prisons should provide more space for the children's activities (72.73%), better food (90.91%), improved nursery systems and facilities (81.82%) and believed that the clinics in the prisons were inconvenient and that it was frequently impossible to secure immediate medical attention for ill children (72.73%). In addition, most interviewees agreed that if they had someone else to take care of their children, they would not be willing to bring them into prison (81.82%), but did not want the persons caring for their children to be social welfare agencies (54.55%). Moreover, over 50% of the interviewees did not worry that their children would be bullied in prison but 72.73% still did not believe that bringing children into prison was a good policy since the environment in prison was not ideal and not suitable to raise children.[99]

Article 13 of the Detention Act allows female defendants to apply to bring children of less than three years old into detention. During the deliberations on revision of this act, there has definitely been discussion about excising this obsolete stipulation. However, this stipulation was retained in a compromise in the conflict between "maternal love" and "a healthy environment for growth." In particular, medical professionals confirmed that the single-gender environment in prisons had negative

[98] Jou, et al (2011), p.11. See also Huang Cheng-nan and Lai Yung-lien (2003), "A Study in the Life Adjustments of Female Inmates in Taiwan," *Police Science Quarterly*, Volume 33, Number 4, pp. 27-54 (in Chinese).
[99] Jou, et al (2011), p. 139.

influence on the personality development of young children, including making more likely to suffer from autism. Nevertheless, given the current state of our country's social welfare system, the shelter facilities and conditions of putting children into foster homes or orphanages will not necessarily provide more complete care than prisons.

For the present, the social affairs bureaus of all local governments should be required to send staff into prisons to conduct investigations and evaluate the situation of children in prisons in order to judge whether they should continue to remain and grow up in the prison environment. The results of such surveys should also be provided to concerned sheltering agencies.[100]

IV. Conclusions and Recommendations

Article 10 sets out the ICCPR's stipulation that persons deprived of liberty should be provided with humane and dignified treatment. The State Report has provided mainly abstract lists of relevant laws and regulations and the names of measures, but has not engaged in a substantive and comprehensive re-examination concerning whether these laws and measures and the actual conditions in prisons are in accord with the spirit of the ICCPR. Moreover, the State Report has failed to examine, from the standpoint of persons deprived of their liberty, whether the State has provided humane and dignified treatment.

With regard to the treatment of persons arrested and detained, the State should implement different treatment of persons under custody and defendants in criminal cases, implement the separation of juveniles from adults in drug abuse rehabilitation, establish clear legal frameworks for different treatment of juveniles and adults who are defendants, revise laws and regulations such as the Statute of Custody, the Rules for Custodial Institutions, the Statute for Execution of Rehabilitation Penalties, and the Detention Act and establish separate facilities for juvenile drug rehabilitation. At the same time, the State should realize differential management and evaluation of prisons to improve the efficiency of supervision.

In addition, with regard to the questions of whether to allow news interviews and photography of suspects after their arrest and the use of handcuffs, the State should call on prosecutors and police agencies to realize the principle of the confidentiality of investigation and not permit photography or interviews by reporters and resolutely

[100] Jou, et al (2011), p. 139.

pursue the responsibility of civil service staff who permit photography and interviews and of the news media who carry out such coverage. The government should also investigate and pursue the responsibility of law enforcement officials who excessively use handcuffs.

The government should also engage in a comprehensive re-examination, formulate concrete remedies, make necessary revisions in the legal code, and establish relevant institutions to deal with the numerous and serious problems that are occurring in today's prisons. These include chronic overcrowding in detention centers and prisons, the shortage of rehabilitation and educational staff and management personnel, the excessive severity of guards and custodians, the lack of opportunities for persons under custody to express their views or appeal the imposition of punishment or sanctions, the lack of linkage between the content of prison work and useful vocational training, the lack of resources for vocational training, the excessively low level of compensation for work done by prisoners, the excessively low budget for rehabilitation and its resulting poor effectiveness, the failure to pay sufficient attention to the needs of special groups of persons in custody (such as women, foreigners, or persons with physical or mental disabilities).

The government cannot be allowed to focus on trivialities and ignore fundamental problems that are in urgent need of resolution as it has done in this State Report.

Article 12: Freedom of Movement and Choice of Residence[101]

I. Introduction

Compared to other articles of the ICCPR, Article 12 involves more issues related to national sovereignty, especially with regards to the power to approve entry and exit of the national territory. Thus, the covenant directly emphasizes the need for the state to take active measures to ensure that the freedoms of movement and residence are not interfered with by public or private entities. The state also has the obligation to prevent anyone being forced to move due to various reasons.

For example, the issuance of passports by a state to its nationals, in order to enable them to leave the country, is a positive obligation of the state. At the same time, holders of a country's passports may not be denied the right to return to their country from abroad. However, not only did Taiwan during the martial law era maintain a "black list" of nationals who were not permitted to return, but even after martial law was lifted, Article 3 of the National Security Act required nationals to obtain permission to return and mandates criminal punishments for any who returned without permission.[102] This was a grave violation of both Article 10 of the Constitution and Article 12 of the ICCPR.

In Taiwan today, the various entry/exit procedures and regulations differ for people according to their status, which fall into four groups: ROC nationals with household registrations in the "Taiwan area" (i.e., areas under ROC control), ROC nationals without household registrations in the Taiwan area, foreign nationals, and stateless people. According to Article 12(3), no restrictions may be imposed except where provided by laws which have been democratically legislated. Such procedures and regulations may not be abused by the executive branch as a means of interference. As for freedom of residence, in the cases of the government use of eminent domain to expropriate land and the forcible relocation of indigenous people, restrictions and interference are determined by whatever the government should declare as necessary. This raises questions of whether or not such measures adopted by the executive branch have first passed the test of legislative review and democratic discussion as to whether such executive powers are not over-reaching. Based on analysis of the facts, as presented below, and a response to the State Report, this Shadow Report examines

[101] This section authored by Tsai Chi-hsun (蔡季勳), Weng Chia-hung (翁嘉宏), Chiu E-ling (邱伊翎), and Cheng Shih-ying (鄭詩穎), and translated by Lynn Miles (梅心怡) and Dennis Engbarth (安德毅).
[102] Article 3 of the National Security Act was removed by legislative amendment at the end of 2011.

the necessity, reasonableness, and appropriateness of the government's restrictions on the people's freedoms of movement and place of residence.

II. Responses to the National Report

In general, the State Report limits itself to consideration of whether various restrictions on freedom of movement and residence conform to domestic laws. There is little serious examination of whether these practices violate Article 12. Therefore, this Shadow Report will provide additional information and examples to investigate them more closely.

(1) Distorted permit system governing entry/exit freedoms: Response to Paragraph 161 (p. 69) and Paragraph 163 (p. 70) of the State Report

As admitted by the National Report, during martial law (May 1949 to July 1987) and the period of "national mobilization for suppression of the Communist rebellion" (May 1948 to April 1991), the blacklisting of many dissidents prevented them from returning to Taiwan. The legal basis for so doing was provided by Martial Law and the Article 3 of the Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion (upon abrogation of the Temporary Provisions in 1991, Article 3 was resurrected in the National Security Act), which stipulated that before entering or leaving the ROC, Taiwan nationals had to first apply for permission with the then Bureau of Immigration under the National Police Agency of the Ministry of Interior: "those failing to gain permission are not permitted to enter or leave the country," and violators may be punished with "up to three years' imprisonment, detention, or a fine of not more than NT$90,000, or both imprisonment/detention and fine." This law was later challenged on constitutional grounds, and in 2003 the Council of Grand Justices issued Constitutional Interpretation No. 558, which found that the law violated Article 10 of the Constitution, which guarantees to the people right of residence and to change residence, which includes the right of ROC nationals to return to their country at any time. After eight years of procrastination, the government finally got around to abrogating that article of the National Security Act in 2011.

Article 12(4) stipulates that "no one shall be arbitrarily deprived of the right to enter his [or her] own country," so a state must guarantee the right of its citizens to enter and to return to one's own homeland. However, in Taiwan, when it comes to permission for its own nationals to enter and exit, the government has in fact adopted

regulations requiring prior application for permission, for example by using the administrative trick of affixing an "entry/exit permit" directly to an individual's passport.

These provisions of the 1999 Immigration Act fall within Chapter 2, "Entry and Exit of Nationals," Article 5, which states that "ROC nationals who are residing in, and have their household registrations established in, the Taiwan Area may enter and exit the country without applying for permission. However, those personnel whose jobs involve national security must first get approval from the agency at which they are serving before they can leave the country. ROC nationals without household registration in the Taiwan Area must apply to the National Immigration Agency for approval before entering the country." In obvious violation of the spirit of the Covenants, which guarantee the right of all citizens to enter and leave his or her own country, this ROC national policy makes the household registration a necessary precondition to being able to enter and leave without first applying for permission. This "prohibition the general rule, permission the exception" style of legislated regulation is truly quite ludicrous. To explain this unique situation, the authorities have asserted that the existence of "Mainland Area" people (i.e. People's Republic of China nationals) and "Overseas Chinese" living around the world justifies the use of "residence" and "household registration" as a way of restricting the right of citizens to enter their country. In actual fact, however, since "Mainland Area" people hold PRC passports, they have nothing at all to do with the established requirement for "a household registration established in the Taiwan Area."

Moreover, although the people are not required to reside at the location indicated by their household registration, and much less must they apply for permission to move, the "household" is still the unit, not only as a basis for census statistics, but also the means by which social control is exercised by collecting all sorts of personal data, ranging from identity and occupation, to education level attained, with all of it going through a process of administrative control. Indeed, this system is a direct successor of the earlier systems of authoritarian control, when household registration was unified with police control.[103] After the functions of policing and household registration administration were separated, the household registration took on a large role in the general public administration. For example, it is a significant factor in the access of citizens to social services, public education, and voting rights.

[103] Translator's note: Indeed, the system was inherited by the ROC government from the Japanese colonial administration.

(2) System of citizen border exit controls: Response to Paragraph 162 (p. 69) of the State Report

Currently, cases of controls put on a citizen's exit from Taiwan fall into the following general categories: tax controls; controls imposed by the judicial branch, including courts and prosecutor's offices; the system of compulsory military service; and restraining orders (translated in the State Report as "protection cases"); and other administrative enforcement measures. Naturally restricting someone from leaving the country amounts to imposing limits on his or her right to leave or enter his or her own country. To take the years 2010-2011 as an example, according to the data in the State Report, there were 108,938 cases of people being prevented from leaving the country, of which around 14,000 cases were based on judicial orders. Apparently, related government units enjoyed relatively unbridled power to curtail a person's freedom to leave. In cases where a person is prevented from leaving due to taxes owed, the administrative nature of the restraints placed on leaving creates questions as to their legal basis and constitutionality, which deserve a proper reexamination. At the same time, the legal basis for judicial bans on leaving the country is also weak, relying on an expansive definition of "restraints on place of domicile." The Code of Criminal Procedure lacks thorough and clear regulations stating under what conditions restraints may be placed on a person's leaving the country, how long those restraints may remain in effect, or what sort of appeal process is allowed. All of this stands in stark contrast to the aim of Article 12(3).

Not only must the criteria for of judicial measures allowing for restraints on a person's ability to leave be tightened, but it is even more urgent to develop a comprehensive set of regulations to define when a person may be confined to the national borders by the executive branch. Especially with regards to cases of unpaid past taxes, when we consider the frequency and importance of overseas business travel, we see that guarantees on a citizen's right to leave the country fall seriously short. In many such cases, the person in question only learns of the ban when presenting himself or herself to the immigration authorities at the port of exit. While bans on leaving the country do not cause the same direct harm to each person involved as detentions, the frequency with which such bans are used means that the likelihood of citizens suffering them is higher. Therefore, there is clear need for the authorities to be restrained and limited by a system of immediate court challenge and review by an independent third party.

(3) Right of non-ROC nationals who are infected with HIV to enter the country: Response to Paragraph 164 (p. 71) of the State Report

Based on a policy it adopted in the 1980s, the Taiwanese government continues to enforce a total ban on entry into the country of non-ROC nationals who are HIV-positive. While recent years have seen improvements in public health care and medical technology, improvement in regulations calling for the barring of aliens with HIV/AIDS into most countries has not kept pace with this progress. In its investigation of 192 countries, the Global Database on HIV-Related Travel Restrictions, an initiative of the International AIDS Society (IAS), reports that there are only 31 countries which require the forced expulsion of aliens infected with HIV, while countries limiting visits to not more than three months number 20, including Taiwan. Taiwan's HIV Infection Control and Patient Rights Protection Act stipulates that travelers to the country for stays of three months or less need not undergo testing for HIV. However, while those whose names appear on a list (maintained by the Department of Health Centers for Disease Control (CDC)) of those discovered to have the disease are allowed to enter Taiwan, they are only permitted to apply for a single stay of fourteen days, one application per quarter year. All foreign nationals who intend to stay for three months or more, or who apply for residence in Taiwan, must either provide recent a recent testing report or else submit to an inspection after arrival. Those testing positive for HIV will have their visas and/or residency permits revoked and then be forcibly deported. The same applies even to foreign spouses of ROC nationals: once they are discovered to be HIV-positive, they are subject to immediate deportation. However, in 2001 this proviso was amended to grant an opportunity to appeal the deportation to those foreign spouses who contracted the disease as a result of undergoing medical treatment in Taiwan.

On 5 January 2010, the Joint United Nations Programme on HIV/AIDS (UNAIDS) issued a statement declaring that the banning or obstructing of entry into a country by those afflicted with HIV/AIDS is of no benefit to public health, while Secretary-General Ban Ki-moon backed this up with his personal appeal: "I repeat my call to all other countries with such discriminatory restrictions to take steps to remove them at the earliest." Today, with the advances in medical treatments, AIDS is a chronic disease whose fatality rates are not what they once were, and now the treatment of HIV/AIDS does not depend on restricting the freedom of its victims.

(4) The predicament of ROC nationals lacking household registration: Response to Paragraph 165, Paragraph 166, Paragraph 168, and Paragraph 169 (pp. 72-75) of the State Report

Comprising Articles 8 through 17, Chapter 3 of the Immigration Act deals exclusively with visits, residence, and permanent residence of ROC nationals lacking household registration in the "Taiwan Area," namely those who come from the "Mainland Area" (and dependents residing in the "Mainland Area"), and ROC overseas nationals (such as those Overseas Chinese in Southeast Asia, or the descendants of ROC troops left stranded in Burma and Thailand at the end of World War Two). Before visiting, people belonging to these two main groups must first apply to the National Immigration Agency (NIA) for permission to enter the country. To take an example, during the period of the Nationalist-Communist Civil War of the 1950s, the Nationalist government in its propaganda war widely issued ROC passports to Overseas Chinese in many countries. By 1991 the policies governing border control had changed, so that from that time on, such people holding ROC passports found it difficult to obtain ROC household registration. Meanwhile, in many cases the counties in which they were living regarded them as foreign nationals, since they were holding ROC passports, and thus would only issue them resident permits (much like the Alien Residence Certificates used in Taiwan), which needed to be renewed periodically. Nor did their long-term residence in those countries entitle them to citizenship or passports. This meant that they were unable to secure stable employment, and also hindered them from saving money or owning property.

However, when they came to Taiwan, these Overseas Chinese were regarded much the same by the Taiwanese government. They were not treated as full citizens; for example, they were not entitled to the social guarantees which ordinary citizens enjoyed, such as the right to work and labor and health insurance. Every six months their permitted term of stay expired, at which time they would have to leave the country to apply for a new visa, in order to return to Taiwan again. Some of them, unable to bear the expense of habitually flying in and out of the country, had no other recourse but to overstay their visas, thereby taking on an illegal status, from which time they assumed the mantle of "black residents," furtively continuing their life in Taiwan.

When an overseas national lacking a household registration in Taiwan applies for permission to stay or reside permanently in Taiwan, Article 11 of the Immigration Act stipulates thirteen conditions under which such permission may be denied,

thereby conferring on the competent authorities full executive power to decide. This does not accord with the demands of Article 12(3) of the ICCPR. The same situation continues to apply under Article 15 of the Immigration Act, which requires the NIA to deport those ROC nationals lacking household registration who have either entered the country without first getting permission or have entered legally but have overstayed their allowed period of visit or residence and restrict their return. It is true, as the State Report points out, that the Executive Yuan has formally called on the Legislative Yuan to amend this provision of the Immigration Act to relax the aforesaid requirements, so that in future overseas nationals without household registration may renew their visas in-country. This would render traveling back and forth to another country merely for the purpose of applying for a new visa, thereby reducing their financial burden. However, as of the present there is no progress to report on this proposed revision.

(5) Refugee and asylum rights unobserved: Response to Paragraph 167 (p. 73) of the State Report

Taiwan has not signed or ratified any of the international protocols dealing with the rights of refugees, nor does it have any of its own laws protecting refugees or asylum seekers, so when political refugees reaching our shores seek protection, in fact the first response is to treat them as illegal entrants and cast them into one of the detention centers for foreigners, thereby depriving them of their freedom of movement. Such cases are accorded serious attention only as a response to the demands and pressures of the NGOs, at which time the government will handle the cases in earnest.

In the sections treating Articles 9, 12, and 13 of the ICCPR and Article 9 of the ICESCR, the State Report mentions that a refugee law has yet to be legislated. But in fact, since with the first political asylum seeker arrived here in Taiwan from China in 2002 right up to the present, the government has been extremely passive in its push for a refugee law. It matters not whether the victims concerned are Chinese dissidents or Tibetan exiles (there was also at least one case of a North Korean refugee), the Taiwan treats all such persons on a purely case-by-case basis. No mechanisms have been created for determining whether such people are refugees or for ongoing assistance in easing their assimilation into Taiwanese society.

When people from China (i.e. the PRC) seek political asylum in Taiwan, the government applies Article 17 of the Act Governing Relations Between the People of

the Taiwan Area and the Mainland Area, which does not permit the long-term residence of those who have reached these shores illegally. As for Tibetans or stranded ROC military personnel and their dependents from Thailand and Burma, they fall under Article 16 of the Immigration Act.

The State Report puts the total of Chinese refugees – that is, those whom the government has determined that they indeed have legitimate political reasons for claiming refugee status – currently present in Taiwan at nine. These Chinese individuals are all stymied by the fact that Taiwan has yet to pass a refugee law: they are not permitted to work while in Taiwan, and are restricted as to place of residence, with resulting harm done to their basic human rights and human dignity. Moreover, even the draft refugee law which the government is preparing does not include Chinese citizens in its scope, thus no attempt is being made to address the problems of these refugees.

While on humanitarian grounds the Taiwan government has not extradited these people, on the other hand it has taken no serious steps to get the pending refugee law passed, nor has it established any formal mechanisms for dealing refugees, meaning grievous harm is being done to the lives and human rights of these people in Taiwan. We believe this situation does not accord with General Comment No. 23, that persons applying for asylum should also enjoy the rights of minorities. These rights should be not be denied because of deficiencies in domestic legislation.

(6) The forcible relocation of indigenous peoples communities and other crude policies has divided ethnicities: Response to Paragraph 172 and Paragraph 173 (p. 75-76) of the State Report on the ICCPR and Paragraph 220 (p. 114) of the State Report on the ICESCR

In recent years there have been numerous major cases of compulsory relocation of indigenous communities as part of the re-settlement and reconstruction programs in the wake of Typhoon Morakot which struck Taiwan on 8 August 2009.

The discussion in the State Report shows that the government does not believe that there was anything amiss or disputable in the Special Act for Post-Typhoon Morakot Disaster Reconstruction. However, during the legislative process of this special act there was no consultation with indigenous people in the flood disaster areas, much less participation in the design or decision-making phases, even though its role as the legal grounding for reconstruction programs had considerable relevance for their

rights. There should have been no surprise that Article 20, which concerned the delineation of "specified areas" (referred to in the English translation of the State Report "certain sections), should have sparked intense controversy about subsequent relocation, including claims of possible genocide.

Therefore, in the process of delineation of "specified areas" or the actual on-site experience of reconstruction, local indigenous people repeatedly reflected their concerns that the administrative agencies had not engaged in sufficient consultation with residents and had not suitably respected their will. Instead, the government only relied on the views of a minority of outside "experts," and residents found it difficult to comprehend the actual standards which government agencies used to delineate the "specified areas." In addition, the government's outsourcing of reconstruction tasks to private charitable agencies fuelled confusion among the people as to the respective power and accountability of the government and such private sector organizations or agencies. The government also focused on building so-called "permanent housing" instead of providing interim housing for emergency settlement. Furthermore, it demanded that indigenous communities abandon their original land before they would be permitted to move into permanent housing. Since most "specified areas" used villages as their units, if any people insisted on reconstructing their original village and did not agree to the delineation of their village as a specified region, such insistence would be an obstacle for other persons from that village to apply for permanent housing. Thus, this policy bred unnecessary internal conflicts and contradictions in many communities.

In fact, in places where the village had already collapsed, the indigenous residents would not insist on remaining there. However, in the process of "delineating specified regions," the zones set by the government repeatedly sparked doubts and suspicions due to the lack of dialogue and discussion with indigenous people in the local communities. Thus many indigenous residents protested when the government demanded their relocation.

For example, the former Kochapongane (Houcha Village) of the Rukai people in Pingtung County initially faced eradication, since the government had demanded that all its residents relocate to flatland (For more discussion of the case, see the section on Article 1 on the right of self-determination). The government's relocation plans had not been subject to examination for their completeness or even safety. In addition, given the inseparable connections between indigenous culture and mountainous and

forested land, indigenous residents relocated to flatland frequently immediately faced the problems of loss of cultural tradition or even assimilation into Han culture.

(7) Grossly excessive land expropriations: Response to Paragraph 175, Paragraph 176, Paragraph 177, and Paragraph 179 (pp. 77-79) of the State Report

Taiwan's Land Expropriation Act was promulgated only in February 2000. Its basic spirit was to promote utilization of land, guarantee individual property rights, promote the public interest, as measured by public benefit and necessity. However, the government used the cover of "public interest" to engage in massive expropriations of to create large consolidated tracts in order to satisfy the thirst of a small number of developers or speculators for "development projects." The result was the creation of excessive zones of expropriated land, a situation which in turn impinged gravely on the people's right of residence. According to the content of Article 12 and General Comment No. 27, the freedom of residence includes the freedom to choose where to live and the people's right of free choice should only be restricted in exceptional cases.

The problems surrounded land expropriations are not limited to just the legality of the expropriation itself, but also involves issues such as the utilization of the expropriated land and the transformation of the concept of ownership. The concept of "zone expropriation" used by the government and large-scale developers began to be used in 1930 by the ROC government in China. The state-led economic development model promoted a new pattern of land planning based on this concept throughout the authoritarian era. One of the most important cases in recent years was the Dapu farmland incident in June 2010, when rice fields nearly ready for harvest was torn up by police and excavators of the Miaoli County government, ostensibly to make way for an expansion of the nearby Jhunan Science-based Industrial Park.[104] After the farmers felt forced to go to Taipei City and hold a protest rally in front of the Office of the President, the people began to rethink the problem of excessive land expropriation. Scholars have pointed out that decisions on land expropriations by public authority cannot only focus on technical issues, but must also take into account key cultural factors. However, the people's feelings for the land are frequently not considered in government decisions on land expropriations.

[104] See Portnoy Zheng, "Taiwan: When the Excavators Came to the Rice fields," 23 June 2010, available at http://globalvoicesonline.org/2010/06/23/taiwan-when-the-excavators-came-to-the-rice-fields, and Chris Wang, "Police in Miaoli accused of using excessive force," *Taipei Times*, 15 June 2010, available at http://www.taipeitimes.com/News/taiwan/archives/2012/06/15/2003535381.

Under pressure from civil society organizations, the Legislative Yuan finally began to deliberate revisions to the Land Expropriation Act. In this process, the Taiwan Rural Front submitted a civil society version, which was placed on the legislative agenda in February 2011 by 23 lawmakers, almost all of whom were from the opposition Democratic Progressive Party. The civil society draft was based on six main principles:

1. prohibit the expropriation of farmland in specially designated agricultural districts;
2. provide a detailed cost and benefit evaluation from the standpoint of the overall public interest;
3. mandate a process of public hearings and debate;
4. realize the principle of full compensation;
5. establish a clear framework for resettlement; and,
6. end the practice of pre-expropriation public auction of land and other illegal procedures.

However, most of these principles were not included in the revisions proposed by the government which were approved by the KMT-controlled Legislative Yuan on and promulgated on 4 January 2012.[105]

(8) The tragedy of the forced relocation of the Losheng Sanatorium: Response to Paragraph 183 (p. 80) of the State Report

The State Report admits that the choice of the Losheng Sanatorium as the location for the maintenance facility of the Xinzhuang mass transit line was discriminatory against the patients living there.[106] During the legal dispute over whether this site should be preserved, the Executive Yuan neglected the important function of the judiciary as a path for remedy to guarantee human rights and should

[105] See Taiwan Rural Front and Taiwan Farmers Union, "Call for due procedure in rectifying the Land Expropriation Act," Food Crisis and the Global Land Grab, 12 December 2011, available at http://farmlandgrab.org/post/view/19772, and Loa Lok-sin, "2012 Elections: Amendments hurt farmers: groups," *Taipei Times*, 30 December 2011, available at http://www.taipeitimes.com/News/taiwan/archives/2011/12/30/2003521977.

[106] Translator's note: The Losheng Sanatorium was built in Sinjhuang City (in what is now New Taipei City) in the 1930s by the Japanese colonial government to isolate people with Hansen`s disease. The plan to evict the remaining residents and demolish most of the buildings to make room for the construction of the maintenance facility for the mass transit raised a major controversy, due to concerns about the patients right to choose their residence, as well as the historical and environmental values of the site. See Loa Iok-sin, "Former residents, activists for Losheng hold reunion," *Taipei Times*, 13 June 2010, available at http://www.taipeitimes.com/News/taiwan/archives/2010/06/13/2003475359.

engage in a thorough re-examination. However, the State Report does not put forward any remedial measures. Proposals for remedial measures will be discussed in the section on Conclusions and Recommendations below.

III. Issues Neglected by the State Report

(1) Notations to visas of foreign spouses violate the rights of families to be together

Migrant workers who have overstayed their visas, even after they have been punished according to related laws, receive notations on their visas by the Ministry of Foreign Affairs (MOFA). These notations restrict their future entry and exit. When such persons have family in Taiwan or becomes spouses of ROC nationals, their rights of family reunion and freedom of movement are violated.

Case study

Vietnamese migrant worker A-yong was exploited by his Taiwanese employer. When he unofficially switched to a different employer, he became a so-called "runaway migrant worker," and had a record of overstaying his visa. While still in Taiwan, he met a Taiwanese woman, Xiao-yu, and they fell in love and had a child. In order to legalize A-yong's status, they paid the fine for his overstay, and traveled to Vietnam to be married. In view of the interests of the child, the NIA agreed to lift A-yong's restriction on entry early. However, when A-yong entered Taiwan, the MOFA issued him with a visitor visa with the notation "during a period of observation, the bearer may not apply for residency." This meant that A-yong could not work in Taiwan, and he was required to leave the country within 6 months and reapply for a visa. Furthermore, when he applied the second time, he received the same notation again. Meanwhile, Xiao-yu had to work to support the whole family, including her infant child, and the family was in severe economic straits. This case is not unique.

When foreign spouses meet all the criteria established by the NIA for an exemption under Section 9 of the "Alien Entry Prohibition Operation Directions" and is thus permitted to enter the country, the MOFA should not unreasonably add such notations to their visas which mean that they are not allowed to work and must exit within a specified period.[107] This practice is a violation of their rights to work as well

[107] The official English translation of the "Alien Entry Prohibition Operation Directions" is available at http://glrs.moi.gov.tw/EngLawContent.aspx?Type=E&id=38.

as to movement and residence, and it has serious impacts on the rights of their families.

IV. Conclusions and Recommendations

(1) Revise the HIV Infection Control and Patient Rights Protection Act:

First, relax the restrictions on long-term stay (three months or more) of people infected with HIV, drop the requirement for foreigners (including naturally people from the PRC) to undergo HIV testing, and respect the right of movement for people with AIDS/HIV. Second, guarantee that discriminatory treatment will not be given on the basis of HIV infection to foreigners and nationals without household registration when they apply for visas, visits, residency, or permanent residency. Concrete measures should include removing Question C from the visa application form (which asks whether the applicant has HIV), and ceasing the maintenance of a "black list" of HIV-positive people which makes it difficult every time they apply for a visa or enter the country simply because of their infection.

(2) Revise the Immigration Act so that the basic human rights of ROC nationals without household registration are guaranteed.

A multifaceted service network aimed at extending guidance and concern to people coming from abroad has been established by the NIA these last few years. Additional steps must be taken so that this service and concern is also extended to overseas ROC nationals who want to apply to come here to stay, so that they may know that guidance and assistance will be theirs when they apply.

Articles 11 and 15 of the Immigration Act are in violation of ICCPR Article 12. This is especially so with Article 15, Paragraph 1, which punishes ROC nationals lacking household registrations who have entered the country without permission or who have overstayed the length-of-stay provisions of their visas or exceeded the length of time that they were allowed to stay outside of the country. The regulations must be changed so that such persons are not summarily deported, and administrative regulations must be put in place which spell out standards for dealing with such situations.

The NIA should comprehensive review all regulations relating to permission for ROC nationals lacking household registration to enter the country, or to visit, to stay, or to set up permanent domicile in Taiwan and submit its recommendations for their

revision to the Ministry of Interior. These should be specific, detailed, and thorough, with discrete standards covering different situations with precision, so that dealing with people fitting these descriptions in the future is eased and streamlined.

Based on the basic right of the people to freedom of movement guaranteed by the Constitution and Article 12 of the ICCPR, the Executive Yuan should waste no time in reviewing in detail the Chapter 3 of the Immigration Act (Articles 8 through 17) – the regulations covering visits, stays and permanent domiciles of ROC nationals lacking household registration – in order to ensure that the basic rights of the people to return to their country, to enjoy freedom of movement, and other such rights are not being violated.

(3) A timetable for enacting a refugee law must be established.

The Taiwanese government must enact without delay a refugee law and associated human rights protective mechanisms meeting international human rights standards. This is especially urgent for people from the "Mainland Area" seeking political asylum in Taiwan; once the refugee law is enacted, the Act Governing Relations Between the People of the Taiwan Area and the Mainland Area must also be revised so that it guarantees relief and protection in accord with the new refugee law.

(4) Indigenous communities should have an active role in participating in post-disaster reconstruction, and forcible relocation should be prohibited.

The lack of participation by indigenous people in the disaster areas has caused many difficulties for the implementation of reconstruction programs, as illustrated by the many controversies surrounding the reconstruction after Typhoon Morakot. In fact, the method that would have been the most efficient as well as most likely to satisfy most of the needs of the disaster areas should have been to add a chapter specifically dealing with the reconstruction of indigenous peoples' communities and villages in the Special Act For Post-Typhoon Morakot Disaster Reconstruction. The "Provisional Act on the September 21 Post-Disaster Reconstruction" enacted in the wake of the massive 7.6 magnitude earthquake that hit central Taiwan on 21 September 1999 did contain special sections on the reconstruction of non-urban areas and for the assistance of the reconstruction of normal life for residents in earthquake-affected areas that also featured specific regulations for the special requirements of indigenous peoples communities. Although these regulations were less than comprehensive, their

stipulations at least provided some basis in the legislation for the provision of arrangements distinct from Han society that recognized the cultural traditions and special character of communities of indigenous peoples. It should have come as no surprise that, a decade later, the Special Act For Post-Typhoon Morakot Disaster Reconstruction should have come under intense criticism for taking a step backward by employing only the viewpoint of Han people to plan reconstruction for disaster-struck communities of indigenous peoples.

Besides allowing present self-governing organizations of indigenous peoples communities to put forward their needs and participate in legislative planning, the most important aspect of the incorporation of a chapter regarding the reconstruction of indigenous peoples communities would be to establish an institutional channel for representatives of each indigenous peoples community or village to participate in the decision-making and implementation of post-disaster reconstruction. After Typhoon Morakot, huge amounts of contributions and assistance were provided by the civic sector organizations, and the government also allocated a massive budget for reconstruction work. It is puzzling why the government did not give residents in the disaster areas the opportunity to jointly participate in the tasks of deciding how to carry out reconstruction and allocate resources and thus open channels to effectively assist indigenous people in the disaster areas to reconstruct their lives while maintaining cultural traditions and identity.

(5) Revisions of the Land Expropriation Act should incorporate views from civil society.

The State Report (in Paragraph 178, p. 78) mentioned a series of recent major cases of forcible expropriations of farm land, such as in Xiangxiliao Village in the Stage IV expansion of the Central Taiwan Science Park, the Dapu Village case with regard to the expansion of the Zhunan Science-based Industrial Park in Miaoli County, Houli in Taichung, and the Erchongpu village case involving the Hsinchu Science-Based Industrial Park. These are not simply individual incidents, but reflections of structural problems which urgently need to be addressed through revision of related laws. The problem of excessive land expropriation has its historical background in the decades of state-directed development, but it is time for the role of the state to change.

The public land expropriation system should no longer be an instrument for the state and conglomerates to squeeze communities and villages and grab the people’s

land. Instead it must become the bottom line in guaranteeing the property and the survival of Taiwan's rural communities. The problem of public land expropriation involves state interference in the basic right of people to freedom of residence and should not be treated as a technical issue, but should incorporate considerations of the people's feeling for their land and their culture. Moreover, the definition of "public interest" should not be arbitrarily decided by the government, much less be a matter that can be dispensed with simply by using market price to expropriate land. The government should incorporate into further revisions of the Land Expropriation Act the six principles of prohibition of the expropriation of farmland in specially designated agricultural districts, provision of detailed cost and benefit evaluation from the standpoint of the overall public interest and necessity, the mandated holding of public hearings, full compensation, the establishment of a transparent framework for resettlement, and the prohibition of ban pre-expropriation public auctions of land and other illegal procedures.

(6) The question of the relocation of the Losheng Sanatorium must be resolved through the establishment of a truth commission, mediation on the project, and an independent monitoring mechanism.

1. Historical investigation and social education:

Article 3, Paragraph 1 of the Statute For Hansen's Disease Patients' Human Rights, which was promulgated in August 2008, mandates that the government should proactively publicize correct knowledge about Hansen's Disease and implement social education policies and other measures in order to assist the restoration of the reputation of persons afflicted with Hansen's Disease. However, the government has not undertaken any substantive action in this regard. We believe that the most important task is the launching of an investigation into the formation, implementation, and impacts on human rights of the postwar policy of quarantining the Losheng Sanatorium and the publication of the results of such investigation to the world community. A comprehensive investigation of historical truth can re-examine the process of social discrimination and the passive lack of action which has caused our entire society to become victimizers. Without clearly understanding the historical truth and studying its lessons, it will be difficult to guarantee that the government in the future will not repeat the mistake of using the pretext of public health to inflict substantive harm to human rights.

2. The issue of the safety of the foundation of the mass transit system Sinjhuang Line

The geology of the area around the Losheng Sanatorium contains high pressure underground water and fault lines and was never suitable for the construction of public infrastructure projects. Numerous worrisome cracks and fissures have appeared in the remaining Losheng Sanatorium buildings since the beginning of the excavation for the depot of the Xinzhuang Line, but the engineering agencies have repeatedly avoided responsibility for addressing the concerns of residents and civil society organizations. As the responsible supervisory government agency, the Public Construction Commission (PCC) of the Executive Yuan should take action to convene a fair, transparent, and substantively binding mediation hearing and organize a task force to investigate the crisis of the Losheng Sanatorium project. Before the PCC officially provides a safe and feasible plan, the Taipei Rapid Transit Corporation should not rashly continue construction.

3. An independent monitoring mechanism:

The Statute For Hansen's Disease Patients' Human Rights only uses an attached resolution to mandate the formation of a Hansen's Disease human rights task force, which was later established by an administrative order by the Department of Health. The lack of a clear legal grounding and the low administrative level of this human rights task force restricts the scope of its powers and prevents it from effectively conducting coordination or dialogue with other agencies in resolving the above issues and the current problems facing the Losheng Sanatorium. Therefore, the government should establish a cross-ministerial task force to discuss and coordinate implementation of the above-mentioned tasks.

Article 13: Procedures for Expulsion of Foreign Nationals[108]

I. Introduction

Regarding the expulsion of aliens and related issues, the State Report of the ROC government merely discusses the domestic laws relating to Article 13 of the ICCPR, laying out the laws and current procedures, but no further discussion is offered concerning whether the laws themselves violate the two covenants.

II. Responses to the State Report

(1) In reviewing applications for dependents' visas, MOFA discriminates on the basis of nationality: Response to ¶ 184, ¶ 185, and ¶ 186 (p. 81) of the State Report

The State Report states that a foreign national may apply for a residence visa as the spouse of an ROC national, and that when such visa application is submitted according to the regulations and "reviewed and approved" by the overseas consular office of the Ministry of Foreign Affairs (MOFA), such visa will thereupon be granted. Unfortunately, in practice the important matter of the visa application being "reviewed and approved" by the overseas consulate, means that whether the foreign spouse will be granted the visa is entirely in the hands of MOFA.

Item 3 of the "Working Guidelines for MOFA and Its Overseas Missions for Interviews of Foreign Nationals Married to ROC Nationals and Applying to Come to Taiwan" (rendered as "Operating Guidelines for Overseas Offices of the Republic of China for Interviews with Foreigners Applying to Come to Taiwan After Marriage with Republic of China Citizens" in the draft English version of the State Report) stipulates that, for specially designated countries, a foreign spouse must first apply at an overseas consulate and be interviewed. "Specially designated countries" refers to countries such as those in Southeast Asia and Africa. Since this regulation does not apply to all foreign nationals uniformly, and although MOFA offers "maintaining the safety of our national borders and avoiding human trafficking" as reasons for the interviews, it is unable to explain why only nationals from specially designated countries require the interviews, so the policy obviously suffers from the defect of having been decided subjectively.

[108] This section was authored by Chen Yi-chun (陳怡君) and Li Ai-lun (李艾倫), and translated by Lynn Miles (梅心怡).

Paragraph 185 of the State Report states that, in the handling of a foreign national's visa application, when deciding whether to approve the application, the foreign mission must not only carefully consider the interests of the country, but also the individual circumstances of the applicant, as well as the relationship between the applicant's country and the ROC. In actual practice, when it comes to certain specially designated countries, such as those in Southeast Asia and Africa, if a national of one of those countries applies for dependent status as the spouse of an ROC national, the MOFA in many cases refuses the visa because the country in question has serious issues with fake marriages, rather than basing the decision on a investigation of the facts of the individual case so as to prove a violation of the law or a criminal act. Without establishing any facts whatever warranting such a suspicion of crime, the decision rests entirely on questions of nationality and stereotypes. Since the applicant has no opportunity for relief through an appeal procedure, this is a grievous violation of the rights to enter the country of foreign spouses from specially designated countries, and as such constitutes discrimination based on nationality. Further, since in most cases no reason is given for the rejection, it puts the applicant in the difficult position of having no further recourse in seeking help.

(2) Channels available to foreign nationals seeking relief from forcible expulsion are limited: Response to ¶ 190, ¶ 191, ¶ 192, ¶ 193, and ¶ 194 (pp. 83-84) of the State Report

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Article 36 of the Immigration Act stipulates that, before forcibly expelling a foreign national who holds resident or permanent resident status, the National Immigration Agency (NIA) "should" call a review conference made up of scholars specialized in the field, in which the party concerned may express their opinion, but the review conference procedure is neither mandatory nor available to everyone. In actual practice, only a few cases have been accorded such review conference treatment, but there is no standard procedural regulation stipulating how the person facing deportation may demand such a hearing, how they may express their opinion, or what assistance they may seek – furthermore, since by definition the persons affected are foreign nationals and thus usually lack knowledge of the language or of related procedures, this regulation hardly affords the foreign national facing forcible expulsion an appropriate channel for appeal. Finally, even this limited procedure is not available to those who have not already obtained resident status.

In 2012, in Article 36 of the Immigration Act, the phrase "may convene a review committee made up of scholars specialized in the field" was revised to read

"*shall* convene a review committee" to review the expulsion decision, so before expelling a foreign national, in principle the central competent authority should take it upon itself to convene the review committee. No further procedural avenues are offered in the revised article, nor does it say what procedures must be followed by such a committee, nor how the affected party is to lodge an appeal in the event that the central competent authority does not initiate such a hearing. It seems that even the NIA lacks any certain formulation in such cases, so how this is to be implemented in the future will bear close watching.

While the State Report states that Article 36 of the Immigration Act applies in guaranteeing procedural justice to the foreign national, this regulation does not apply when it comes to Chinese nationals, who fall under the Act Governing Relations between the People of the Taiwan Area and the Mainland Area. Once the Immigration Act was revised, the related regulations of the Act Governing Relations between the People of the Taiwan Area were not concurrently revised. Although the NIA has indicated that cases involving Chinese nationals will be handled in like manner to other nationals, nevertheless, so as to afford absolute guarantees of the rights of Chinese nationals under the law, urgent revision of the law is in order.

Actual Case

A Chinese national, who had been residing in Taiwan for six years and having given birth to a child between her and her Taiwanese husband, was sentenced to a day in jail for having violated the Social Order Maintenance Law, following which she was immediately sent to the detention center to await repatriation. Upon the intervention of such NGOs as the Taiwan Association for Human Rights and the Coalition for Immigrant/Residence Rights and Legal Revisions, it was discovered that in this individual case, from detention procedure to repatriation processing, neither the party concerned nor her family were served with anything in writing dealing with the handling of the case. She was later able to leave the detention center by means of a bail procedure, but she then had to worry about whether her visa would be renewed once it expired. The Taiwan Association for Human Rights petitioned on her behalf, and after she was interviewed by the NIA's Specialized Operation Corps, her visa was extended, so she no longer had to worry about being repatriated, and was again able to leave and reenter the country so long as her visa was valid. However, in practice, in similar cases where such intervention by NGOs is lacking, if the party concerned is unaware of his or her rights and the administrative procedures are involved, the NIA makes no determination concerning the

severity of the case involving the spouse nor does it weigh the situation, much less does it make any reference to the judgment of the courts. Any determination that an infraction has occurred is sufficient grounds for them to decide that the person's activities do not accord with her original purpose in coming to Taiwan and to revoke her residence certificate. In this way, foreign nationals ignorant of their rights are repatriated, and families broken up.

III. Issues Neglected by the State Report

(1) Expulsion of foreign nationals infected by HIV

Articles 18 and 19 of the HIV Infection Control and Patient Rights Protection Act (hereafter "HIV Act") stipulates that the central competent authority may require foreign nationals who have resided in the country for three months or more to submit the results of testing for HIV antibodies taken within the previous three months or else undergo a physical examination to obtain such test results. If the results show positive, the central competent authority shall notify the MOFA to have their visa revoked, or the immigration office to have their residence permit canceled, whereupon they will be expelled from the country. Even if these foreign nationals are otherwise eligible for legal residential status, they have no avenue for appeal but are unceremoniously expelled from the country, in serious violation of Article 13. Yet the State Report, in its discussion of Article 13, has not a word to say about the content of the HIV Act.

As for foreign nationals who have become infected with HIV during their stay in the ROC, while Article 20 of the HIV Act provides that the central competent authority affords the opportunity to appeal the expulsion order to foreign nationals infected by their native spouse, as well as to ROC nationals lacking household registration but having relatives in the ROC within the second degree of kinship who themselves have household registrations, still the scope of that article is much too narrow. By specifying that such petitions may be initiated only by those foreign nationals who have either been infected by their native spouses or who contracted the virus while undergoing medical treatment while in the ROC – with such individuals who meet these conditions being allowed to continue to reside in the ROC – it excludes all other foreign nationals infected by HIV, which is clearly discriminatory treatment. Although this discrimination only directly applies to the right of petitioning, it creates a serious difference between whether one may stay or is to be expelled. The government has never explained whether there is any appropriate reason underlying this discriminatory regulation.

As for the putative appropriateness of HIV infection serving as due cause for expulsion as stipulated in the HIV Act, this is examined in the section of this report dealing with Article 12.

Actual Cases
With her new immigrant spouse of Thai nationality testing positive for HIV and confronting the fate of repatriation, the native ROC wife cried bitterly for help against the expulsion of her husband, but no help came from the related authorities. As the Taiwan laws stipulate that a foreign national, upon being tested positive for HIV, must be repatriated, this causes the breakup of many families. Laws intended to protect human rights in Taiwan are unfriendly to foreign nationals who have contracted HIV, leading to the dashing of many familial dreams. Viewing the despair of marital partnerships such as this, one hopes that the Taiwan government will be able to revise the relevant statutes so as to protect the basic human rights of foreign nationals in Taiwan who are infected with HIV.
An Overseas Chinese from Burma named A-wei, upon receiving his Taiwan ID, returned to Burma, where he met Hsiao-hsueh, who became his wife. She bore a son and a daughter. In 1996, in order to renew her residence certificate, Hsiao-hsueh underwent a physical examination, in which she tested positive for HIV. A-wei also was found to be infected. Although the law stipulated that she had to be repatriated, she decided to risk overstaying her residence permit and continued to stay in Taiwan to look after her children and husband. In 2007, with the opening of the opportunity to appeal the expulsion order, even though Hsiao-hsueh met the appeal requirements, the health authorities were unwilling to allow her to remain in Taiwan while her appeal was processed, insisting that she return to Burma and file her appeal there. In the meantime the family finances were becoming ever more strained, to the point where Hsiao-hsueh, who no longer had health insurance now that she no longer had legal resident status, could no longer pay her medical bills or continue her pharmacological program, much less pay for airfare back to Burma. In 2010, the Centers for Disease Control of the Department of Health, Executive Yuan called a conference, in which it offered a three-month national health program to a group of HIV-infected spouses of foreign nationality who had overstayed their residences, and in which it expressed the wish that, in the course of availing themselves of this help, these overstayed people would leave the country at the earliest opportunity, so they would not be helped in appealing the expulsion

order.[109] In September 2011, the organization Persons with HIV/AIDS Rights Advocacy Association of Taiwan helped Hsiao-hsueh file an appeal with the Department of Health. Finally, on 11 November 2011, after undergoing a process of confirmation of the validity of the submitted materials, and the supplementing with more documents and explanations, she finally received official confirmation that her appeal had been approved.

IV. Recommendations

(1) So as to avoid discriminatory practices based on nationality, reexamine the interview mechanism for spousal visa applicants.
(2) Regarding the review committee stipulated in Article 36 of the Immigration Act, there should be rules covering the entire process, including but not limited to who may on their own initiative file an appeal with the authorities, or whether the central competent authority must actively initiate a review hearing within a certain period; who makes up the review committee; and whether one may seek relief from the findings of such a review.
(3) Regarding such as detention procedures and forcible expulsion stipulated in the Act Governing Relations between the People of the Taiwan Area and the Mainland Area, they should be the equivalent standards and procedures called for in the Immigration Act; now that Article 36 of the Immigration Act has been amended, the Act Governing Relations between the People of the Taiwan Area and the Mainland Area should likewise be amended as soon as possible to offer the same standard.
(4) Article 18 and Article 19 of the HIV Infection Control and Patient Rights Protection Act should be rescinded.

[109] Yeh Chia-yu, 2011, "Good-bye, Hsiao-hsueh," TAHRPAS Summer 2011, Taiwan Association for Human Rights (in Chinese).

Article 14: Right to a Fair Trial[110]

I. Introduction

The State Report merely explains what our national laws are concerning public hearings, presumption of innocence, the right to defense counsel, interpreter assistance at judicial proceedings, the right to a speedy trial, the right of counsel to review case documents, cross examination procedures, system of appeals, and procedures governing the trying of juveniles, as well as laws and some statistics relating to fair trial principles. Not taken up is any substantive review of whether or not the aforesaid laws violate the ICCPR. Also left unremarked are: whether the prosecutor has the absolute responsibility for presenting substantive evidence; whether in the course of the investigation when the prosecutor applies for detention of the suspect, the defendant's counsel has the right to know the reasons given in the application; whether the defendant and the defense counsel are given adequate time to prepare and communicate with each other; the number of interpreters, their professional qualifications, and the languages in which they claim mastery; and whether Article 376 of the Code of Criminal Procedure is being applied. All of these missing topics should have been explained in turn, and the omission is obvious.

Prepared by civil society, this Shadow Report, in addition to supplementing the remarks in the content of the State Report, will therefore also raise topics not reviewed in the State Report, and will point out in what respects the exercise of state power under the current system does not comply with the ICCPR. More concretely, this section will include detailed explanation of the following: (1) rules governing the guidelines to be followed in assigning cases in the district courts; (2) the Supreme Court system of confidential assignment of cases; (3) trial by media; (4) the number of instances where plaintiffs petition for reconsideration of decisions not to indict, as well as number of instances and durations where the Taiwan High Prosecutors Office returns cases for further investigation; (5) omission of mandatory defense counsel system when cases are appealed to the tribunal of third instance; and (6) applications by the prosecutor for retrial or extraordinary appeal for reasons contrary to the interest of the defendant.

II. Responses to the State Report

[110] This section was authored by Wellington Koo (顧立雄), Chao Shu-yu (趙書郁), Derek Kao (高烋輝), Li Ai-lun (李艾倫), and Kao Jung-chih (高榮志), and translated by Lynn Miles(梅心怡).

(1) Degeneration of "presumption of innocence" into a mere slogan: Response to ¶ 209 (p. 89) of the State Report

The State Report claims: "Presumption of innocence is a fundamental principle in the Code of Criminal Procedure. Before a defendant is proven and confirmed to be guilty through a trial, he or she shall be presumed to be innocent. Facts of the crime should be determined on the evidence. Without evidence, facts of the crime shall not be determined." Further, Article 151, Paragraph 1 of the Code of Criminal Procedure stipulates that the prosecutor must exercise to the fullest his formal duty to present the evidence, and must make clear how he or she proposes to prove the case, so as to convince the court, giving the judge ample confidence for a finding that the facts exist to pronounce the defendant guilty.

Unfortunately, in actual practice the prosecutor appeals the verdict to the court of third instance, often giving the reason that, having failed to investigate the evidence as officially empowered, the court had violated the proviso in Article 163 Paragraph 2 of the Code of Criminal Procedure, and had thereby broken the law by not investigating the evidence during the term of the trial. How the condition given in Article 163 Paragraph 2 that investigation by the court must be "for the purpose of maintaining justice" should be interpreted and concretely specified awaits further judicial practice and precedents.

Recently, in its second Criminal Division Conference of 2012, the Supreme Court passed a resolution recognizing that, based on both Article 14 (2) of the ICCPR and the legislative intent of Article 163 of the Code of Criminal Procedure, responsibility for proving the guilt of the defendant falls to the prosecutor, and that based on the principle of a fair trial, the court cannot take upon itself the duty of the prosecutor, whose responsibility it is to exercise to the utmost the official power to investigate the evidence. Therefore, the "purpose of maintaining justice" basis for an ex-officio investigation in Article 163 Paragraph 2 of the Code of Criminal Procedure should be interpreted narrowly according to legislative intent, which is to say that it should be limited such that it works only in the defendant's favor. Otherwise it would conflict with the regulation assigning the prosecutor the responsibility of providing the evidence as well as with the principle of presumption of innocence, meaning a return to an inquisitional system and departure from the ideal of coherent legal order.

In the opinion of this report, now that the Supreme Court Criminal Division Conference has issued this resolution, it remains to be seen whether it will thoroughly

rectify the actual practice, where too many prosecutors are passing off to the court their official duty to submit substantive evidence, by which behavior demonstrating that the basis for case appeals is ultimately the assertion that the courts have violated the law by failing to exercise their official power to investigate the evidence. But at the very least, this resolution has now declared that the commonly seen judicial practice of prosecutors shirking their responsibility to provide the evidence is in clear violation of the spirit of the ICCPR.

(2) Various limitations on selection of counsel and the right to review documents: response to ¶ 211 (p. 89) and ¶ 219 (p. 92) of the State Report

The State Report states that the Code of Criminal Procedure provides for conferring on the defendant in a criminal suit such rights as ample time and convenience to prepare a defense and to contact his or her chosen counsel, as well as according the defense counsel the opportunity to inspect the documents and evidentiary items, to take notes, and to photograph them during the course of the trial. However, no mention is made of the short time span in the process of detaining a suspect between the arrest and the prosecutor's applying to the court for a writ of detention. In this brief period, suspects do not have ample time to communicate with counsel. Furthermore, during the investigation phase defense counsel do not have the right to view the case documents; thus, both defendant and counsel are unable to ascertain the accusations against the defendant contained in the detention application, so making an effective defense impossible at that stage. This is truly in violation of the principle of an open and just trial of Article 14(1), as well as regulations governing procedural guarantees outlined in Article 14(3)(b).

In accordance with the regulations set forth in the Code of Criminal Procedure, when prosecutors wish to detain a suspect in the course of carrying out investigations, they apply for writs of detention to the court. Since, while the case is under investigation, the defense counsel does not have the right to view the application document, neither the defendant nor the counsel has any knowledge of what charges or evidence are contained in the document. Admittedly, the effective prosecution of crime necessitates giving prosecutors and police the upper hand when it comes to information during the investigation stage. But left unexamined is the question of the necessity for delineating the extent to which information can be controlled, and that of denying counsel the right to examine documents while the case is under investigation, making it impossible to offer the defendant an effective defense. This is in obvious violation of the defendant's right to defense as covered in Article 16 of the ROC

Constitution and Article 14(3)(b) of the ICCPR. Furthermore, such excessive deprivation of the defendant's right to petition for information violates the principle of equality before the court in Article 14(1).

This report recommends the future revision of the Code of Criminal Procedure such that during the investigation period, when a prosecutor applies for a writ of detention, the judge, prior to questioning the suspect in accordance with Article 101 of the Code of Criminal Procedure, must ensure that the suspect and his or her counsel are apprised of the content of the document justifying the detention and be accorded adequate time to prepare for questioning.

(3) Lack of interpreter assistance: Response to ¶ 217 (p. 91) of the State Report

The State Report asserts, "Free interpretation services are available during investigations and trials by the public prosecutor and the judge for Taiwanese, Hakka, aboriginal languages, various foreign languages, and sign language." However, closer examination unfortunately reveals that, while the High Court Prosecutors Office and its branches have an interpreter roster, the State Report does not tell us how many out of that pool of interpreters are actually being used, nor whether they are assigned at the discretion of the prosecutor or instead are actively assigned by the state according to each case. Also unexplained are such details as whether, in response to the trending increase in spouses and workers from Southeast Asian countries, the numbers of interpreters are sufficient to the needs of each of the jurisdictions.

As for the courts, the State Report does not provide statistical support as to use of interpreters by the courts, obviously glossing over how in actual practice the courts, in their haste to avoid drawing out the case, ignore the defendant's need for an interpreter. Furthermore, since of course the judicial process calls for a certain professional understanding, where even those generally conversant in Chinese cannot hope to have a complete understanding of the proceedings, how much more difficult must it be for those who have not had legal training and are hired as interpreters on a temporary basis? In other words, given the ad hoc nature of our national interpreter system, the numbers of interpreters actually employed, their professional qualifications, and the languages in which they are proficient all warrant further discussion. Obviously, Article 14(3)(a) and (e), which call for regulations according the defendant the right to an interpreter, are being violated. Moreover, if it is to be supposed that in some cases the defendant, being unable to understand the

proceedings owing to language handicap, must be unable to advocate for his or her rights or mount an effective defense, the spirit of a fair trial cannot be realized.

(4) Violation of the defendant's right to appeal: Response to ¶ 221, ¶ 222, and ¶ 223 (pp. 92-94) of the State Report

The State Report merely lays out provisions of the Code of Criminal Procedure and the Code of Court Martial Procedure relating to matters of appeal, but does not examine whether the concrete conditions in practice meet with the rules given in Article 14(5). Moreover, the State Report provides quite a few tables, such as "Elimination of the right to appeal in criminal proceedings" and "Ratio of cases approved to be submitted to the higher court for review" as a basis for its contention that the people's right to seek relief through appeal is being guaranteed. Unfortunately, all that can be seen from these tables is the number of cases sent up for appeal over the years in this country, so they cannot be taken as evidence affirming substantive and effective protection of the defendant's right of appeal.

According to Paragraph 45 of ICCPR General Comment No. 32, anyone convicted of a crime has a right to review by a higher court of both the verdict and the sentence. In other words, at the very least, a defendant in a criminal suit has at least one chance at substantive and effective appellate relief. But in fact, according to Article 376 of the Code of Criminal Procedure, certain types of cases may not be appealed to the court of third instance. As a result, in actual practice situations often arise where, having been found not guilty in the first trial but guilty in the second, "a criminal defendant found guilty" then has his or her appeal rejected on the basis of Article 376 of the Code of Criminal Procedure. In such cases, a criminal defendant, once found guilty in the tribunal of second instance, is thereafter denied the opportunity of appellate relief. As a result this regulation given in Article 376 of the Code of Criminal Procedure is in obvious violation of Article 14(5).

III. Issues Neglected by the State Report

(1) The Guidelines for Case Assignments at District Court Level violate principles of fair trial (determining of court jurisdictions according to law)

Certain regulations given in the "Guidelines for Case Assignments at District Court Level" (also rendered as "Case Assignment Directions of Criminal Divisions of the District Court") relate to cases where two or more inter-related cases are

combined as one. The Council of Grand Justices (CGJ) ruled in its Interpretation No. 665 that this practice was not unconstitutional; however, since the Guidelines are only an internal document of the courts, they are unknown to those who fall within their jurisdiction. Thus, these rules may not only violate the principle of lawful designation of judges, but may also be in violation of the "tribunal established by law" principle cited in Article 14(1).

In Interpretation No. 665, the CGJ ruled as follows: "Among major rule of law countries around the world, the constitutional law of the Federal Republic of Germany is noteworthy. Article 101, Paragraph 1 of the Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland) expressly provides that, 'Extraordinary courts (Ausnahmegerichte) shall not be allowed, and no one may be removed from the jurisdiction of his lawful judge.' Academically, this is the so called principle of a lawful designation of judges (gesetzlicher Richter) under the constitutional law. It entails the constitutional mandates that cases shall be assigned by pre-defined abstract and general guidelines, and are not subject to the arbitrary control of any particular judge so as to interfere the adjudication. However, this principle does not preclude the assignment of cases by regulations or rules promulgated by a legally organized judicial panel (Präsidium, including the Chief Judge of the court and judges' representatives). (See Article 21-5, Paragraph 1 of the German Organic Law of Courts.) While other rule of law countries, such as the United Kingdom, the United States of America, France, the Nederland and Denmark, whether with a written or unwritten constitution, contain no provision pertinent to the principle of lawful designation of judges. Nevertheless, without a doubt the principle that case assignment of the courts shall not be subject to arbitrary manipulation shall be the constitution principle adhered to by a rule of law country."[111] Accordingly, "Articles 10 and 43 of the Directions at Issue [Case Assignment Directions of Criminal Divisions of the Taiwan Taipei District Court] were promulgated under the statutory authorization of Articles 78 and 79, Paragraph 1 of the Court Organic Act and under the authorization of the meeting of judges of the Taiwan Taipei District Court. The Directions at Issue are reasonable and necessary supplementary regulations to lay out a procedure promulgated by the meeting of divisional affairs of all criminal divisions of the court to stipulate in advance a generally applicable, abstract rule on whether or not there is a need of integration and how to and whether to integrate related criminal cases. Accordingly, the Directions at Issue are not in contravention of the constitutional guarantee of people's right to institute legal

[111] Full text of the interpretation is available in English at <http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=665>

proceedings under Article 16 of the Constitution and of the constitutional mandate that judges shall, in accordance with law, hold trials independently and shall be free from any interference under Article 80 of the Constitution."

However, the regulations given in the Guidelines for Case Assignments at District Court Level relating to combination of inter-related cases, despite the CGJ ruling of constitutionality in its Interpretation No. 665, are still only internal court rules (rules relating to conduct of business). Therefore, individuals who fall under the constraint of these rules are unaware of them, since they cannot be found in the national database of laws and regulations. As a result, when a case is coming before the court, the parties have no way of knowing in advance according to what rules the case is to be assigned. Such being the case, not only is whether the Guidelines are in violation of the principle of lawful designation of judges a matter of contention, but the Guidelines may also be in violation of the "tribunal established by law" principle cited in Article 14(1).

This report recommends that the Judicial Yuan publish the Guidelines for Case Assignments covering the criminal tribunals of every district and high court, and moreover place them in the national laws and regulations database for the people to search out and inspect, in order that they may know in advance the internal court rules governing the assignment of cases, and thereby bringing this practice into accord with Article 14(1).

(2) System of confidential Supreme Court case assignments violates principles of fair trial

Until very recently, the Supreme Court had utilized a system of confidential assignment of cases. Under this system, once cases are sent up to the Supreme Court (the court of third instance in most cases) on appeal, they undergo screening by a review tribunal, either civil or criminal. Then, if the procedural requirements are met, the process of confidential assignment of the case is taken up. The case is sealed and given a tracking number, then handed over to the assigning judge, who uses a computer-generated assigning system and then refers the case in secrecy to the judge who has been assigned the case. In this two-stage assignment process, before the court's verdict has been finalized, no one has any knowledge of the assigned judge's identity. Seen in a positive light, of course, this helps ensure that the judge will not come under the influence of outside interference or threat, guaranteeing him or her room to handle the case entirely independently. But this violates Article 14(1).

The State Report did not examine this system of confidential assignment of cases, so obviously it did not consider the "fair *and public*" principle called for in Article 14(1), where what is indicated is not merely public disclosure *after* the verdict, but also *prior disclosure* of both the rules followed in assigning the case as well as the name of the judge, so as to make it possible to determine whether or not there have been cases of special assignments done in violation of the principle of "impartial tribunal established by law." This also enables examination of each judge's legal consistency, or whether, for special reasons or momentary weakness, any arbitrary alternations have been made that might constitute threats to judicial independence. Put simply, it is precisely the *prior* public and transparent disclosure of case assignments that will ensure an independent decision from the judge and that there will be no shrinking from going forward with a case owing to interference from within or without. All the more will it ensure that the important core content of the basic rights of the people pertaining to trial procedures will not be violated by judges. Restrictions on such rights can only be imposed by legislators acting in accordance with the Constitution; we cannot countenance the position that these are internal administrative measures of the judiciary, which is apparently intended to circumvent legal oversight.[112]

Since the writing of the State Report, the Supreme Court recently claimed that its process of assigning cases is now open and transparent, making it identical to the systems used in the courts of first and second instances and in no way should be considered a practice of assigning cases in black-box secrecy. On 9 April 2012 the Supreme Court convened a conference of the civil and criminal tribunal chief justices and judges to discuss revisions of the "Supreme Court Guidelines for Sequencing, Counting, and Assignment Report and Closure of Civil and Criminal Cases."[113] It was resolved that, starting 16 April 2012, so as to achieve transparency in case assignments and to guarantee the rights of the people in judicial matters, any of the parties in the case, including the victims, plaintiffs, defendants, or legal representatives of the above, may request in writing for the name of the presiding judge in the case. In the opinion of this report, upon the revision of the "Supreme Court Guidelines for Sequencing, Counting, and Assignment Report and Closure of Civil and Criminal Cases," close monitoring is warranted as to whether this new system of formal written requests for name of the presiding judge will function well in

[112] Chen Chien-jung, *Confidential Case Assignment: Accomplice to Prolonging of Lobby Culture, Assassin of Independent Judiciary*.

[113] See press release from the Judicial Yuan, 13 April 2012, available in English at <http://jirs.judicial.gov.tw/GNNWS/engcontent.asp?id=91846&MuchInfo=1>

practice, and whether indeed it means the curtain has finally dropped on the Supreme Court's system of assigning cases in secret.

(3) "Trial by media" violates the principle of the presumption of innocence

With today's "trial by media" so rampant and foul, we have yet to see the government taking any measures whatever to guarantee presumption of innocence, which is among the state's positive obligations implicit in Article 14(2).

Accordingly, the State Report addresses the presumption of innocence clause of ICCPR Article 14(2) by merely listing the relevant regulations found in the Code of Criminal Procedure – Article 154 Paragraph 1, Article 156 Paragraph 4, Article 161 Paragraph 1, and Article 282 – but says nothing about such matters as the discrepancy between these laws and their actual enforcement, or how the legal guarantees presently do not measure up. It has obviously failed to examine how in the social setting of today's Taiwan, not only the newspapers, weeklies, and other print media, but also the several 24-hour cable TV news channels, all as a consequence of explosive and evil competition, dish out the most shocking, exaggerated, and one-sided reports, such that in Taiwan the most odious "trial by media" is pervasive. In actual practice, even more commonly seen are cases of the investigating authorities providing the media with visuals and video tapes, or the media, whether reporting news relating to cases still being tried or talk shows discussing such topics, predict the verdict in the criminal case or otherwise comment on it, thereby manufacturing so-called verdict by public opinion. This imposes a certain pressure on both the prosecutor and the judge handling the case, all the more amplifying the odious "trial by media" effect.

On 28 June 2002 the Ministry of Justice issued its "Guidelines for Prosecutors, Police and Investigating Authorities in Dealing with the Press" (subsequently revised on 3 February 2010). Its fourth point reads: "In the following situations, so as to protect the public welfare or to guarantee legal rights, when deemed necessary, the spokesperson may release news as appropriate, but should still respect the principle of not publicly disclosing details of the investigation." From a look at the Guidelines, the related regulations mean that neither the prosecutor, the police, nor the investigation authorities may issue any prediction concerning the trial's outcome, but still, if the prosecutor, police, or investigating authorities are to be allowed to release news on a criminal case in progress, then this certainly constitutes violation of the positive duty of the state to guarantee presumption of innocence as laid out in Article 14(2).

In practice, it is frequently seen that prosecutors or police take it upon themselves to provide the media with new about the breaking of cases, whether through formal channels (press releases) or informal ones (planting stories – the media quoting them with such expressions as "authoritative (or internal) information sources indicated that …"), through handouts or leaks providing related or favored journalists news related to a criminal case. As an example, the Supreme Prosecutors Office Special Investigation Division, upon indicting former president Lee Teng-hui for crimes of embezzling state funds and money laundering, held a press conference with great fanfare to announce the indictment to society at large. That they should regard this as one "method of handling a case" shows that they obviously lack minimal human rights consciousness. Such cases hardly inspire confidence that the above-mentioned Guidelines are being implemented in practice.

On top of this, Article 22 of the Radio and Television Act stipulates that "Radio/television programs shall not comment on legal cases under investigation or trial, judicial personnel handling the cases, or the parties involved; nor shall they carry the debate of lawsuits that are prohibited from being open to the public." Aside from this legal stricture, nowhere may be seen the Judicial Yuan, the Executive Yuan, the Ministry of Justice, or any of the related government departments taking any positive measures in their different capacities to eliminate the aforesaid media disclosure of information relating to cases still being litigated, or to abolish the media's discussion of such topics in their talk-show formats, or their predicting the outcome of criminal cases still in progress in the courts, thereby manufacturing so-called "verdict by public opinion" and a certain deleterious effect that such pressure exerts on the judge handling the case. Since this increasingly eviscerates the requirement that the defendant be accorded the presumption of innocence, it obviously means that the state has yet to faithfully and exhaustively exercise its duties to ensure guarantees of presumption of innocence.

This report recommends that the Judicial Yuan, the Executive Yuan, the Ministry of Justice and the related government departments take all positive measures in their different capacities (eg, the investigating authorities who actively provide news or simple media discussion points), deliberate on what positive measures they may take to eliminate predictions that arise concerning trial outcomes and inappropriate influences on the judges who have taken on the cases, and exercise their positive duty to ensure guarantees of presumption of innocence as stipulated in Article 14(2).

(4) No limits on plaintiff appeals for reconsideration; Taiwan High Court Prosecutors Office's returning of cases to lower court for further investigation

In order to bring into practice the trial rights covered by Article 16 of the ROC Constitution, and to accord with international human rights standards concerning minimal guarantees in the procedures affecting criminal defendants laid out in Article 14(3)(c) of the ICCPR, on 19 May 2010 the government promulgated the Speedy Criminal Trials Act, with 14 articles in all, of which Article 8 and Article 9 Paragraph 1 place new limits on the right of prosecutors and plaintiffs to appeal a not guilty verdict to the court of third instance.[114] The reason given for this legislation was, "If we continue to allow the prosecutor or plaintiff to repeatedly appeal a not guilty verdict, this will impose a huge burden of worry on the defendant, which would hinder the defendant's right to an open, fair, legal, and expeditious trial."

The Speedy Criminal Trials Act only applies to appeals by the prosecutor or plaintiff to the court of third instance. No corresponding reasonable limits are imposed during the investigative phase, whether on plaintiffs' appealing for reconsideration of the public prosecutor's decision not to indict, or of the Taiwan High Court Prosecutors Office overturning district prosecutors' decisions not to indict or requesting further investigation. For example, there are no limits on the total time spent on the investigation, the number of times a plaintiff may file for reconsideration, or the number of times the Taiwan High Court Prosecutors' Office may sending a case back for further investigation. In actual practice, the same case may be repeatedly appealed for higher review when the public prosecutor fails to indict, with the Taiwan High Court Prosecutors Office sending the case back a number of times. With the outcome of the case hanging in limbo indefinitely like this, the legal status of the defendant remains in a very unsettled state of affairs for a long time. Moreover, in some cases, while the investigation continues the suspect must suffer restrictions on his or her freedom of movement, such as being barred from leaving the country. These practices also constitute a violation of guarantees to the people of an fair, legal, and expeditious trial, as guaranteed by Article 16 of the ROC Constitution, and Article 14(3)(c) of the ICCPR.

This report recommends that the parts of the Code of Criminal Procedure relating to investigation procedures be revised to deal with both number of instances

[114] Note: in Taiwan, while most criminal prosecutions are initiated by public prosecutors, for certain criminal offenses prosecutions may be initiated by private citizens. Such persons are herein referred to as "plaintiffs."

and the duration of both appeals by plaintiffs of the prosecutor's decision not to indict as well as the Taiwan High Court Prosecutors Office's remanding of cases for further investigation.

(5) A gaping loophole: defense counsel not mandatory in courts of third instance

The basis for enactment of Article 388 of the Code of Criminal Procedure is that "the court of third instance being but a legal review with no reviewing of the facts of the case, in principle the case is reviewed on paper, so there is no need for having defense counsel present." Granted that the court of third instance only allows for legal review, even though it is an on-paper review, if there is no defense counsel present to assist, the defendant, who has no specialized legal training, will be unable to determine in what way the original trial had violated the law. Moreover, mandatory defense is needed because defendants, whether owing to poor knowledge of the law or owing to psychological factors arising from being under investigation and indictment, are placed in a disadvantaged position relative to prosecutors, with their professional legal knowledge and familiarity with trial procedures. Therefore, trial procedures cannot be reduced to simply a matter of formal equality among the parties; they must also include a forceful defense of the defendant by counsel, thereby guaranteeing full legal rights. It follows from this that, if the defendant is allowed mandatory legal counsel in the courts of first and second instance but is denied it in the third, this amounts to a lack of substantive and effective guarantee of rights when appealing to the court of third instance, in effect meaning the right to appeal has not really been guaranteed. This is especially so with capital cases, for which the UN Human Rights Committee (UNHRC) has called for defense from counsel in all stages of the trial process. However, according to Article 388 of the Code of Criminal Procedure and Article 203 of the Code of Court Martial Procedure, defense counsel is not mandatory when cases in which the death sentence has been imposed are appealed to the court of third instance. This violates the criminal defendant's guaranteed right to appeal as called for in Article 14(5) of the ICCPR.

This report recommends that the Code of Criminal Procedure and the Code of Court Martial Procedure be amended such that, under the Code of Criminal Procedure, cases appealed to the court of third instance must be included in the mandatory defense counsel system when, and likewise, under the Code of Court Martial Procedure, cases in wartime shall also use the system. In this way the intent of Article 14(5) calling for the opportunity for substantive and effective relief for those appealing their convictions can be upheld. Recently, on 19 April 2012, the Executive

Yuan cabinet meeting passed a partial revision of the Code of Criminal Procedure and revision of Article 7-7 of the Enforcement Act of the Criminal Code. Among the amendments were revisions to the Code of Criminal Procedure Articles 388 and 395, mandating that the system of mandatory defense counsel be extended to the court of third instance. However, even as we are waiting for these amendments to be enacted by the legislature, recently there have continued to be many trials conducted entirely without counsel present involving serious offenses – even those punishable by death – which were upheld by the court of third instance. The authors of this report call on the Judicial Yuan, in its deliberations concerning the revising of Article 388 of the Code of Criminal Procedure, to not neglect the justice of individual cases, and be sure to revise it so as to afford the opportunity of relief to capital defendants who, prior to such revision, were not allowed defense counsel during their appeals.

(6) Prosecutors are not prohibited from filing motions for retrial or extraordinary appeals after final verdicts confirmed

According to Article 422 of the Code of Criminal Procedure, once a judgment of guilty, not guilty, exempt from prosecution, or case dismissed is finalized (i.e. after the conclusion of any appeals), under the following circumstances the prosecutor may file a motion for retrial contrary to the interest of the defendant: "where exhibits on which the original judgment is based have been proved to have been fabricated, or altered"; "where material testimony, expert opinion, or interpretation on which the original judgment is based has been proven false"; "where judgment by a common court or special court on which the original judgment is based has been changed in a final judgment"; "if a judge participating in the original judgment, in a judgment before the trial or in investigations before the judgment, or if a prosecutor participating in the investigation or the prosecution commits offenses in his/her post out of the case and the offenses have been substantiated, or if he or she neglects the duties out of the case and has been 'administratively punished' and such behavior is sufficient to affect the original judgment"; "if, whether through the person's confession or discovery of new evidence, it is determined that this warrants a finding of guilty or heavier punishment, or a finding of lack of grounds for exempt from prosecution or case dismissed." The effect of this regulation is that those found not guilty or those given a light sentence face the uncertain risk of seeing a case which has been decided in court brought to trial again or punished more severely, so violating the principles of no double jeopardy and of not having a sentence changed, as set forth in Article 14(7).

Moreover, in its application of the Code of Criminal Procedure, our country has adopted a modified adversarial system. Thus, the prosecutor is charged with the responsibility of bringing substantive evidence concerning the facts of the case to court. If he or she does not thoroughly investigate the case, but nevertheless proceeds with the prosecution, and as a result certain evidence which could have been presented fell through the cracks, resulting in the defendant receiving a verdict of not guilty or in receiving a lighter sentence, based on considerations of a criminal charge not being retried and on the stability of the law, any unfavorable decision should be shouldered by the prosecutor. The reasons for retrying a case given in Article 422 of the Code of Criminal Procedure are altogether different from what the Human Rights Committee refers to as exceptions to the principle of no retrying of cases for which final sentence has been rendered allowable if suitable reasons arise in special situations. Based on this, the provisions listed in Article 422 contradict the principle of one punishment for one crime covered in Article 14(7) of the ICCPR.

In September 2011 the Judicial Yuan presented a draft revision of these provisions in the Code of Criminal Procedure allowing for the retrial of a case when it is against the interest of the defendant, but this revision have yet to be formally enacted. This report calls for the reconsideration of the related Code of Criminal Procedure regulations making possible the current practice of allowing for filing for retrial when contrary to the convicted party's interest.

IV. Conclusions and Recommendations

The articles considered here are those coming within the scope of guarantees of fair trial as set forth in the ICCPR. Article 14(1) covers the principle of equality before the court. Article 14(2) to (5) cover various procedural guarantees affecting the defendant. Article 14(6) entitles criminal defendants who have been wrongly convicted in court to just compensation. Article 14(7) defends the right to be free from the threat of double jeopardy for a single offense. The State Report is mainly content to elucidate the content of these articles and introduce the country's related procedural laws and regulations, but offers no substantive examination of whether or not the established related regulations accord with the spirit of the ICCPR, nor does it completely present an accounting of whether, in the course of carrying out these related regulations, state institutions actually violate the right of criminal defendants to a fair trial.

While the State Report explains that, based on the principle of presumption of innocence, the prosecutor should assume the responsibility of presenting substantive evidence, in the opinion of this report, in the course of actually carrying out their duties, the prosecutors, based on the proviso given in Article 163 Paragraph 2 of the Code of Criminal Procedure, often pass on this duty to the court. Recently, in its second Criminal Division Conference of 2012, the Supreme Court passed a resolution recognizing that the court cannot take upon itself the duty of the prosecutor, which is to exercise to the utmost the official power to investigate the evidence; however, we believe that whether this is being effectively applied in practice bears further scrutiny.

Second, the regulations in the Code of Criminal Procedure covering the right of counsel to view the case documents only applies once the case has come to court, and not before, when the defendant is under investigation or detention. Under the press of circumstances, defendant and counsel are usually not allowed sufficient time to prepare before the defendant is detained. In the opinion of this report, related laws must be amended to allow defendant and counsel to be apprised of the content of the application for a writ of detention prior to the defendant being brought before the judge for questioning, as well as to allow the defendant and counsel to be allowed an appropriate amount of time to prepare prior to questioning.

Third, while at first glance the interpretation system appears to be systematic, in actual practice, the number of interpreters, their quality, and which languages they have mastered are not covered in the State Report, which does not even mention the number of interpreters in the national interpreter talent roster, so just how the interpreter system is put into practice bears further watching.

Finally, Article 376 of the Code of Criminal Procedure stipulates that once a verdict has been rendered in the court of second instance, for certain criminal offenses the verdict may not be appealed to the court of third instance. In the opinion of this report, in the name of protecting the right of preserving substantive and effective appellate relief to the defendant, the restrictive provisos of Article 376 should not be binding on those found guilty in the court of second instance; otherwise this would constitute depriving the defendant of the right to appeal and as such would violate right-to-appeal guarantees covered in the ICCPR.

Other than these conclusions about the State Report, topics not touched upon by the State Report include: how the ICCPR Article 14(1) principle of “competent, independent and impartial tribunal established by law” relates to criminal courts at the

district court and high court level in their case assignments, and whether the principle is being applied. “Guidelines for Case Assignments” or equivalent rules covering the criminal tribunals of every district and high court should be placed in the national laws and regulations database for the people to search out and inspect, in order that once the case has been accepted by the courts for trial they may know in advance the internal court rules governing the assignment of cases, and thereby putting it in accord with the demand for a “tribunal established by law.”.

The Supreme Court’s system of confidential case assignments obviously violates the principle of fair and public trial. And, while the Judicial Yuan and the Supreme Court have revised the laws allowing for the transparent assignment of cases, whether the new system is actually effectively guaranteeing the people their judicial trial rights must await further observation.

Because “trial by media” has always produced public predictions of case verdicts and also creates untoward influences on the judge, and as the state must exhaustively exercise its positive responsibility to protect the presumption of innocence, the Judicial Yuan, Ministry of Justice, and related state agencies must prevent the prosecutors from taking it upon themselves to present the media with information, and must prevent the media from engaging in simplistic discussion of cases under investigation or before the courts.

Also in need of revision are the laws relating to the number of times in which, in the investigation of a criminal case, the plaintiff appeals to the court for reconsideration when the prosecutor decides not to indict, those relating to the number of times in which the High Court Prosecutors Office send cases back for further investigation, and those relating to the duration of investigations. The aim is to relieve the affected parties from prolonged worry owing to an uncertain situation, thereby violating the right to a trial without undue delay.

Both Article 388 of the Code of Criminal Procedure and Article 203 of the Code of Court Martial Procedure should be revised so that laws relating to when a case being tried under the Code of Criminal Procedure (or the Code of Court Martial Procedure in wartime) is accepted by the court of third instance on appeal, defense counsel shall be mandatory, thereby ensuring that the criminal defendant, who is at a disadvantage, is accorded substantive and effective protection of the right to appellate relief through assistance from counsel. Also in need of examining are the rules in the Code of Criminal Procedure disallowing appeals if the verdict has gone against the

defendant, so that the “one crime one punishment” principle of Article 14 Paragraph 7 of the ICCPR is upheld, making it impossible for someone to be retried for the same offense.

Article 15: Statutory Definition of Crimes and Their Punishment, Prohibition of Retroactive Criminal Offenses or Punishment[115]

I. Introduction

Regarding Article 15 of the ICCPR, the State Report merely lists pro forma the wording of certain related legal provisions, but fails to examine whether these laws are being followed or whether they are adequate. This can hardly be called compliance with the spirit of international human rights treaties. Following are further explanations.

II. Responses to the State Report

(1) The principle of defining criminal offenses and their punishment by statute: Response to State Report Paragraph 229 (p. 96)

The State Report perfunctorily enumerates relevant laws and regulations such as Article 1 of the Criminal Code and Article 13 of the Criminal Code of the Armed Forces, while deliberately ignoring or omitting discussion of other problems, such as the fact that in reality a number of judicial administration or legislative actions have already substantively contravened the ban, derived from the principle of legality, on retroactive criminal laws. The government's negligent attitude is blatantly obvious.

(2) Frequent changes in applicability of old and new laws: response to State Report Paragraph 230 and Paragraph 231 (p. 96-97)

Citing Article 2, Paragraph 1 of the Criminal Code, the State Report claims "the principle of applying the older or the more lenient law applies to both investigation and trial," but in reality this is not the case. To cite an example, our judicial practice does not view a so-called "change of an undefined element of a crime"[116] as an "amendment to the law" and therefore Article 2 of the Criminal Code is not applicable. This view violates the spirit of Article 15 of the ICCPR. To illustrate this phenomenon more concretely, assume the constituents of the crime committed by the offender were subsequently altered through complementary administrative regulations

[115] This section was authored by Wellington Koo (顧立雄) and Su Hsiao-lun (蘇孝倫), and translated by Susanne Ganz (金樹曦).

[116] An "undefined element" of a crime is where the Criminal Code leaves an element of a crime undefined and the element is defined by a separate administrative regulation or another act.

or the competent authority's interpretation of the law. Based on the view mentioned above, even if the administrative regulations or the competent authority's written interpretation decriminalize *ex post* the acts committed by the defendant, the court will still hand the defendant a guilty verdict based on an undefined element, even if this has been altered and no longer exists. The defendant cannot cite Article 2 of the Criminal Code, which states "when the amended law is favorable to the offender, the most favorable law shall apply," to escape criminal liability.

The above view has often been explained with the help of the Council of Grand Justices' Interpretation 103 of 1963 which states: "Alteration of the content of the Executive Yuan's official notice prescribing controlled items and their quantity in accordance with Article 2, Paragraph 2, of the Smuggling Punishment Act has no effect on the punishment of smuggling committed prior to the aforesaid alteration. It follows that Article 2 of the Criminal Code is inapplicable in this situation."[117] Actual court opinions – Supreme Court ruling No. 2474 of 1976, Supreme Court Criminal Divisions decision of 2 June 1987, and Supreme Court criminal judgment No. 771 of 2005 – have confirmed that view.

What also requires further examination is the question of what is the legitimate basis for making a distinction, as the above mentioned legal opinions do, between "general" and "unspecified" constituents of a crime with regard to their legal effect. What is the particular reason for restricting the applicability of Article 2 of the Criminal Code so as to not cover the so-called "alteration of unspecified constituents"? From a citizens' perspective, both Article 2 of the Criminal Code and the latter part of Article 15 (1) of the ICCPR ("If, subsequent to the commission of the offense, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby") should be interpreted to the effect that the "alteration of unspecified constituents" should not be exluded from the applicability of the principle of imposing the lighter penalty. In other words, the legal opinions mentioned above provide room for review and revision.

[117] Interpretation 103 of 23 October 1963, available at http://jirs.judicial.gov.tw/eng/FINT/FINTQRY03.asp?Y1=&M1=&D1=&Y2=&M2=&D2=&cno=103&kw=&btnSubmit=Search&sdate=&edate=&keyword=&total=1&seq=1. The reasoning given in the judgment stated: "Alteration of the content of the Executive Yuan's official notice, prescribing controlled items and their quantity in accordance with Article 2, Paragraph 2, of the Smuggling Punishment Act, is not an amendment to the penalty provisions in the Act. Therefore such alteration does not fall within the scope of "amendment" under Article 2 of the Criminal Code."

(3) The principle of applying the lighter penalty should be applied to irreversible punishments: Response to State Report Paragraph 232 (p. 97)

This section of the State Report states the following: "When the law is changed after a judgment is made according to the older law with more severe punishments, the sentence shall still be executed based on the judgment." However, civil and political rights expert Manfred Nowak states in his *CCPR Commentary* that the application of Article 15 implies a "time limit," so that a distinction must be made between the different effects of reversible versus irreversible punishments. States are obliged to retroactively apply a lighter penalty if it is subsequently provided for by law generally in cases where a penalty is irreversible and the offender has not completed their sentence. Therefore the abolition of the death penalty must be retroactively applied at any point in time to all persons on death row. The same applies to cases where the sentence is corporal punishment or life imprisonment.[118] Correspondingly, states are not obliged to retroactively apply a lighter penalty (but are not prohibited from doing so) in cases where the sentence is imprisonment or a fine.In other words, in ongoing court cases, courts at all levels are obliged to retroactively apply regulations that work to the benefit of the offender. This clause equally applies after the trial is over and the sentence has been confirmed in cases where the penalty is irreversible (such as the death penalty, corporal punishment, or lifelong imprisonment). Therefore, the status quo described in the State Report does not comply with the intent of the ICCPR.

III. Issues neglected by the State Report

(1) The current system used by the Supreme Court's Criminal Division Conferences to select decisions and judgments constitutes a case of judicial administration overriding legislative powers

Simply based on abstract norms, the selection of decisions and judgments by the conferences of the Supreme Court's Criminal Divisions is not legally binding at all. However, in reality the lower courts worry that rulings, that defy Supreme Court decisions or judgments, will be revoked by the higher court. Consequently, for the lower courts the decisions and judgments mentioned above exert a binding force equivalent to or even higher than the law. Trial practice often deviates from the underlying basic facts in order to accommodate the Supreme Court's judgments and

[118] See Manfred Nowak, *U.N. Commentary on Civil and Political Rights. CCPR Commentary* (2nd rev. ed.), Part 3, Article 15, Para. 19-20.

decisions, which gives them seemingly the character of abstract laws. This practice is tantamount to the judiciary itself making law. It increasingly deviates from the principle of "treating similar cases similarly" for which the continued binding force of precedents is the legitimate basis. Therefore there is reason for concern over the violation of the constitutionally mandated separation of powers and independent adjudication (i.e. ability of judges to rule in each case independently). Even worse, such acts by the judiciary cause an increase of restrictions that do not exist in the original law, with negative effects on citizens. They also contravene the principle that crimes are defined and punished by statutory law, as well as Article 15 of the ICCPR.

Take as an example the decision by the 2010 Seventh Criminal Division Conference, which states: "Assuming Party B is over the age of seven and under the age of fourteen, and Party A and Party B have consensual sexual intercourse, then Party A shall be punished under Article 227, Paragraph 1 of the Criminal Code for committing the offense of sexual intercourse with a male or female under the age of fourteen. If Party A has non-consensual sexual intercourse with Party B, where Party B is over the age of seven and under the age of fourteen, or any sexual intercourse with Party B, where Party B is under the age of seven, Party A shall punished under Article 222, Paragraph 1, Subparagraph 2 of the Criminal Code for committing the aggravated offense of sexual intercourse against the will of the victim." In reality the content of the above decision amounts to a change of the constituents of the crime in Articles 221 and 222 of the Criminal Code (sexual intercourse with children, aggravated offense of forced sexual intercourse), because it regards any sexual intercourse with a person under the age of seven as against their will.[119] In contrast,

[119] The age threshold of seven years does not appear anywhere in the Criminal Code, but was created by the Supreme Court. The relevant articles include:

Article 221:

A person who by threats, violence, intimidation, inducing hypnosis, or other means against the will of a male or female and who has sexual intercourse with such person shall be sentenced to imprisonment for not less than three years but not more than ten years.

Article 222

A person who commits an offense specified in the preceding article under one of the following circumstances shall be sentenced to imprisonment for not less than seven years:

1. Offense committed by two or more persons
2. Offense against a male or a female under the age of fourteen
3. Offense against a mentally, physically or otherwise handicapped person
4. Offense with the use of a drug in the offense
5. Abuse against the victim

the wording of the original article means that it must be determined in each individual case whether the act was committed against the will of the other person involved. By making this further restriction to the disadvantage of the offender, the Supreme Court decision violates Article 15 of the ICCPR. Should a court find an offender guilty based on the opinion voiced in the decision, the ruling would clearly violate the principle of statutory definition of crimes and Article 15 of the ICCPR. The State's attitude is further demonstrated in Parapraph 70 (p. 34) of the State Report, which cites this very decision of the Supreme Court's Seventh Criminal Division Conference as evidence that Taiwan is in compliance with the spirit of Article 3 of the ICCPR (equal right of men and women to the enjoyment of civil and political rights). This highlights how ignorant and short-sighted our government acts with regard to human rights.

(2) Retroactive Compulsory Treatment under the Sexual Assault Crime Prevention Act is a backward step:

It needs to be emphasized that Article 15 of the ICCPR is binding for all acts carried out by the State. Therefore the possible violation of the principle of statutory definition of crimes does not only occur as a result of the exercise of judicial power, in connection with individual rulings or judicial administration practices. Legislative actions may also contravene articles of the ICCPR. The most typical example is the violation of the ICCPR's prohibition of retroactive creation of crimes or increase of criminal punishments.

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6. Offense committed by taking the opportunity of operating a means of transportation used for the public or unspecified people

7. Commission of an offense by intruding into a residence or a structure used for residence or a vessel or by hiding inside of it for commission of the offense

8. Carrying a weapon while the offense is committed

Article 227:

A person who has sexual intercourse with a male or female under the age of fourteen shall be sentenced to imprisonment for not less than three years but not more than ten years.

A person who commits an obscene act against a male or female who is under the age of fourteen shall be sentenced to imprisonment for not less than six months but not more than five years.

A person who has sexual intercourse with a male or female who is over the age of fourteen but under the age of sixteen shall be sentenced to imprisonment for not more than seven years.

A person who commits an obscene act against a male or female who is over the age of fourteen years but under the age of sixteen shall be sentenced to imprisonment for not more than three years.

Article 15 (1) applies not only to the definition and constituents of a criminal offense, but also to the punishment applied, which must not be heavier than than in force at the time of the offense. In this context the term "punishment" should be understood in a broader sense. The ICCPR standard must be applied to all types of both punitive and deterrent sanctions. Therefore, lawmaking that imposes retroactive "rehabilitative measures" of a punitive character on citizens also violates Article 15.[120]

On 1 July 2006, newly added Article 91-1 of the Criminal Code took effect, which allows for a seamless succession of treatment in prison or community-based physical and psychological treatment or counseling education for sex offenders. However, since it could not be applied to offenders who committed sex crimes before that date, in 2011 a new amendment, Article 22-1, was added to the Sexual Assault Crime Prevention Act. The legislative intent of the article was clearly to close this "loophole" in the Criminal Code, as can be seen by the fact that it twice includes the phrase "not applicable to Article 91-1 of the Criminal Code." Thus, by adding Article 22-1, the Sexual Assault Crime Prevention Act extends the use of compulsory treatment to convicted sexual offenders who were originally not subject to Article 91-1 of the Criminal Code.

In practice, "compulsory treatment" after a sentence has been served amounts to the restriction of personal freedom through institutional treatment. Such measures have punitive and deterrent character, and thus must be included under the term "punishment" in Article 15 of the ICCPR. Therefore the retroactive regulations in the Sexual Assault Crime Prevention Act severely violate the principle of the rule of law and the statutory definition of crimes. They are not only unconstitutional, but also contravene Article 15.

IV. Conclusion

The problem that Taiwan faces with regard to the statutory definition of criminal offenses and their punishment, which is guaranteed by Article 15, is not a lack of legal norms, but that the laws are not applied in practice. Given that the State Report

[120] Translator's note: "Rehabilitative measures" is the translation used in the official English version of the Criminal Code, Article 1. However, the original Chinese meaning is closer to "preventive measures" (a literal translation would be "peace-preserving measures"). An example of rehabilitative measures is involuntary hospitalization of individuals with severe mental illness.

merely lists relevant laws without going into detail, the government's attitude towards this problem is evident.

Article 17: Right to Privacy

I. Introduction

The State Human Rights Report merely lists relevant laws and regulations pertaining to Article 17 on the Right to Privacy, but does not mention the gap between these laws and their actual implementation. It fails to adequately examine either insufficient legal guarantees and other aspects or violations of the right to privacy by the state.

II. Responses to the State Report

(1) Rampant wiretapping, flawed relief procedures: Response to Paragraph 239 and Paragraph 240 (pp. 98-99) of the State Report

The State Report notes "the communication surveillance petition filed by judicial police to facilitate investigation of criminal cases must be reviewed and approved by the prosecutor first and then filed with the court by the prosecutor. In other words, the procedure goes through two levels of judicial control."[122] According to a news report of June 2010, as many as 75 percent of communication surveillance petitions filed in Taiwan are approved, which indicates abuse of power.[123] Between the end of 2007 and May 2010 a total of 49,634 communication surveillance petitions were approved, according to Judicial Yuan statistics. However in the one-year period between 2010 and 2011 there was a steep rise in wiretapping, so that the average number of cases rose from 1,711 per month for the period from December 2007 to May 2010 period to 1,976 for the 2007-2011 period.[124] These statistics do probably not give the full

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[121] This section was authored by Chiou Wen-tsong (邱文聰), Chiu E-ling (邱伊翎), Ivory Lin (林宜慧), Chang Cheng-hsueh (張正學), Taiwan Disabled People's Association (殘障聯盟, TDPA), and Yeh Hung-ling (葉虹靈), and translated by Susanne Ganz (金樹曦).

[122] Translator's note: According to Article 3 of the Communication Protection and Interception Act, "communications" include: all forms of electronic data (symbols, text, images, voice etc.) that are sent, stored, transmitted, or received via wireless or fixed line devices; mail and written communications; and spoken statements and conversations. Note also that the name of the law exists in three different versions: Communication Protection and Interception Act (from the Ministry of Justice), Communication Security and Surveillance Act (from the Ministry of Interior), Communication Protection and Monitoring Law (from the Council of Grand Justices website), and Communication Protection and Surveillance Law (from the English edition of the State Report). The MOJ version is used here.

[123] *Apple Daily*, 10 June 2010, "75% Wiretapping Approval Rate 'Violates Human Rights'" (in Chinese).

[124] The first figure is from a report "Implementation of Communication Protection and Interception" submitted by the Judicial Yuan to a special committee of the Legislative Yuan, available at http://npl.ly.gov.tw/npl/report/990510/15.pdf (in Chinese), and the dates it covered were 11 December

picture of communications surveillance by the state. The civic groups suggest that the State Report not only provide statistics on the number of wiretapping cases, but also reveal the number of persons under surveillance.

The Communication Protection and Interception Act (CPIA) stipulates that the subject of surveillance must be notified after surveillance has ceased to facilitate application for relief after the fact. But according to a news report, a Control Yuan survey found that in more than one fourth of surveillance cases the implementing agencies failed to notify the subject of the surveillance after the case was closed, as stipulated by law.[125] Members of the Control Yuan asserted that notifying persons who had been put under surveillance after the surveillance measures have ended is important, in that it helps prevent the abuse of communications surveillance and protect human rights. The Control Yuan proposed corrective measures to the Ministry of Justice (MOJ) on the grounds that prosecutors across Taiwan had been clearly negligent because they failed to strictly implement the law. Before the CPIA was amended in 2007, prosecutors were allowed during an ongoing investigation to issue "writs of communication surveillance" upon application by police authorities or by virtue of their own authority without having to go through the courts. In July 2007, the Council of Grand Justices ruled in Constitutional Interpretation No. 631 that communication surveillance orders issued by prosecutors were unconstitutional on the grounds that "their procedures should be reasonable and legitimate to fulfill the purpose of protecting the freedom of privacy of correspondence guaranteed by the Constitution."[126] As required by Interpretation No. 631, the revision of the CPIA in 2007 transferred the right to issue writs of communication surveillance in connection with ordinary crimes to the courts (Article 5, Paragraph 1).

However, writs of communication surveillance issued by the director of the National Security Bureau are subject to judicial control only to a lesser degree or not at all. The CPIA still allows for "emergency surveillance" by prosecutors (Article 6, Paragraph 1) or "national security surveillance" by the heads of national intelligence

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2007 (when the amended CPIA came into force) to 7 May 2010. The second figure come from a draft of the State Report, which listed a total of approved cases from "2007 to 2011" as 82,994, but that datum was removed from the final State Report (the draft, in Chinese only, is available at http://www.humanrights.moj.gov.tw/public/Attachment/1122110331778.docx; this information appears in what was then Paragraph 383). Note that, in order to raise the average over the whole period to this extent, the monthy rate after May 2010 must have been roughly 2,500 per month, an increase of over 40% over the earlier period.

[125] *China Times*, 12 April 2012, "More than 1/4 of Surveillance Subjects Remain Uninformed - Ministry of Justice Asked to Make Corrections" (in Chinese).

[126] The full text of Constitutional Interpretation No. 631 is available at http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=631.

agencies (Article 7, Paragraph 1), as long as they gain approval from the court of the said jurisdiction or the Taiwan High Court within 48 hours of launching the measures. As a result this “48 hour window period” has become a blind spot that escapes court review and control. Presently there is no public information available that would allow substantiating how surveillance is actually carried out during this 48-hour time window. The civic groups believe that relevant statistical data should be made public. At the same time national security surveillance should be controlled under the same procedures as ordinary surveillance, while the time frame for emergency surveillance should be shortened to 24 hours.

(2) The Social Order Maintenance Act cannot truly protect privacy, but is feared to violate press freedom: Response to Paragraph 241 (p. 99) of the State Report

In Interpretation No. 689 of June 2011 the Council of Grand Justices held the view that Article 89, Subparagraph 2, of the Social Order Maintenance Act (SOMA), (“anyone who pursues another person without legitimate reasons and does not listen when being asked to stop shall be fined not more than NT$3,000 or be reprimanded”), is appropriate with regard to protecting the right to privacy. But as the State Report notes, fines were imposed in no more than three cases per year between 2007 and 2011, which indicates that the Article is actually not very effective when it comes to protecting the right to privacy.

With Interpretation No. 689 the Grand Justices for the first time clarified the relationship between the "freedom of news gathering” and "the right to privacy.” The Grand Justices opted to interpret the constitutionality of Article 89, Subparagraph 2, in the narrow sense. At the same time they pointed out that the disputed article does not mean to restrict the freedom of news gathering. In trying to clarify whether news gathering constitutes a “legitimate reason” for following a person, they further noted that news gathering does not fall within the scope of guaranteed press freedom if “it goes as far as continuously approaching another person to constitute an intrusion, with a degree of urgency, in the other person’s physical space, movements, private sphere or the ability to control information about oneself, and having escalated to a degree that could endanger the right to physical and mental safety or the freedom of movement of the person being pursued.”

Moreover, the Grand Justices used the highly abstract terms “the public interest” and “news value” to judge whether there can be talk of “news gathering.” When applying the SOMA, this actually means that the right to interpret what “news

gathering" means is handed to the police agencies, which gives police the opportunity to willfully crack down on news gathering and undermine press freedom. On the other hand, regulations pertaining to the SOMA are touted as protecting people's right to privacy. However, the right to privacy can hardly be expected to gain actual protection just because police may decide to punish a violation with a fine of not more than NT$3,000. Consequently, the regulations of the SOMA have become an actual example of the state cracking down on press freedom in the name of protecting privacy rights.

(3) The revised Personal Information Protection Act still fails to guarantee informational self-determination: Response to Paragraph 243 (p. 100) of the State Report

During the process of amending the Personal Information Protection Act (PIPA), the mass media voiced misgivings because the revised law would also apply to the gathering of personal information by the media.[127] As a result, the Legislative Yuan and the Executive Yuan stepped on the brakes before the third reading of the revised PIPA and added a vague clause that states that the PIPA does not apply in the case of "personal information collected by the mass media for the purpose of news reporting on the basis of public interests."

The new PIPA envisaged fixing the information security loopholes in the old version of the law. While flaws with regard to the law's legal objects and legal subjects were solved, the revision failed to thoroughly resolve several structural problems that had already marred the old law. First of all, both versions fail to properly acknowledge that threats to personal information privacy are not just caused by information security issues at the final point of control, but by the continued erosion of people's right to determine for themselves how their personal information is used during the collection, processing, and use of such information.

The PIPA frequently places "proper reasons" for collecting, processing, and using personal information and "written consent" of the individual of whom the personal information has been collected, processed, or used on the same level or even mixes them with each other. As a result, the "two-tier system" of proper reasons and consent, which was originally meant to restrict the information processing actitivites of those who collect and use personal information while granting people the right to

[127] Translator's note: In addition to many substantive changes, the 2010 amendment included changing the name of the law, from the previous "Computer-Processed Personal Data Protection Law" to the current "Personal Information Protection Act."

informational self-determination, has completely lost its function. Instead, under the PIPA it is not necessary to gain an individual's written consent as long as there are proper reasons for collecting, processing, and using personal information. Against this backdrop, room for "informational self-determination" has been severely constrained. Unfortunately the recent amendments have not remedied this very fundamental problem.

Secondly, the revised PIPA does not provide for the kind of "internal control mechanism" that many countries have adopted or a "prior check mechanism" that should be used for specific personal information. Internal controls are normally realized in the form of an independent information protection officer or committee within an organization or institution. As guardians at the frontline, these mechanisms make sure that the collection, processing, and use of personal information comply with legal requirements. They also often take the role of dealing with prior checks regarding the processing of specific personal information. Given the lack of independent internal control over information processing operations and the absence of prior checking for specific information processing, Taiwan is left without a frontline security checkpoint. As a result we are forced to entirely rely on external controls by the government for the protection of personal information, amid an environment with rampant and mostly unrestrained information processing.

The problem is that the PIPA also shows severe deficits with regard to external control strategies. The revised law fails to solve the old law's failure to provide for a dedicated competent authority for personal data protection, which means that the important responsibility of control and education cannot be clearly assigned. Furthermore, the coordination and liaison tasks that the MOJ had under the original law have been directly scrapped. Instead, the relevant industry competent authority (or local government) is now in charge of controls, which dispersal of power is unfavorable to coordination. On the other hand, government agencies need dedicated control personnel to supervise and coordinate the collection, processing and use of personal information. In the absence of a dedicated agency, it will most likely be impossible to hammer out and implement a comprehensive policy on personal information protection and to integrate effectively education and information campaigns on the concept behind it.

In response to the revision of the PIPA, the MOJ made an advance announcement about the revised Computer-Processed Personal Data Protection Law Enforcement Rules (herein called Enforcement Rules), giving further explanations

about the application of the PIPA.[128] However, some articles in the revised Enforcement Rules clearly exceed the scope of the PIPA itself, and thus they constitute a further infringement of personal information protection. Based on the specific purpose principle, the PIPA stipulates: "when the specific purpose no longer exists or the time period expires, the collecting agency should on its own initiatve or upon the request of the Party delete the information collected and discontinue its process or use." However, it goes on to state that the principle must not be applied "when it is necessary for the performance of an official duty," which means that the restraining effect of the "specific purpose principle" on those who collect personal information is been weakened.

The Enforcement Rules exacerbate this problem by broadening the scope of exceptions deemed "necessary for the performance of an official duty" to include circumstances when the information "cannot be deleted for other legitimate reasons." Even worse, the Enforcement Rules determine whether the specific purpose no longer exists not simply based on "whether the original specific purpose been achieved," but depending on "whether there is a need for continued use," thus completely undermining the specific purpose principle, and throwing the door wide open to the unfettered use of personal information.

Unlike most laws, the PIPA did not enter into force on the day of its promulgation, 26 May 2010. Instead, it stipulated that the date for enforcement shall be set by the Executive Yuan. Since some clauses of the original law were deleted in the course of the 2010 amendment process, due to protests from some operators, enforcement of the new PIPA was delayed for two years after its enactment, creating an extended vacuum in the protection of personal information. Finally, the Executive Yuan reached consensus that the new PIPA would take effect on 1 October 2012, but it still decided to postpone the enforcement of Article 6 (which regulates sensitive personal information) and Article 54 (punishment). The Executive Yuan's approach not only violated the legislature's law-making powers, but also has wideranging implications for the personal information protection of the entire nation.

(4) The Taiwan Biobank violates informational self-determination: Response to Paragraph 244 (p. 100) of the State Report

[128] Translator's note: This name is held over from the previous name of the predecessor to PIPA, the "Computer-Processed Personal Data Protection Law."

The Taiwan Biobank often triggers controversy, because investigators conducting research involving human subjects often fail to clearly notify the subjects to obtain their consent for the eternal and unrestricted use of information or biological specimens taken from them, and because they mislead most people into believing they are only undergoing a free governmental health examination.

The establishment of a national gene data bank is different from ordinary academic research, because it pertains to collecting genetic information from all citizens nationwide. A major policy like this, involving sensitive personal information of the entire nation, should be only implemented after careful evaluation and deliberation. However, the government again did as it saw fit and highhandedly commissioned an academic institution to carry out the project, acting in the absence of any legal authorization. Faced with repeated protests by civic groups, the government eventually proposed the Human Biobank Management Act, which was passed by the Legislative Yuan in 2010. However, medical and pharmaceutical circles again criticized this bill as difficult to implement because it was formulated for all biobanks and not solely to control the Taiwan Biobank. Reacting to the industry's negative response, the Department of Health (DOH) noted that it would help companies find a solution.[129] The effect of this solution is that specimens collected in the past without the consent of the human subjects, even if the concerned party has not subsequently been notified, will not have to be destroyed as required by law. This and other national policies severely infringe citizens' right to informational self-determination and also violate Article 17.

(5) Random DNA sampling: Response to Paragraph 245 (p. 101) of the State Report

In recent years the National Police Agency (NPA) has again and again expressed hopes that the scope of DNA sample collection under existing laws be expanded. On the last day before the term of the 7th Legislative Yuan ended in late 2011, the lawmakers passed a draft amendment to the DNA Sampling Act. During consultations on the statute's revision, the NPA repeatedly broadened the scope of individuals from whom samples may be taken by putting vastly differing crimes within the same category in order to carry out compulsory DNA sampling. Following protests by civic groups, a number of articles that arbitrarily broadened the scope of DNA collection were deleted during the bill's third reading. However, compulsory DNA sampling still applies to suspects who have been charged with, but not yet convicted of, crimes that

129China Times, November 2, 2011, ""Cabinet Loosens Strict Restrictions on Biomedical Specimens"

carry prison sentences of less than one year or fines of only NT$300 (such as Criminal Code Article 173, Subparagraph 3: "preparing to commit an offense" againt public safety). Offenses that require compulsory DNA sampling only after sentencing include crimes of opportunity such as theft. DNA sampling to such a vast extent violates the constitutional principle of proportionality and the principle of presumption of innocence.

At the same time no standards have been set in the DNA Sampling Act for the use and management of criminal DNA databases. In fact the NPA secretely began to collect DNA samples long before the DNA Sampling Act was amended. After establishing a DNA laboratory, the Tainan County Police Department expanded collecting and putting on file DNA samples from suspects and convicts, in the absence of legal authorization. These developments constitute a severe threat to the rights guaranteed by Article 17.

(6) Personal information protection hinges on the discipline of Joint Credit Information Center members: Response to Paragraph 247 (p. 101) of the State Report

The collection, processing and use of personal information by financial institutions for the purpose of credit granting should in the first place comply with laws relating to personal information protection, which means personal information must be used within the scope of the special purpose of its collection. But in reality the member banks of the Joint Credit Information Center (JCIC) use standard contract clauses to force customers "to agree" that their personal information is stored at the JCIC and made available to other financial institutions.[130] Although the JCIC demands that member institutions that query a customer's personal credit information stored at the center first obtain the customer's consent, the JCIC audits its members' discipline only through computer checks after the fact to prevent the abuse of personal credit information, or inquiries about it, without the customer's prior consent. Furthermore, the JCIC cannot refuse inquiries by government agencies. Finally, citizens have no way to find out which organizations have looked up their information.

[130] The precursor of the Joint Credit Information Center (JCIC) was established under the Bankers Association of Taipei in 1975. It was responsible for collecting, processing and exchanging credit data among the association's member banks. In 1992 the JCIC was transformed into a non-profit organization. In March 1993, when the Ministry of Finance designated the JCIC to establish a nationwide credit information data base, the center began to collect credit information of financial customers across Taiwan. However, a legal basis for services involving the processing and exchanging of credit information among banks was only established with the amendment of the Banking Act in 2000.

There have been a number of cases in which JCIC members abused their power to look up personal information without the consent of the person concerned, which in some instances even led to information leaks. But the punishment handed out by the competent authority often does not go beyond restricting members' right to look up information for just a few days or imposing a fine. According to the State Report, in the six-year period between 2006 and 2011, the Financial Supervisory Commission (FSC) punished only 14 financial institutions that were proven to have violated regulations; this is a clear sign that the punishment mechanism is not functioning. All citizens' personal credit information is concentrated and stored in a single database at the JCIC. This does not only constitute an enormous information security risk, but also makes it impossible to ensure informational self-determination, because we lack corresponding effective controls.

(7) The Archives Act restricts family access to the files of victims of political persecution in the name of third party privacy: Response to Paragraph 248 (p. 101) of the State Report

The government formulated the "Application Guidelines for the Return of Private Documents of Victims of Political Persecution Kept at the National Archives" only in 2011, following unrelenting demands for their return by civic groups and the families of victims of political suppression. The families of victims of political persecution during the White Terror period can now get back the victims' private correspondence and family letters that are kept at the National Archives. Before the adoption of the "Application Guidelines," reclaiming these personal documents was entirely impossible. But under Article 18 of the Archives Act, access to the victims' confessions and written notes is still tightly restricted, as it may be denied "to ensure public interest or a third party's due right or interest."

White Terror period cases often involve multiple individuals. If the victims and their families are not allowed to view confessions and written notes of those also involved, they will not be able to get the full picture of their own case. Moreover, many historians have been denied access to documents of the above mentioned categories because of Article 18, which makes research relating to transitional justice a mission impossible and thwarts the quest for historical truth. Under the pretense of protecting privacy, the state restricts the right to know of the victims' families, which means that transitional justice cannot be achieved. The National Archives Administration should reconsider its approach and strike a balance between society's collective interest of finding the historical truth and achieving historical justice and

the protection of personal information (which must not necessarily be termed privacy).

III. Issues Neglected by the State Report

(1) Privacy violations in the name of crime investigation, prevention, and control

1. Search and seizure

Leaving aside wiretapping, the seizure of telephone records kept by telecommunications operators, which include the caller's number; the number called; and the date, time, and duration of phone calls, is often an important measure in the investigation or prevention of crimes. However, such "communications" do not fall under the CPIA, but are personal information in the sense of the PIPA; therefore, when such information is obtained for the purpose of a criminal investigation, the PIPA's restrictions on the use of personal information collected by non-government agencies beyond its original purpose of collection should apply. At the same time the regulations of the Code of Criminal Procedure apply, which requires a writ issued by a court for search and seizure. But in reality the retrieval of communications records does not strictly follow legal procedure. Statistics by the National Communications Commission (NCC) show that prosecutors, police, and other government agencies accessed some 2.2 million cell phone or residential phone records between January 2007 and September 2009, while 2.31 milllion such applications were filed with telecommunications service providers.[131] Although such accessing of telephone records constitutes a de facto search, in none of these cases was either court approval or the consent of the person whose records were checked (prior to or after the checks) obtained.

It is also commonplace that other information collection operations are conducted in a manner constituting illegal search and seizure. According to press reports, between 2010 and 2011 the Daan Police District of the Taipei City Police Department required police officers who, during police raids, encountered suspicious persons or individuals who had been convicted of larceny, mugging, or robbery within the past three years, to not only take down the basic information and names of these suspects, but also videotape them to set up an "investigative images database."

[131] As reported in a news report by China Television System on 18 March 2010, available at http://woman2010.wordpress.com/2010/03/19/%E6%AF%8F%E5%A4%A9%E8%AA%BF%E9%96%B12200%E9%80%9A-12%E5%8F%B0%E7%81%A3%E8%A2%AB%E7%9B%A3%E8%81%BD/ (in Chinese).

Neither the Code of Criminal Procedure nor the Police Duties Enforcement Act authorizes such acts.

2. Video surveillance

In recent years, the installation of closed circuit television (CCTV) systems in public venues has become an important tool in crime prevention and investigation. Across Taiwan installing video surveillance has become a popular trend. CCTV systems are not only installed in public spaces, but also in schools and other educational venues (the restrooms in high schools are equipped with CCTV), often for bullying prevention, whereas video monitoring at the workplace has become a tool to monitor employees. However, crime investigation and prevention are still the foremost purpose of video surveillance. In 2010, for example, the Taipei City Government spent more than NT$1.6 billion to install an additional 13,699 police surveillance cameras in 11,500 locations deemed important for public security, on top of the city's existing video surveillance cameras set up by civil affairs, transportation, and social affairs agencies. Kaohsiung City does not lag behind. Since the city government spent NT$500 million to set up more than 11,000 surveillance cameras across the city, Kaohsiung has the densest video surveillance network in all of Taiwan, with 74.5 police surveillance cameras per square kilometer. Actually the rollout of these video systems is part of the NPA's plan for an integrated nationwide public security video surveillance system, which was adopted in 2006.

However, the collection of personal information such as pictures of faces and number plates through video surveillance cameras in public places or at public entrances and exits in order to conduct crime investigation and prevention does not have a strict legal basis in administrative law. Local government agencies even use self-government ordinances to grant police agencies the power to routinely or randomly access video surveillance systems that have been installed by non-police agencies. Such behavior clearly violates Article 17.

3. Sex Crime Prevention

A number of controversial rulings on sexual crimes in 2010 drew particular public attention to the revision of the Sexual Assault Crime Prevention Act and even triggered a social movement which demanded that Taiwan follow the example of the United States and adopt its own "Megan's Law." The US "Megan's Law" mandates public notification of personal information for sex offenders who have served out their prison sentence or have been granted parole. The reasoning was that if such personal information was publicly available for retrieval, community surveillance and

citizens' self-protection would be strengthened, and repeat sex offenses could be prevented.

Faced with these vocal demands from social activists, the Executive Yuan proposed revisions to the Sexual Assault Crime Prevention Act, choosing conditional public notification as a compromise proposal. But individual lawmakers proposed a dozen more different amendments including demands for unconditional public notification and much more radical proposals such as punishing sex crimes with chemical castration or the death penalty. Following protests by human rights organizations, the Legislative Yuan eventually passed articles that only allow publicizing the personal information of convicted sex offenders who have served out their jail terms or rehabilitative measures, but based on evaluation by the competent authority still require treatment or counseling, yet have absconded or are in hiding, and for whom a circular order for arrest has been issued. While the revised law does not adopt the approach of publicizing the identification information of all sex offenders, it imposes semi-compulsory treatment on top of the regular jail sentence and rehabilitative measures, in the absence of proper legal procedure. This constitutes a violation of the spirit of Article 17.

4. Hotel lodger registration

Article 23 of the "Regulations for the Administration of Hotel Enterprises" and Article 16 of the "Regulations for Administration of Tourist Hotel Enterprises" stipulate that hotels must record information on lodgers on a daily basis and submit this information to the local police department or station. The information must be kept on file for half a year. However, the relevant provision of the primary law governing the two "Regulations," the Act for the Development of Tourism (Article 66, Paragraph 2), does not authorize hotel operators or police agencies to collect personal information of lodgers who are domestic travelers. The "Regulations," for their part, fail to state clearly which personal information the operators or police agencies may collect, and they do not state procedures for the collection and processing thereof, nor measures to protect the safety of the collected personal information, or procedures to destroy it.

In 2011, the Tourism Bureau under the Ministry of Transportation and Communications declared in a formal letter that the collection of personal information by hotel operators and their submission to police agencies is based on the "Rules Governing Registration of Persons Without Residences." However, those Rules had in fact already been abolished on 9 September 2008, because the requirement for the

registration of persons without residence had long been scrapped from their primary law, the Household Registration Act. Therefore, the Tourism Bureau's demand that hotel operators collect the personal information of travelers and submit it to police, in the absence of any legal authorization other than Article 23 of the "Regulations for the Administration of Hotel Enterprises" and Article 16 of the "Regulations for Administration of Tourist Hotel Enterprises," goes against the spirit of Article 17.

5. Detention of defendants

The purpose of pre-trial detention is securing the defendant for trial and ensuring the integrity of evidence. Based on the principle of presumption of innocence, detention measures amount to a restriction of a defendant's human rights. Given that the necessity of detention should be measured against its purpose, it should be restricted to cases where the defendant must be prevented from absconding or colluding. Under the existing Detention Act, the treatment of defendants during pre-trial detention very much resembles that of already sentenced convicts under the Prison Act, with regard to clothing and appearance – for instance, uniform-style clothes, shoes, and socks are distributed by the detention center – and other daily life activities. For instance, Articles 18 and 19 stipulate, "A defendant is allowed to read, but private books shall be examined," and "When a defendant requests to use paper, pen and ink, or read the newspaper, the request may be granted after careful consideration of the circumstances." All this exceeds the scope of what is necessary to achieve the purpose of detention, while the defendant's personal freedom is handled as if he was already serving a sentence. Such treatment during detention runs counter to the spirit of Article 17 of the ICCPR.

(2) Privacy violations in the name of national security

The Ministry of Foreign Affairs officially launched issuance of biometric passports with microprocessor chips on 29 December 2008, and they announced at the end of 2011 that 3.88 million such passports had been issued. The ministry declared that the new passports were necessary to "meet international standards, cooperate with international anti-terrorism drives, prevent identity theft and forgery, gain visa-free treatment from European Union member states and the United States, and facilitate customs clearance for our citizens." The biometric passports store information in the chip, which can be read and transferred with wireless RFID technology and authenticated with electronic authentication technology. They are advertised as providing greater protection against identity theft and forgery and strengthening individuals' control over their own information. But the use of new technologies has

not been able to prevent the creation of even more links in the information processing chain that could be pried open by attackers, raising concern over the possible invasion of individual privacy.

Moreover Article 91 of the Immigration Act states "When aliens, nationals without registered permanent residence, people of the Mainland Area, residents of Hong Kong and residents of Macau undertake inspections on their licenses or apply for residence or permanent residence, the National Immigration Agency (NIA) shall apply biometrics to collect individual's information and then record it for keeping." In June 2011, the Ministry of the Interior adopted the "Regulations Governing the Collection, Management, and Use of Individual Biometric Data." Since then, the foreign nationals mentioned above are required to accept the collection of their facial biometric data and a full set of 10 fingerprints by the NIA. Aside from the original goal of national security control, these "Regulations" permit that other government agencies use individual biometric characteristics data collected by the NIA after obtaining its approval. If the situation is urgent, requests may be submitted via telecommunication, with the original written request to be delivered afterwards.

However, the Council of Grand Justices noted in Constitutional Interpretation No. 603 on the constitutionality of the mandatory collection of fingerprints for ROC identity cards that fingerprints are important personal information and therefore "where it is necessary for the State to engage in mass collection and storage of the people's fingerprints and set up databases to keep the same for the purposes of any particular major public interest, it shall not only prescribe by law the purposes of such collection, which shall be necessary and relevant to the achievement of the purposes of such major public interest, but also prohibit by law any use other than the statutory purposes."[132] The collection of fingerprints from foreign nationals on the grounds of national border security under the Immigration Act does not conform to Interpretation No. 603, which calls for the prohibition of any use other than statutory purposes. This does not only constitute discriminatory treatment of foreign nationals, but also runs counter to the spirit of Article 17 of the ICCPR.

Furthermore, foreign nationals need to undergo a health examination when applying for an alien residence permit. Presently the "Standard Operating Procedure for Post-Arrival Health Examinations of Employed Aliens" of the "C Category" (i.e. blue collar workers) stipulates an examination for Hansen's disease, but does not

[132] The full text of Constitutional Interpretation No. 603 is available at http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=603.

determine an examining procedure. It only states that "a visual check of the examinee's skin is conducted by the physician" and "sufficient lighting should be provided in the examination room." Based on this explanation of the examination, some doctors demand that the examinee must be stark naked, although the examination rooms do not provide full separation from other people. This violates the Department of Health's (DOH) "Rules on Privacy Protection in Outpatient Care." The Centers for Disease Control under the DOH have promised that the planned new "Standard Operating Procedure" will clearly state that underwear may be worn during examinations for Hansen's disease and that hospitals will be required to provide examination gowns. Visual examinations will have to be conducted step by step so that there is no need to undress completely. Only if abnormalties are discovered during the visual check, the physician may touch the examinee for further diagnosis, and no other parts of the body must be touched at will. Even when this adjustment is eventually made, the fact remains that this is an overtly discriminatory measure, since it only applies to certain categories of foreign nationals.

(3) Privacy violations in the name of financial supervision

After the revision of the PIPA in 2010, some non-governmental agencies which collect and process personal information began to lobby for other special laws to have their information operations exempted from the scope of application of the revised law. For example, some lawmakers who had been lobbied by the insurance industry proposed amendments to the Insurance Act, which would have granted insurers the right to collect, process, and use "sensitive personal information" with the prior consent of the person concerned, or even without prior consent "if necessary to prevent insurance crimes and moral risk." The proposed amendments triggered vehement protests from human rights groups, because even when prosecutors, police officers, and Bureau of Investigation officers investigate crimes, they need to follow statutory procedures before they can employ compulsory measures. If insurance enterprises can at will collect, process, and use sensitive personal information without having to go through the court to obtain a writ, and without the consent of the person concerned, this would constitute a big step back for the rule of law.

Fortunately, the revised Insurance Act finally adopted by the Legislative Yuan in June 2011 only permits insurance sales agents to collect, process, and use an insured person's "sensitive personal information" (medical record, medical treatment, health examinations, etc.) with the prior written consent of the insured person. With such consent, in that regard insurers are exempt from the provisions of the PIPA that in

principle prohibit the collection, processing, and use of such information. Although the revised Insurance Act does not permit the insurance industry to collect, process, and use personal information for the purpose of preventing insurance crimes, insurance enterprises may be exempted from the obligation to notify the person concerned "when they process and use legally collected information on the name, date of birth, ID Card number, and contact information of beneficiaries of insurance contracts for the needs of underwriting or claims operations."

Leaving aside the question whether it is legitimate that notification is not necessary for the needs of underwriting or claims operations, the collected information should have to be destroyed when the purpose of its collection has been achieved. But current practice is that insurers still continue to preserve sensitive personal information after the original purpose – underwriting or claims operations – has ceased to exist. Such practices violate Article 17 of the ICCPR, yet the insurance competent authority has not yet adopted relevant regulations to regulate such type of information operations by insurance enterprises.

(4) Privacy violations in the name of public health and medical care

1. Criminalization of male gay blood donors

In March 2011 a homosexual man was indicted on charges of "negligence resulting in severe injury" because he donated blood in January 2010 "although he belongs to a group with a high risk of contracting the HIV virus and should have ben aware that he is probably infected with the AIDS-causing virus." The blood donation eventually led to the death of one person and the infection of another. The Center for Disease Control (CDC) under the DOH criticized the said man, arguing he was clearly aware that he was violating the ban, stated in regulations on blood donation, on homosexual donors and also failed to notify staff at the blood donation center. They also accused the gay man of donating blood with the aim of getting an HIV test. In fact the man in question had been a blood donor for a long time. He also had been regularly taking anonymous HIV tests, including just prior to the blood donation, when he tested negative. He only knew in April 2010 when he took another anonymous HIV test that he was infected with the HIV virus and inferred that his blood donation had fallen exactly into the window period (during which a person who has just been infected still may test negative for the HIV virus).

The DOH has determined the "Criteria for Blood Donor Selection" in accordance with the Blood Derivative Act, which state that "a man who has had sex

with other men" will "never be allowed" to donate blood. In comparison, those who have "had risky sex with anyone, had or been treated for syphilis, gonorrhea, chlymidia, genital herpes, chancroid, genital warts within a year" shall only "defer" blood donation. The "Criteria" clearly use a stricter yardstick for gay men. The DOH does not make safe sex (use of condoms) the criterion for blood donors, but directly supposes that "sex between men" is without exception absolutely risky behavior. These "Criteria" amount to a criminalization of homosexuality (as long as someone engages in homosexual sex, he cannot donate blood), which allows the health competent authorities to shun their responsibility for ensuring a "safe use of blood." Actually, given that the safe use of blood pertains to the health and welfare of the entire public, countries around the globe conduct HIV tests using the most sensitive state-of-the art technology. They do their best to shorten the window period to ensure the most effective protection of the safe use of blood. However, while Canada, the United States, and Singapore have all been using nucleic acid testing (NAT), which has a window period of just 11 days, to screen blood for infection prior to use for a long time, the DOH refused to switch to NAT on the grounds that this technology is too expensive.

After the incident with the tainted blood donation occurred, the DOH, following instructions by the Executive Yuan, stated that it would start to adopt NAT in 2012. However, the DoH again attempted to diminish its responsibility for ensuring national blood safety by voicing concern that NAT technology would attract members of high risk groups to donate blood to get an HIV test. In fact, regardless of whether people engage in "sex among men" there is always a possibility of contracting or spreading the HIV virus. Demonizing male homosexuals to shift responsibility for the safe use of blood away from the DOH will not help truly solve our blood safety problem. Countries around the world have already begun to gradually lift the ban on homosexual donors. The attitude that the DOH displays in its "Criteria for Blood Donor Selection" runs counter to the spirit of Article 17 of the ICCPR. The state should not interfere with people's self-identity and individual sexual orientation, nor take an individual's sexual orientation as a reason to indict and charge him with a crime. In this particular case, the DOH should withdraw its lawsuit.

2. Policy to record HIV/AIDS on National Health Insurance cards

Taiwan's National Health Insurance (NHI) system began to replace paper insurance cards with IC cards in 2004. Since IC cards differ greatly from the old paper cards with regard to the collection, display, use, transfer, storage and destruction of personal medical information, this gave rise to concern that information leaks could

harm the interests of people with specific diseases, particularly because the stigmatization of certain diseases is social reality in Taiwan. Against this backdrop the Personal Information Protection Alliance of Taiwan was launched in 2002. The following year the alliance reached consensus with the Bureau of National Health Insurance that "in the case of a person with a specific disease, medical information related to the disease can be not recorded in the IC card if the person makes such a request." This consensus remains in place to date. Although not without obstacles, it is largely feasible.

In late August 2011 a scandal erupted at National Taiwan University Hospital and National Cheng Kung University Hospital over the mistaken transplantation of organs from an HIV-positive donor. The organs had been transplanted to five patients, putting the recipients at a very high risk of contracting HIV, which caused a public outcry. Public opinion held that HIV/AIDS information is kept too private so that it is difficult for medical personnel to verify whether a person is infected and not possible to check back, which led to this unfortunate transplantation mistake. Since the media only poured oil into the fire, the confused public got in an unprecedented panic. Organ recipients and medical personnel were portrayed as the victims of an excessive protection of the privacy of people with HIV or AIDS (actually, medical personnel wrote letters to the editor almost daily demanding that they have the right to know whether a patient is HIV positive). Several lawmakers and members of the Control Yuan publicly voiced their concern. Lawmakers demanded legal amendments to make it easier for medical personnel to query an individual's HIV/AIDS-related information, while the Control Yuan members began to investigate the mistakes in the competent authority's policy to protect HIV/AIDS information. Public opinion even demanded that an HIV infection be recorded on the NHI card. The CDC, taking an extremely cautious approach to prevent a further spread of the disease, finally expressed opposition to recording an HIV infection on the NHI card for fear that medical staff could become lax, misjudge, and overlook HIV-positive individuals who have not been listed as such. The Center agreed to provide its AIDS information to organ transplantation centers for cross-checking, but emphasized that key for preventing the mistaken transplantation of HIV-infected organs is actual testing prior to any transplantation.

3. Difficulties in promoting electronic medical records

Hoping to boost industrial development, the government has spent huge amounts of taxpayer money (more than NT$200 million in 2011) in recent years to subsidize the implementation of electronic medical record systems. The DOH has set up the

"EMR Exchange Center," which serves as platform for the exchange of electronic medical records among medical institutions. Thanks to the standardization and digitization of electronic medical records, the transmission, exchange and use of medical records has become much more convenient, while the waste of resources caused by redundant repeat health examinations has decreased and patients' safety in seeing a doctor and taking medication has improved. However, electronic medical records also come with a higher risk of personal information privacy violations. For instance, in order to prevent the loss of electronic medical records in the computer systems of medical care institutions, such data are usually backed up remotely using cloud computing, which creates an even greater risk of personal information leaks. The "Regulations on the Creation and Management of Electronic Medical Records" proposed by the DOH in 2009 contain just a handful of articles and mainly focus on the substitution of physical paper medical records with electronic medical records.

Although also pertaining to the safety of electronic medical records, the "Guidelines for the Implementation of Electronic Medical Records by Medical Care Institutions," which were announced in 2004, omitted encryption measures, despite their enormous importance for information safety. An even greater problem is that the convenience of electronic patient records will likely create new demand for their use so that people will be forced to reveal their personal information in ever more situations in which information is collected and used. Against this backdrop, the DOH has emphasized that the computerization of medical records falls under the regulations of existing medical records and that their electronic format will only serve to facilitate their use, but not lead to new additional demands for using them. Therefore, no special regulations on electronic medical records were formulated regarding the protection of informational self-determination.

Patient records are in the first place put together for the purpose of diagnosing and treating individual patients. Therefore they should only be used with the consent of the patient in question. However, actual practice shows that patient records are often used as raw data in research, and that hospitals are even pressured "to create indices and statistical analyses to facilitate research and referencing." The digitization of patient records make their comparison, statistical collation, analysis, and research much easier.

Although the regulatory system under the current PIPA does not specifically regulate the use of patient records for academic research, as with any purpose beyond the original purpose of their collection, in principle the prior consent of the person

concerned should have to be obtained. However, the PIPA waives the prior consent requirement for use in academic research when "the information, after processing by the provider or through the way of disclosure chosen by the collector, makes it impossible to identify a certain person." For lack of more detailed regulations that prescribe how patient records shall be processed to ensure that those who use them cannot identify a certain patient, the digitization of patient records, without doubt, constitutes a potential threat to informational self-determination and personal information privacy.

(5) Privacy violations in the name of academic research

The State Report discusses human trials under Article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment) of the ICCPR, but we believe that the state's violations in connection with human trials are not severe enough to fall under Article 7. Instead they are more related to violations of people's right to control over their body and informational self-determination. Therefore the Shadow Report responds to that part of the State Report under Article 17.

Scientific research is largely conducted in two ways: 1. through direct intervention in individuals or direct collection of personal data and specimens. 2. by using existing personal data or specimens that have been collected for another purpose.

1. Conducting research through direct intervention in individuals or direct collection of personal data or specimens

The Legislative Yuan adopted the Act on Human Subjects Research only in 2011, creating a legal framework for the rights of research subjects and the ethical review mechanism in research. Before this Act was adopted, already a number of cases had occurred in which research ethics were contravened and the research subjects' right to control over their bodies was violated. For instance in 2007, Marie Lin, a researcher at the Department of Medical Research at Mackay Memorial Hospital, triggered protests from the Kavalan tribe for collecting saliva samples from its members for research without confirming whether an ethics review had been carried out and without fully informing the research subjects of their rights and the purpose of her research. Lin also failed to obtain consent from a tribal meeting in accordance with the Indigenous Peoples Basic Law. As a result, the Kavalan people called for a collective pull-out from the research project and the destruction of the saliva samples. Subsequently, the

National Science Council convened its Academic Ethics Committee, which ruled that Lin had violated research ethics and issued a letter demanding corrective measures.

Between December 2010 and January 2011 the "Nutrition and Health Survey in Taiwan" was conducted on behalf of the Food and Drug Administration under the DOH. When specimens were collected from junior high school students from indigenous peoples in Hsinchu, some of the students refused to participate because no prior consent had been obtained from their tribal village, and the parents of some students had not even seen a consent form. But the researchers continued to put pressure on the students, which triggered a major controversy.

In 2006 the Ministry of Education commissioned an "Information Platform on the Whereabouts of University and College Graduates," which tracks students before graduation until one year after graduation with regard to entry into graduate school, military service, employment, search for work, further training etc. The project still continues, but when cooperating with the survey a minority of universities and colleges do not properly explain to students the category of this research and even make participation in it a prerequisite for obtaining their graduation certificates. Such an approach violates the principle that research should fit in with the personal autonomy of the research subject.

Research projects that violate research ethics and individual rights increasingly trigger attention and corrective action, because research subjects are more and more aware of the need to protect themselves. But it remains to be seen how the Act on Human Subjects Research will be able to effectively protect research subjects in practice.

2. Conducting research using existing personal data or specimens

It is quite common that research is conducted by indirectly using existing data and specimens that were collected for other purposes. However, such practices also often raise questions as to whether the reuse of data or specimens after the purpose of their collection has changed violates the rights of the specimen donor. For instance, membership-based private health examination companies provide specimens and data from their members to academic institutions for research without notifying or seeking the consent of the specimen donors. Blood donation centers provide remnant blood samples to research institutions for research without notifying the donor or seeking his or her consent. Specimens and data collected in the course of the "Nutrition and

Health Survey in Taiwan" are used in obesity research. Medical specimens that have been kept without the prior consent of the specimen donors are used in new research to which the donors never consented. Furthermore, the situation is growing more serious in genetic research, where existing specimens and data are used to establish biobanks.

Still, current law is clearly quite insufficient with regard to protecting the rights of the person concerned when existing data or specimens are indirectly used to conduct research. Under the Computer-Processed Personal Information Protection Act of 1995 the prior consent of the interested party was not required when personal information "is necessary for academic research and does not harm the major interest of the interested party." It was also not necessary to consider privacy protection since all personal information collected by "government agencies" could be used for academic research, although it lies outside the original purpose of the collection of the said information. "Non-government agencies" cannot use personal information for purposes other than the original purpose of its collection in the name of academic research. However, they repeatedly cite the abstract "promotion of the public interest" to use personal information that has been collected for other purposes in academic research without seeking the consent of the specimen donor.

Following its revision in 2010, the amended PIPA allows government agencies or academic research institutions to use personal information outside the specific purpose of collection "in statistics or for the purpose of academic research where it is necessary in the public interest." However, it restricts such use to information that has been processed by the information provider or disclosed by the collecting agency in a way that makes it impossible to identify a specific person. Taking into consideration the protection of individuals' control over their personal information, the amendment only allows the use of personal information outside its original purpose of collection if it is no longer related to a certain individual (which is known as "delinking" of the information). While this represents a major step forward in protecting information privacy, the concept of individual control over personal information has not been clearly incorporated. As a result, information can be delinked against the individual's will and then be used for purposes other than the specific purpose of collection. This runs counter to the intended protection of privacy under Article 17.

With regard to the use of existing specimens, the DOH in 2002 formulated the "Guidelines for Collection and Use of Human Specimens for Research." These stipulate the principle that specimens are used in accordance with a specific purpose.

The "Regulations on Human Trials" adopted in 2009 stipulate that "the trial subject's biological samples, personal data, or derivatives shall be destroyed immediately upon completion of the human trial." In 2009 the Legislative Yuan adopted the Human Biobank Management Act, which tacitly allowed the continued use of existing biological specimens with the "general consent" of the person who provided the specimens, so that it is not necessary to again obtain the participant's consent should the specimens be used in separate research projects in the future. This violates the principle that "consent" should be limited to a specific purpose. Given that no mechanism has been designed for continued notification when specimens are used in future research, participants' right to control over their personal information will likely be violated, which would also run counter to the protection of personal privacy under Article 17.

(6) Privacy violations in the name of social welfare benefits

In recent years electronic payment systems (EPS) have become a trend in using public services. In order to provide preferential treatment, such as reduced fares, to specific groups it must be possible to identify the status of users of EPS cards. However, this again leads to new privacy challenges. In accordance with the amended Ministry of Transportation and Communications (MOTC) "Operating Procedure Guidelines on Integrated Subsidies for EPS Multifunctional Cards in Public Road Passenger Transport" announced on 2 August 2010, the MOTC formulated the "Functional Requirement Standards for EPS Multifunctional Cards." Point 12 of these Standards states that EPS cards "must be able to deduct different amounts based on cardholder status, while indicating cardholder status through different sound or light signals; must be able to display the ticket name, ticket type, transaction amount, remaining value, and transaction time of each electronic ticket transaction for simultaneous reading by driver and passenger in a clearly discernable way within a reasonable viewing distance." Presently different EPS card operators use different sounds (such as three loud beeps) or voice announcements (such as "charity card holder boarding") to indicate different card categories. This leads to the exposure of cardholder status, and often causes special user groups, particularly persons with disabilities, to face stigmatization or condescending glances from fellow passengers. Some disabled persons, particularly those who based on their appearance are not easily identifiable as mentally disturbed persons, face the mental anguish that their condition is exposed each time they board a means of mass transportation. Due to their longtime discrimination and stigmatization in society, many disabled people participate even less in society to avoid exposing their status. Revealing an

individual's disability status in public violates the personal privacy guarantees of Article 17. But presently the competent authorities have not yet actively looked into measures to solve this problem.

The State should formulate relevant laws and regulations to ensure that disabled people are no longer forced to reveal their disability status when using reduced fares and other benefits relating to public services.

IV. Conclusions and Suggestions

Overall this Shadow Report makes the following suggestions:

The PIPA should be amended again to write into law a dedicated agency for the protection of personal information. Through the amendment the collection, processing, and use of personal information by government agencies should be restricted by reaffirming people's right to control over their personal information and the principle of the rule of law. Until the law has been amended, the MOJ should use legal interpretations to make sure that the current PIPA complies with the principle of personal information autonomy in its actual application. But the Enforcement Rules of the Personal Information Protection Act should not go beyond the primary Act and inappropriately expand the powers of the government or non-government agencies in using personal information after the specific purpose of its original collection has ceased to exist.

With regard to striking a balance between crime investigation and prevention as well as privacy rights, we suggest the following:

(1) Wiretapping by the National Security Bureau should be subject to the same controls as ordinary surveillance procedures, while the window period for emergency surveillance should be shortened to 24 hours.

(2) Stricter legal controls are needed with regard to accessing telephone records. Crime databases without legal basis should be abolished and the already collected personal information should be deleted.

(3) Compulsory DNA sampling must comply with the principle of proportionality stated in Article 23 of the Constitution and must not be expanded to petty offenders. The samples and information in DNA databases should be managed separately. The NPA may only use DNA information in connection with crime investigations. The retrieval and reuse of of DNA samples must be independently

monitored and should require a court order and the prior consent of the individual of whom DNA has been collected.

(4) When the State produces its own video surveillance materials or obtains privately-produced video surveillance materials, it should be authorized to do so by administrative law which clearly states the specific purpose of and legitimate reason for collecting video surveillance materials.

(5) The "Regulations for the Administration of Hotel Enterprises" and the "Regulations for the Administration of Tourist Hotel Enterprises" should be immediately amended.

(6) Restrictions in the Detention Act on the privacy of defendants that go beyond securing the defendant for trial and ensuring the integrity of evidence should be immediately abolished.

With regard to striking a balance between national border security and privacy rights, we propose the following suggestions. First, fingerprinting of foreign nationals on the grounds of border security under the Immigration Act, against the intention of Interpretation No. 603 which restricts the use of fingerprinting beyond its original purpose, should be amended. Second, the government should formulate standing operating procedures for health examinations of foreign nationals that are clear, disclosed to the public, and comply with international human rights and privacy standards.

With regard to striking a balance between financial supervision and privacy rights, we suggest that the legality and legitimacy of personal information collection, storage, and usage by the JCIC should be immediately and comprehensively reviewed, while an effective control mechanism on the processing and use of information must be established.

Regarding the decriminalization of sexual identity (self-identity), we believe: The DOH should amend the clauses in the "Criteria for Blood Donor Selection" that permanently ban certain groups from donating blood and should substitute the clause "sex among men" with "risky behavior that likely transmits viruses."

Regarding the protection of privacy in medical records the civic groups believe:

(1) As part of the policy for the digitization of patient records, standard procedures should be determined for the safe encryption of information. Before the digitization policy is promoted any further, it must be established how medical

records should be processed so that the user of the records cannot identify a specific patient.

(2) In order to protect the interests of researchers and research subjects, the Act on Human Subjects Research should clearly incorporate the concept of the subject's autonomy. It should also prohibit the delinking of information against the personal will of the research subject, to prevent the use of personal information for purposes other than its original specific purpose.

(3) The State should formulate relevant laws and regulations to ensure that disabled people are no longer forced to reveal their disability status when using reduced fares and other benefits relating to public services.

With regard to the controversy surrounding transitional justice and privacy rights, the State should convene a public hearing to amend Article 18 of the Archives Act to ensure that a proper balance is struck between personal information (not necessarily sensitive personal information) and the public interest (transitional justice). An amendment must also guarantee the right to know of the victims and their families, researchers, and society at large.

With regard to striking a balance between press freedom and privacy rights, we believe that Article 89 of the Social Order Maintenance Act should be amended to clarify the circumstances that constitute an offense and under which a penalty is imposed, in order to balance the right to privacy and the freedom of news coverage.

Article 19: Freedoms of Opinion, Expression, and the Press, as well as Freedom of Information[133]

I. Introduction

The State Report failed to seriously discuss the problems encountered in broadcasting and news freedom or to mention public criticisms. Nor did it put forward government measures to correct these problems and ensure the guarantees for the rights of free expression and news and broadcasting freedom contained in Article 19.

II. Responses to the State Report

The State Report asserts that Taiwan at present enjoys a high degree of news freedom and lists various statistical data, such as the number of licensed media and the number of television and radio stations and broadcasting channels, to prove that Taiwan has free flow of information. However, civic organizations believe that this section of State Report is avoiding the main issues and focusing on trivialities. For example, it does not adequately address the threat to news freedom and freedom expression posed by the media concentration and monopolization, the bitter controversy over the Taiwan Public Television Service, the role of the National Communications Commission, the degree of openness of government information, and the guarantees of journalistic professionalism. Therefore, the Shadow Report will focus on these issues and put forward our observations and criticisms.

(1) The government is tacitly permitting media monopolization harmful to the diversity of source and expressions and news freedom: Response to Paragraph 258 (p. 105) of the State Report

The State Report acknowledges that "the non-stop efforts of powerful companies to enlarge their 'slice of the media pie' with massive capital will result in seriously adverse effects as a result of concentrated media ownership." However, the government has taken no significant action to curb the concentration of media ownership in the hands of private conglomerates or adopted any action to prevent Taiwan society from suffering the "seriously adverse effects" on freedom of expression and news freedom that such concentration will inflict, as stipulated by

[133] This section was authored by Tsai Chi-hsun (蔡季勳), Sung Hsiao-hai (宋小海), Wang Shu-cheng (王毓正), and Dennis Engbarth (安德毅), and translated by Dennis Engbarth (安德毅).

Paragraph 40 of United Nations Human Rights Committee General Comment No. 34.[134]

In November 2005, Taiwan's national legislature approved the National Communications Commission (NCC) Organization Act. After it took effect, the NCC became the competent agency to administer all laws and regulations involving communication and broadcasting, including the Telecommunications Act, the Radio and Television Act, the Cable Radio and Television Act and the Satellite Broadcasting Act, and for all related regulatory measures including reviewing applications for and renewals, retractions, or cessation of broadcasting licenses for terrestrial, cable ,or satellite radio or television broadcasting enterprises.

With regard to some major media review cases which have been the object of considerable concern in society – from the purchase by the Want Want Group of China Television Corp (CTV, one of Taiwan's original three terrestrial broadcasters), CTiTV cable television, and the *China Times* print media group, to the subsequent acquisition by a subsidiary of the Want Want China Times Media Group (hereinafter WWCT) of Taiwan's largest cable television systems operator China Network Services (CNS) – NCC commissioners theoretically should have carried out a comprehensive process of democratic discussion and review. However, the battleground over media mergers and acquisitions is not restricted to the NCC chamber or professional and public hearings but also extends to arenas outside the NCC, including the use by media owners and conglomerates of the public assets of news media as their personal tools, the abuse of laws and regulations, legal actions against civic organizations or journalists, and other improper actions.

For example, on the eve of a NCC hearing on the takeover by the Want Want Group of the takeover of the CTV, CTiTV, and the *China Times* in May 2009, the Want Want Group sent formal legal notifications to threaten libel suits against several scholars and journalists who spoke out in opposition to the acquisition. In September 2011, as WWCT was preparing to buy CNS, a reporter for the *New Talk* internet newspaper filed a story headlined "KMT Legislator Twice Pressures NCC Regarding the Case of the WWCT-CNS Merger."[135] The legislator in question, Hsieh Kuo-liang,

[134] See United Nations Human Rights Committee, General Comment No.34: Article 19: Freedoms of opinion and expression, 12 September 2011, available at http://www2.ohchr.org/english/bodies/hrc/comments.htm.

[135] The original article by senior journalist Lin Chao-yi, "WWCT-CNS merger: two KMT legislators lobbied the NCC," was published on the *New Talk* website on 2 September 2011. The article has since been removed, but it is available as part of a compilation of related news items and reports at http://www.mediawatch.org.tw/sites/default/files/20110902-1022press_freedom.pdf (in Chinese). See

sued the chairman of *New Talk* and the reporter for criminal defamation and filed a motion to freeze their assets.[136]

Moreover, during the NCC review of WWCT's application to purchase CNS, media outlets controlled by the WWCT, notably the *China Times*, *China Times Weekly*, China Television, and CTiTV, engaged in incessant personal attacks, including fabricated reports, on several persons who voiced criticism of the acquisition, including legislators from the DPP and KMT, a senior legal scholar, and even a student protestor, that led to numerous resignations among *China Times* editors and reporters and sparked a major demonstration of nearly 10,000 citizens directed at WWCT and Tsai on 1 September 2012.[137]

Despite all the objections raised by media reform organizations, scholars and lawmakers from almost all parties over the monopolistic impact of the merger, as well as the WWCT's record as one of the worst offenders in the controversy over "embedded advertising" or "paid news" (see below), the NCC on 25 July 2012 "conditionally" approved the application by WWCT to purchase CNS. However, Tsai Eng-meng has refused to accept the conditions imposed by the NCC, notably its requirement that WWCT must divest from the CTiTV news channel, and is appealing the decision to the administrative court.[138]

Again and again it can be seen that in the process of the concentration of Taiwan's media into conglomerates that news media can easily become tools at the service of tycoons. Moreover, in the wake of the movement by columnists to boycott the *China Times* in February 2012 after Tsai Eng-meng made improper comments in an interview with a foreign media, it can be seen how news media, which should be a

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also Dennis Engbarth, "Taiwan Libel Law Clashes with UN Human Rights Standards," *New Talk*, 28 October 2011, available at http://newtalk.tw/blog_read.php?oid=4174.

[136] The International Federation of Journalists expressed concern over the suit and the continued use of criminal defamation laws to curb press freedom in Taiwan in a statement on 26 October 2011, available at http://asiapacific.ifj.org/en/articles/ifj-calls-for-end-to-criminal-defamation-in-taiwan.

[137] See Loa Iok-sin, "Netzens blame Want Want for scandal," *Taipei Times*, 30 July 2012, available at http://www.taipeitimes.com/News/front/archives/2012/07/30/2003538983, "Want Want's actions likely will incur opposition, not submission," *China Post*, 1 August 2012, available at, http://www.chinapost.com.tw/editorial/taiwan-issues/2012/08/01/349393/Want-Wants.htm, and Shelley Shan, "More quit over Want Want row," *Taipei Times*, 15 August 2012, available at http://www.taipeitimes.com/News/taiwan/archives/2012/08/15/2003540353.

[138] See "Pro-China tycoon will be allowed to acquire Taiwan TV cable operator," *China Screen News*, 26 July 2012, available at http://china-screen-news.com/2012/07/pro-china-tycoon-will-be-allowed-to-acquire-taiwan-tv-cable-operator.

social asset to reflect democratic and pluralist views, can instead be controlled by a small number of bosses. Such media bosses, due to their particular political stances, may at every turn intimidate reporters to "think carefully before they write."[139]

Such interference in journalistic professionalism and autonomy has already gravely infringed on the health of Taiwan's democracy. If the news media loses its original function as a reporter and examiner of political and economic phenomenon, it will degenerate into a mouthpiece for the positions preferred by conglomerates.

In addition, there are suspicions that the NCC carries out "advance hearings" on its reviews for licenses. For example, on 13 August 2009, the Next Media (Taiwan) Group applied to operate five cable television channels, namely Next TV News Channel, Next TV Variety Channel, Next TV Movie Channel, Next TV Sports Channel, and Next TV Shopping Channel. However, the controversial coverage of sexual assaults, sexual harassment and violence against children and families and animated simulations of the scene and process of such crimes in the Next Media Animation website launched by the group's *Apple Daily News* in November 2009 sparked concerns over the infringement on the human rights of crime victims and even possible copy-cat effects on juveniles.

Nevertheless, regardless of how the animated news was used and the fact that the Next Media Group had already set up a media with sensational sexual and violent coverage, the NCC had repeatedly rejected the applications by Next Media even before the animation website had been officially established and began broadcasting, based on the possible problems that had not yet occurred. In March and July 2010, the NCC in separate decisions approved the applications for the movie and sports channels; however, in September 2010 again resolved not to issue licenses for the Next Media variety, news, and shopping channels. As a result, Next Television filed an appeal in administrative appeal to the Executive Yuan that charged the NCC with citing "possible improper content" to abrogate Next TV's constitutional rights to "operate and use media equipment to receive information and express viewpoints." Numerous broadcasting scholars and legal professionals upheld similar views and the International Press Institute (IPI) also expressed concern. Finally, in July 2011, the

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[139] Andrew Higgens, "Tycoon prods Taiwan closer to China," *Washington Post*, 20 January 2012, available at http://www.washingtonpost.com/world/tycoon-prods-taiwan-closer-to-china/2012/01/20/gIQAhswmFQ_story.html. In the article, Tsai was quoted as saying that journalists "are free to criticize, but 'need to think carefully before they write.'"

NCC and the Next Media Group negotiated an agreement that allowed the issuance of operating licenses to all five channels.

These trends have combined into a major crisis for Taiwan's future media development that poses a grave threat to diversity of sources of information and channels for expression of citizens.

On 29 November 2012, in large part due to losses suffered by Next TV due to delays in regulatory approval, the Next Media Group (which is owned by Hong Kong-based garment and media owner Jimmy Lai) signed a contract in Macao to sell the four media operations of Next Media (Taiwan) for NT$17.5 billion (approximately US$600 million) to five investors, including WWCT President Tsai Shao-chung (the son of controversial Want Want tycoon Tsai Eng-ming), Formosa Plastics Group Chairman William Wong, and Chinatrust Charity Foundation Chairman Jeffrey Koo, Jr.

In the light of statements by regulators that the focus for an FTC review should be the "overall economic interest," scholars, journalists, economists, and consumer rights representatives attending a public hearing held at the FTC 29 November 2012 unanimously urged the FTC to veto or at least suspend approval until the national legislature enacts robust legislation to regulate cross-sectoral media monopolization.

National Taiwan University Department of Economics Chair and Professor Cheng Hsiu-ling estimated that acquisition of the Next Media (Taiwan) units of *Apple Daily*, *Sharp Daily*, *Next Magazine* and Next TV by the consortium substantively led by Want Want Group chairman Tsai Eng-meng would give the latter control over 51% of Taiwan's national newspaper market, 19% of the terrestrial TV market, 24% of the cable television market, 25% of the cable TV channel agency market, 36% of the consumer product purchasing channels, 16% of the magazine market, and 28% of the cable operating systems market.[140]

Professor Cheng warned that this combination would turn the WWCT Group into "vertically and horizontally integrated hegemon" and would result in the concentration of advertising and circulation and eventually force the remaining two national newspapers, the *Liberty Times* and the *United Daily News*, out of the market.

[140] Cheng Hsiu-ling, "Media Mergers and Integrated Regulation of the Fair Trade Act," testimony at public hearing held by Fair Trade Commission, 29 November 2012 (in Chinese). See also Dennis Engbarth, "Media Giant Advances on Taiwan," Inter Press Service, 2 December 2012 http://www.ipsnews.net/2012/12/media-giant-advances-on-taiwan.

Given the dominant role of national newspapers as "agenda-setters" for almost all news coverage in Taiwan, the substantial possibility that Taiwan citizens may be left with only one upstream source of news poses a fundamental threat to both Taiwan's news freedom but also to the viability of its democratic system and the fundamental human rights of its citizens.[141] The gravity of such a threat is compounded by the character of the prospective new owners and their business links with the authoritarian People's Republic of China and the likelihood, as shown by the track record of the investors, that these media will be used as personal tools and lose their character as social assets.[142]

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[141] The International Federation of Journalists has twice expressed concern over the impact of the Next Media (Taiwan) acquisition on media diversity, press freedom, and labor rights, first on 23 October 2012, available at http://asiapacific.ifj.org/en/articles/concerns-for-media-diversity-and-workers-rights-in-taiwan, and then on 23 November 2012, available at http://asiapacific.ifj.org/en/articles/fears-for-media-diversity-and-press-freedom-heightened-in-taiwan.

[142] Besides the actions and statements related above, Tsai Eng-meng was referred to in a *South China Morning Post* report on his sizable capital input into Hong Kong's Asia Television, known for a clear pro-Beijing editorial slant, in February 2009 as "chairman of Hong Kong-listed Want Want China, one of China's biggest snack makers." His role fits the pattern described by Civic Exchange thinktank head and former Legislative Council member Christine Loh of the PRC's using "tycoons with substantial Mainland interests" as proxies to take control of Hong Kong media in her book *Underground Front: The Chinese Communist Party in Hong Kong* (Hong Kong University Press, 2010, p.217). For a sample of the type of coverage available on Asia Television, see "Hong Kong's ATV: London and Washington behind anti-National Education protests," Shanghaiist, 4 September 2012, available at http://shanghaiist.com/2012/09/04/hong_kongs_atv_london_and_washingto.php.

With regards to William Wong, the Formosa Plastics Group of which he is chairman has a major power plant in Zhuangzhou, Fujian Province and at least 40 FPG-built factories across China, as well as numerous petrochemical facilities in Taiwan. Its accident-plagued sixth naphtha cracker in Yunlin County has been the target of several investigative reports by *Apple Daily* and *Next Magazine*. Moreover, the FPG's stance toward critics is reflected in a controversial NT$40 million criminal defamation suit filed by Formosa Plastics Group in April 2012 against National Chung Hsing University Professor of Environmental Engineering Tsuang Ben-jei (see point (4) below.).

Once on Taiwan's most wanted list, Jeffrey Koo, Jr., former Chinatrust Financial Holding Company chairman, is currently appealing against an insider trading conviction for misusing Chinatrust Financial funds to buy a stake in Taiwan's Mega Financial Holding in the notorious "Red Fire Case." National Taiwan University Professor of Journalism Chang Chin-hua stated 29 November that Koo was "unsuitable" to be a board director in cable television media as the Satellite and Cable Television

In the light of arguments raised by advocates for the WWCT-CNS merger that current law did not regulate cross-sector media acquisitions, numerous scholars have advocated that the problem of cross-sectoral media monopolization should be resolved through the enactment of legislation. In April 2012, lawmakers from all major parties introduced revisions to the Cable Television and Radio Act that would prohibit television stations or newspapers or shareholders with more than a 10% holding in such media from directly or indirectly owning more than 10% shares of cable system operators, and would require central government agencies to deny licenses to any applications that would be unfavorable to the development of media industry or the upholding of professional autonomy.[143] However, the government has not displayed interest in such legislation; instead, the majority KMT legislative caucus on 30 November 2012 rejected opposition motions to postpone review of the Next Media acquisition until a robust anti-monopoly statute could be enacted.[144]

(2) Incessant Controversy over Public Television: Response to Paragraph 258 (p. 105) of the State Report

The public Taiwan Broadcasting System (TBS) was formed on 1 July 2006 and thus became the largest broadcast media in terms of numbers of employees.[145]

Act prohibits any person convicted of breach of trust or fraud from being a director, supervisor, or executive in a television media. See Chen Chih-hsiang, "Chang Chin-hwa: Given the Red Fire Breach of Trust Case, Koo Jr. should not become a director of Next TV," *New Talk*, 29 November 2012 available at http://newtalk.tw/news_read.php?oid=31510 (in Chinese).

143 "Demand that the National Communications Commission reject the Want Want-China Systems Network Acquisition and Refuse Media Monsters! Urge the Legislature to Enact Revisions to the 'Cable Television and Radio Act,'" Press Release of the Office of Legislator Yu Mei-nu, 25 April 2012, available at http://www.ly.gov.tw/03_leg/0301_main/dispatch/dispatchView.action?id=36018&lgno=00008&stage=8&atcid=36018 (in Chinese), and Chris Wang, "Media merger rule changes proposed," *Taipei Times*, 26 April 2012, available at http://www.taipeitimes.com/News/taiwan/archives/2012/04/26/2003531304.

144 Hsieh Li-hui, "The opposition motion to block the Next Media merger is vetoed by the KMT majority," 30 November 2012, available at http://newtalk.tw/news_read.php?oid=31537 (in Chinese).

145 Translator's note: The Taiwan Broadcasting System was formed by the merger of the Public Television Service (founded in 1998) and the state-owned Chinese Television System, as well as three smaller government-run stations: Hakka Television, Taiwan Indigenous Television, and Taiwan Macroview Television, and PeoPo (People Post or Taiwan Citizen Journalism Platform (http://www.peopo.org). The governing body of TBS is the Public Television Service Foundation. The intent at the time was to remove the state from any direct ownership role in television broadcasting (the

However, despite many quality programs, it has lagged far behind its potential due to inadequacies of related government polices and management and personnel frictions. The State Report only contains one sentence on the issue, namely that "the Public Television Act stipulates that Public Television belongs to the whole body of citizens. Its operation is independent and autonomous. There are, however, disputes over the operation of the Public Television Board of Directors [i.e. the board of the Public Television Service Foundation (PTSF)] at the moment pending discussions and improvements." This brief passage makes no mention of any substantive re-examination or planned improvements, such as how to ensure the independence and freedom of the Taiwan media and the right of information of the whole society.

Civic organizations involved in long-term efforts to promote news freedom and media reform in Taiwan have noted that the enactment of revisions to the Public Television Act to bring that act in line with the operational needs of the TBS is seen as being even more important by the public. The focus of public proposals for revisions in the act remains on pushing the government to draft a comprehensive public television development policy and demand that the executive and legislative branches adopt an integrated policy framework for national-level public media development. However, during the past four years, the Legislative Yuan has only approved revisions to the Public Television Act that have expanded the size of PTSF board of directors to 21 persons in order to facilitate the stacking of the PTSF board by the ruling party.

In fact, despite the brevity of the State Report's mention, the controversy over the composition of the PTSF board of directors and the management of PTS has raged almost continuously since 2008. In 2009, as noted above, revisions to the Public Television Act were adopted with the apparent goal of stacking of the board. Legal disputes ensued as the original board attempted to prevent the stacking. In December 2009, the Control Yuan issued an order to the Government Information Office (GIO) for corrective measures for shortcomings in the review process for the fourth-term board and the mutual contradictions in the GIO's determination of the number of legal members of the board of directors.[146] In 2010, the GIO secured an injunction against PTSF Chairman Cheng Tung-liao (and several other directors) and replaced him with acting chairman Chen Sheng-fu. Most recently, the Taiwan Supreme Court issued a

two other main terrestrial television broadcasters were privatized at the same time) as well as to create a public broadcaster with adequate resources. Note that Chinese Television System (CTS) and China Television (CTV, now part of the Want Want China Times Group) are two totally different broadcasters.

[146] Translator's note: The GIO has since been disbanded, with its functions and personnel distributed among various agencies. Responsibility for public television now lies with the Ministry of Culture.

judgment on 22 October 2012 rejecting an appeal by the Ministry of Culture against a similar decision by the Taiwan High Court in August 2011, and thus finally rescinding the 2010 injunction, formally restoring Cheng and the other members of the fourth board to office, but it remains to be seen how the Ministry of Culture and the occupying PTSF management will respond to the decision.[147] Meanwhile, on 5 June 2012, former PTS General Manager Sylvia Feng won a favorable judgment from the Taiwan High Court in her suit against what she believed was her illegal dismissal by acting chairman Chen in September 2010.[148]

Moreover, political wrangling has so far stymied the selection of the fifth PTSF board; thus the three year tenures of the members of the controversial fourth PTSF board, which were slated to end on 3 December 2010, have been repeatedly extended until the time of writing. As of its third meeting on 20 August 2012, the review board chosen in the wake of the January 2012 legislative elections had succeeded only in confirming the nomination of three board members and two supervisors.[149] Ostensibly to overcome the deadlock, Culture Minister Lung Ying-tai has followed in the footsteps of past GIO chiefs by proposing revisions to the Public Television Act that would reduce the threshold for approval of PTSF board members from the current three-fourths majority of the review board nominated by the legislative caucuses to a simple majority.[150] The series of revisions in the Public Television Act to change the size of the review board and the subsequent attempts to reduce thresholds for the approval of PTSF directors and supervisors introduced previously by the KMT dominated legislature itself cannot but give rise to suspicion that the ruling party intends to keep changing the rules until it gets what it wants.[151] The original intent of the requirement for either a two-thirds or three-fourths majority was to prevent short-term political influences from dominating public broadcasting, whereas a simple majority would hand over control to the party with the legislative majority, making

[147] The reinstated board members held a press conference on 2 December 2012 to call for thorough reforms and a return to professionalism. See Chou Pei-hung, "6 PTS directors reinstated, raise 3 demands and call for constitutional interpretation," ET Today News, available at http://www.ettoday.net/news/20121203/134801.htm#ixzz2E9B5y4Pv (in Chinese).

[148] See Liu Li-jen, "Open review of PTS board: watchdog," *Taipei Times*, 25 June 2012, available at http://www.taipeitimes.com/News/front/archives/2012/06/25/2003536186.

[149] Central News Agency with Staff Writer, "Meeting to elect PTS board fails again," *Taipei Times*, 21 August 2012 http://www.taipeitimes.com/News/taiwan/archives/2012/08/21/2003540820.

[150] In March 2011, the Cabinet proposed revisions to Article 11 of the Public Television Act so that board members and supervisors would only need two-thirds approval, but the bill was unable to pass the Legislative Yuan before its term ended in January 2012. On 29 March 2012, the Cabinet submitted a new package of amendments that would reduce this threshold even further, to a simple majority. See Media Watch, "Media Reform Groups Slam the New Cabinet Version of Revisions to the Public Broadcasting Law," 3 April2012, available at http://mediawatchtaiwan.blogspot.tw/2012/04/blog-post.html (in Chinese).

[151] Chin Heng-wei, "KMT playing with the law, again," *Taipei Times*, 26 August 2012, available at http://www.taipeitimes.com/News/editorials/archives/2012/08/26/2003541195.

public television even more vulnerable to political influences.

These incessant disputes have worsened the grave problems of governance and internal morale within TBS, especially within the original PTS station. Recently, there has been a sharp shrinkage in the number of new quality programming on PTS, including the transfer to marginal time slots or even cancellation of public forums featuring in-depth and rational discussion of public issues or programs with the mission of covering minority ethnic groups and promoting cultural diversity. These changes have undermined the PTS's ability to maintain the proper standard that a national public television should maintain. It is thus understandable that these trends have sparked criticism by media scholars.

In addition, during hearings to review the draft budget for the Indigenous Peoples Culture Fund submitted by the Cabinet-level Council of Indigenous Peoples (CIP) in November 2011, two ruling Chinese Nationalist Party (Kuomintang or KMT) legislators Chien Tung-ming and Kung Wen-chi expressed doubts that the content of the "Indigenous Rights Movement" documentary aired by the Taiwan Broadcasting System's Taiwan Indigenous Television (TITV) was unfair and some ruling KMT legislators also believed that the TITV should report more on the achievements of the government. As a result, they proposed a motion to entirely cut the NT$25 million draft budget for the TITV and demanded that the TITV deliver a special report to explain the "Indigenous Rights Movement" documentary as a condition to retract the motion.

The use by these politicians to use an impromptu review and monitoring method based on their individual likes and dislikes instead of employing a publically responsible review mechanism to regularly evaluate the overall performance of public media has already inflicted grave harm on the TITV's public credibility and independence. In addition, when the TITV had begun operating in 2007, it was based on the mandate of Article 14, Paragraph 3 of the Statute on the Disposition of Government Shareholdings in the Terrestrial Television Industry that "the drafting of government budgets, bidding and procurement of television programs or installations in Hakka Television, Taiwan Indigenous Television, and Taiwan Macroview Television should be handled by the Public Television Service Foundation beginning the year after the promulgation of this statute." However, the Statute for Establishing Indigenous Peoples Cultural Projects Foundation (IPCPF) approved by the Legislative Yuan in December 2007 again gave administrative agencies the power to interfere in the operations of the TITV. According to Article Four, Paragraph 1, Item 1 of that

statute, the operations of the IPCPF include "planning and distribution services for special channels for indigenous peoples broadcasting and television." Item 2 of the same article states, "The production of programs for the exclusive channel for indigenous television mentioned in the previous clause should be handled by the Public Television Service Foundation and not be subject to the restrictions of the Government Procurement Act." The fact that the Statute on the Disposition of Government Shareholdings in the Terrestrial Television Industry has only a status as an administrative law had caused ambiguity in the relationship and respective status of the IPCPF, the TITV, and the TBS, causing endless disputes.

(3) The Decline of Labor Dignity for Journalists: Response to Paragraph 260 (p. 107) of the State Report

In November 2008, Association for Relations Across the Taiwan Strait (ARATs) Chairman Chen Yunlin, the chief negotiator for the People's Republic of China on Taiwan affairs, arrived in Taiwan for talks with his Taiwanese counterpart, Strait Exchange Foundation Chairman Chiang Ping-kun. At the time, Chen was the highest-ranked PRC official to have ever set foot in Taiwan. Amid numerous protest actions by Taiwanese citizens, journalists were beaten and injured by police, including Formosa Television reporter Tsai Meng-yu, who was beaten by police while covering a demonstration outside the Grand Hotel on the evening of 6 November 2008. Later that evening, many news media received demands by police to provide photographs or video of "rioters." This demand sparked a counter-reaction by many front-line reporters. The demand by police for photographers to provide photographs of rioters would turn reporters into the object of hostility by citizens when they covered future demonstrations or protest activities. The National Police Administration (NPA) should immediately cease its improper demands on photojournalists to cooperate with its collection of evidence, which inflict severe harm on the working rights and safety of journalists.

On 18 November 2008, the Association of Taiwan Journalists (ATJ), Taiwan Media Watch (TMW), the Campaign for Media Reform (CMR), the Excellent Journalism Award Foundation, the Broadcasting Students Front, and other organizations led journalists to the NPA to urge Director-General Wang Chuo-chun to cease using photojournalists as "evidence collection tools," but the NPA did not offer any response and also did not assign any senior official to accept the petition of the journalists.[152]

[152] On 19 November 2008, the International Federation of Journalists issued a statement urging

For a long time, the labor rights of media workers as employees have been neglected, due to their image of being endowed with the social responsibility of the Fourth Estate. For example, in reporting on natural disasters, some news media have demanded that their reporters personally go to dangerous areas in the middle of typhoons in order to dramatize their reports and stimulate viewership, without any consideration for the labor rights or safety of the reporters concerned.

Another incident that involved the labor rights of journalists was the August 8 flood disaster in 2009 in the wake of Typhoon Morakot. Each television news station received call-in disaster information, including ERA News. A major dispute erupted after an ERA TV employee expressed doubts on his blog that the station had not abided the promise made by its news anchors to promptly pass emergency information from victims to government rescue agencies. Afterward, an investigation by the NCC showed that ERA had indeed made omissions, but before the results of the NCC investigation had been released, ERA Communications had already fired the two employees who blew the whistle under Article 12 of the Labor Standards Law for having "grossly insulted" the employer and sued them for slandering the company's reputation. Ultimately, although prosecutors closed the case in January 2010 by deciding not to indict the two employees on criminal slander charges, they lost their civil suit against ERA Communications for back wages on appeal by the company. In any case, the most fundamental labor rights of the right to work of the two persons involved had already gravely violated.[153]

(4) Unreasonable and outdated restrictions on freedom of expression: Response to Paragraph 264 (p. 108) of the State Report

The State Report (in Table 34 on pages 108-109) lists no less than 14 laws

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Taiwan's National Police Administration to cease asking photojournalists for information about protestors at the "Yellow Ribbon Siege" demonstration against the 6 November meeting between President Ma Ying-jeou and ARATS Chairman Chen Yunlin. The IFJ urged Taiwan authorities "to respect press freedom and ensure that they do not compromise journalists' integrity" and urged all media outlets "to defend press freedom and refrain from handing over photographs." The statement is available at http://asiapacific.ifj.org/en/articles/call-for-taiwan-police-to-stop-pressuring-media-for-protest-information.

[153] Su Yen-wen, "A Diary of the ERA News August 8 Disaster Call-in Incident," *The Worker* No. 160, Taiwan Labor Front, July 2011 (in Chinese).

containing criminal penalties against expression, including offenses such as "insulting civil servants or public office" (Article 140 of the Criminal Code), "dishonoring the national emblem or flag" (Article 160, Paragraph 1 of the Criminal Code), "insulting the portrait of the national father (Article 160, Paragraph 2 of the Criminal Code), public obscenity (Article 234 of the Criminal Code), "insulting a religious building or memorial site" (Article 246 Paragraph One of the Criminal Code), "indignity to a dead body" (Article 312 of the Criminal Code), and, by no means least, defamation (Article 310 of the Criminal Code).

Rationalizations for the retention of such "crimes" in the criminal code range from "maintaining national sovereignty and government authority, "protecting national dignity and social order," to "respect the founder of the Republic of China," to "protect good customs and secrecy of personal sexual behavior," to "protect reverence for the deceased" and, last but not least, "to protect national security." Such rationales are more likely to be seen in authoritarian societies (especially with regard to the national emblem and flag, which it should be noted are virtually indistinguishable from the symbols of the KMT, and the "national father," who is also considered the founder of the KMT). They should not be retained in the legal code of an ostensibly democratic state.

Paragraph 38 of General Comment No 34 states that "in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high" and that "the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties." The same paragraph specifically expresses concern regarding laws on "disrespect for authority, disrespect for flags and symbols, defamation of the head of state, and the protection of the honor of public officials." With regard to the criminal charges for "defamation" of the "national father," it should be noted that General Comment No. 34, Paragraph 49 states that "laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties."

Nevertheless, besides a tacit acknowledgement that such regulations restrict freedom of speech, the State Report offers no indication whatsoever of any timetable to revamp these statutes. While most of these offenses are rarely used, the potential for such abuse to restrain freedom of speech and expression continues to exist and the government should offer a timetable for the re-examination (with a review to eliminate or at least decriminalize) outdated and unreasonable restrictions on freedom

of speech and expression as soon as possible.

Paragraph 21 of General Comment No 34 takes note that restrictions to the right of free speech may be necessary for "respect of the rights and reputations of others." However, Paragraph 47 emphasizes that "defamation laws must be crafted with care to ensure that … they do not serve, in practice, to stifle freedom of expression" and should not be applied to "forms of expression that are not of their nature, subject to verification." Moreover, the General Comment advises that "States parties should consider the decriminalization of defamation" and that "the application of criminal law should only be countenanced in the most serious of cases, and imprisonment is never an appropriate penalty."

Nevertheless, the availability of criminal defamation provides opportunities for filing (or threatening to file) criminal defamation charges, accompanied by disproportionate monetary penalties or injunctions to freeze the assets of the accused, to suppress news freedom or freedom of speech or research, particularly by tycoons and conglomerates.

One recent example was the NT$40 million criminal defamation suit filed by Formosa Plastics Group in April 2012 against National Chung Hsing University Professor of Environmental Engineering Tsuang Ben-jei for releasing a research report in 2011 that found that FPG's sixth naphtha cracking facility in Yunlin County was one of 68 factories in Taichung City and Yunlin County found to be emitting heavy metals and dioxins. More than 500 academics, led by former Academia Sinica President Lee Yuan-tseh, have signed a statement, criticizing the business group as suppressing academic freedom in a bid to create fear in academia.[154] While Taipei District prosecutors decided not to indict Tsuang on the criminal charges, on the grounds that he was providing testimony as an expert and therefore had a "benign" motive,[155] the civil defamation charges are still in process.[156]

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[154] Focus Taiwan News Channel, "Talk of the Day – Formosa group sues academic over pollution study," 29 April 2012, available at http://focustaiwan.tw/ShowNews/WebNews_Detail.aspx?ID=201204290017&Type=aTOD.

[155] Rich Chang, "Professor not charged over Formosa Group research," *Taipei Times*, 7 June 2012, available at http://www.taipeitimes.com/News/taiwan/archives/2012/06/07/2003534738.

[156] "Taiwan scientist faces libel trial," *Nature* Newsblog, 19 September 2012, available at http://blogs.nature.com/news/2012/09/taiwan-scientist-faces-libel-trial.html, and "Fourth Hearing of Civil Suit Filed by FPG against Tsuang Bei-chi: FPG Still does not Provide Complete Test Data," Taiwan Environmental Information Center, 22 September 2012, available at http://e-info.org.tw/node/80592 (in Chinese).

Besides the criminal and civil suit filed by KMT Legislator Hsieh Kuo-liang against two journalists with the New Talk webpaper referred to above, the Want Want Group itself and its chairman, Tsai Eng-meng, have also used threats of criminal libel charges to intimidate critics. On 12 June 2009, the Want Want Group sent formal legal notifications to several journalists and officers in media reform groups which reported unfavorably the group's takeover of the China Television Corporation and the CTiTV cable television network or expressed opinions on the transaction in public hearings held by the National Communications Council, including then Association of Taiwan Journalists (ATJ) president Chuang Feng-chia and several other ATJ officers, saying that the recipients would be sued unless they admitted that they were wrong in their commentaries.

On 18 June 2009, the ATJ published a petition of over 400 print and broadcast media workers and academics calling for the WWCT to cease intimidating critics or dissidents and return to principles of journalistic integrity by signing an agreement with the employees of the *China Times* and other affiliated media guaranteeing editorial professionalism and autonomy. Ultimately, the Want Want Group did not follow through with its threats after a meeting with representatives of the media reform campaign.

III. Issues Raised by the Public

(1) Government Embedded Advertising and the Movement to Oppose News Buying

Besides the above-mentioned individual cases which expose the neglect of the labor rights of news workers, a problem of an even greater scale and institutional character is the prevalence of embedded advertising in news, or "advertorials," that squeeze the room for reporting by professional journalists and has forced many journalists to leave their jobs or even the profession. Freedom of the press has long been seen as an essential element in the processes of democratic reform and the nurturing of civil society. However, after the liberalization of the news media market, the pursuit of "commercial profit" has become the core business value in most media. The purchasing of news by both government and commercial interests in the form of embedded advertising or advertorial copy has thus become increasingly prevalent. This practice suppresses the pluralistic voices of civil society organizations and makes it difficult for critical reports on government policies or the actions of government officials to appear in the news media. Shortly before the 20 March 2008 presidential election, Frank Hsieh, the presidential candidate for the Democratic Progressive Party,

signed a pledge to cease government embedded advertising drafted by the "Alliance to Oppose Government News Buying," organized by media reform organizations including the Association for Taiwan Journalists, Taiwan Media Watch, the Campaign for Media Reform and the Broadcasting Students Front. Ma Ying-jeou, the KMT candidate, only expressed verbally, in April 2008 after winning the election, that his government would not engage in embedded advertising for "political purposes." After the Ma government took office, the situation regarding the buying of news did not improve, but rather worsened. The foundation of trust between readers and viewers and the media, which was already weak, has progressively collapsed.[157]

On 11 November 2010, the Control Yuan finally issued a correction order to the government stating that Taiwan's print media had become saturated with "special sections" designed to avoid legal restrictions to engage in embedded advertising and that executive branch agencies had failed to carry out their responsibility to enforce the law.[158]

In December 2010, senior journalist Dennis Huang Tse-pin resigned his post as a senior reporter with the *China Times*, now owned by the WWCT, in protest against government embedded advertising and news buying by private enterprises, as well as management pressure on reporters to comply with demands to write advertorial articles. Huang's action sparked a new wave of calls in Taiwan society for media reform and promoted a new media self-examination and reform movement to push both major political parties to seriously face the issue of the long-term use of taxpayer funds by the government to buy news and engage in embedded advertising. Shortly afterward, the Legislative Yuan approved a revision to Article 62-1 of the Budget Act which clearly mandated that "all government agencies and state-run enterprises, funds established with 50% or more in government-donated funds, and business enterprises in which the government has invested 50% or more in capital should carry out policy advocacy with clearly listed budgets and clearly list such material as advertisements

[157] On 7 May 2010, then ATJ President Yang Wei-chung gave President Ma Ying-jeou a letter by the ATJ which related that "embedded advertising by government ministries has continued in the past two years" in print, television, and radio news media and called on the president to pay attention to "the grave harm" the practice had inflicted on Taiwan's media environment and international image. See Inter Press Service (IPS), "TAIWAN: Media Fights Propaganda Masked as News," 31 January 2011, available at http://www.ipsnews.net/2011/01/taiwan-media-fights-propaganda-masked-as-news.

[158] The correction order issued by the Control Yuan on 11 November 2010, drafted by Control Yuan Commissioner Wu Feng-shan, also related that government agencies at all levels of the People's Republic of China (PRC) had used the method of publishing "special sections" in Taiwan print media that effectively evaded relevant laws and constituted embedded advertising, and stated that the responsible government agencies in Taiwan had failed to inspect and properly deal with this situation. Rebecca Lin, "Stained Red: China Infiltrates Taiwanese Media," *Commonwealth Magazine*, 6 May 2011, available at http://english.cw.com.tw/article.do?action=show&id=12807.

and must reveal the name of the responsible or sponsoring agency and not use the method of embedded marketing."

Nevertheless, after the revision of the Budget Act, media monitors have observed that embedded government policy propaganda has continued to be published in the manner of news reports and, even if the name of the agency is listed, ambiguous terms such as "advertising edition" or "special section" have been used that still do not abide by the act's requirement to "list such material as advertisements." This method not only reflects concerns of illegality but points to a loophole in the legal code as well. For example, in its monthly reports on errors in the news media, the Foundation for the Advancement of Media Excellence (FAME) has shown that advertising by PRC government entities, corporations, and individuals, all of which remains illegal under the statute governing cross-strait affairs, has continued virtually unabated since the Control Yuan correction. FAME did not record formal "embedded advertising" by Taiwanese government agencies in 2012, but there were still many instances of unattributed advertisements by such government agencies.[159]

(2) Openness and Restrictions on Information

The Freedom of Government Information Law (FGIL) took effect in 2006 in order to facilitate citizens or the media to understand and monitor current government administration. The purpose for this law was to guarantee the people's "right to know," and it therefore adopted a principle of "openness in principle and restrictions as the exception" in the process of its legislation. Nevertheless, Article 18 of the FGIL lists nine sets of government information whose provision to the public is restricted but whose content is extremely abstract or based on unclear legal foundation. Examples include so-called "national secrets or information which is required to remain

[159] According to FAME's October 2012 report, there were a total of 247 PRC advertisements, almost all of which were published in the *China Times*, the *United Daily News* and the *United Evening News* during the past two years. In the first 10 months of 2012, there were 47 PRC advertisements, of which 38 went to the *UDN* and its *UEN* sister, nine went to the *China Times* and none were published in either the *Liberty Times* or *Apple Daily*. Moreover, while FAME lists no "embedded advertising" by government agencies during the first 10 months of 2012, FAME found 27 unattributed advertisements by government agencies, of which 20 went to the *China Times* and seven to the *UDN* or *UEN* and, again, none to the *Liberty Times* or *Apple Daily*. In terms of attributed Taiwan government advertisements (i.e. those that are legal under the revised Budget Act), FAME data indicated a striking imbalance in the placement of publically-funded advertisements compared to the circulations of the major newspapers. Even though *Apple Daily* and *Liberty Times* each have nearly 40% of Taiwan`s readership in national newspapers, they received only about 17% and less than 13%, respectively of the 1,158 public advertisements placed by the government in the first 10 months of 2012 while the *United Daily News* (and its sister *United Evening News*) and the *China Times*, which have a far lower circulations but clearly pro-government editorial stances, received 70% of public advertisements.

confidential or prohibited from provision to the public according to other laws," information which "if made available to the public or provided will obstruct the investigation, prosecution or law enforcement of a crime," "drafts for internal use or other preparatory works," "information acquired or produced by government agencies to carry out supervision, regulation, investigation or prohibition," "examination or certification test material," "private personal information," or "trade secrets."

The delineation of these items in the article are exceedingly brief and sketchy. This naturally provides government agencies who receive requests for information a considerable degree of flexibility in legal interpretation and allows them to avoid being handicapped by an excessively rigid framework. However, this degree of ambiguity can also provide agencies which lack a tradition of openness with information or which do not have a correct understanding on the importance of openness with opportunities to improperly exaggerate or erroneously interpret and utilize apparent legal justifications to restrict or simply not provide information. Given this situation, the actual operation of this law has been to authorize "restriction in principle and openness in exception," which is exactly in the opposite direction from its legislative intent.[160]

For example, this law permits the government to use the reason of "national secrets or information which is required to remain confidential or prohibited from provision to the public according to other laws" to refuse to release information or to extend the period of classification. Nevertheless, the phrases "national secrets … according to other laws" or "information which is required to remain confidential … according to other laws" contain a degree of uncertainty. For example, in August 2011, *Next Weekly* reported that there were 14 oil tankage facilities which were polluting eight cities and counties in Taiwan, a fact which the military had used the excuse of national secrets to cover up for over a decade. In response to this report, the Ministry of National Defense (MND) issued a clarification which stated that this report may have involved national defense secrets which should remain confidential according to law.[161]

Behind this news report was first and foremost a conflict of interest between the covering up of environmental information and military secrets. At a time when the

[160] Ministry of Justice Research Project, "A Study into the Standards of Review for Restriction, Openness or Provision of Government Information and Improvement or Remedial Procedures," 2011, Project Number: PG10005-0091 (in Chinese).

[161] Ministry of National Defense news release, 25 August 2010, available at http://www.mnd.gov.tw/Publish.aspx?cnid=65&p=42932 (in Chinese).

openness of environmental information has received considerable attention in the framework of the policies and legal structure for the general freedom of government information, the question of how to handle such information when it contains military secrets that concern national security is a matter that merits response. In addition, there may be disputes among different government agencies over whether information regarding pollution at military facilities is an item that should remain confidential under the law, not to mention the even more likely difference of views on such a matter between the people and the state.

There are numerous regulations in environmental protection affairs which involve individual or corporate confidential information or data. Consequently, when responsible agencies for environment protection enforce related laws or exercise their official powers, such as in review and approval procedures for operation of polluting industrial enterprises, or inspections or prohibition of polluting activities, or even accepting information on violations from citizens, they will receive material that may involve individual privacy or business secrets. Therefore, when citizens petition the government to provide information regarding the current situation on pollution, the data they request may often simultaneously be information belonging to enterprises. Under Article 18, Paragraph 1, Item 7 of the FGIL, when the publication or provision of information regarding individuals, corporate persons, or organizations may infringe on the rights, the competitiveness, or other legitimate interests of the individual or organizations, the relevant government agency can refuse such applications or restrict the scope of the provision of information. Indeed, government agencies when handling administrative affairs often use this reason as justification to refuse to publish or provide information requested by citizens. However, in fact, Article 18, Paragraph 1, Item 7 of the FGIL also mandates that, when necessary for the public interest or to protect the people's lives, physical safety, and health, government agencies which receive such petitions can still open access or provide the information requested. Nonetheless, the course of actual operations indicates most agencies are still inclined to be conservative and are as yet not in accordance with the requirements of the ICCPR.

Regarding the issue of whether trade secrets or environmental protection should receive priority, Article 4, Paragraph 4 of the United Nations Aarhus Convention states that trade secrets in a legally defined scope should receive protection and therefore should not be made open to the public.[162] However, the article adds that

[162] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1988, available at http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

"(w)ithin this framework, information on emissions which is relevant for the protection of the environment shall be disclosed."[163]

This basic stance is articulated more clearly in Directive 2003/4/EC issued by the European Parliament and the European Council on 28 January 2003 regarding public access to environmental information which constitutes the fundamental legal position for national laws of the members of the European Union.[164] For example, in Germany, one of the preconditions for whether trade secrets are defined as being confidential is that they must be in accordance with legal economic interests (ein berechtigtes wirtschaftliches Interesse).[165]

Our country's FGIL and Article 2 of the Trade Secrets Act do not limit the scope of legally protected commercial secrets to the scope of legal economic interests. Nevertheless, it should still be recognized that the protection of commercial secrets is derived from the constitutional guarantee for the right of property and the right to work. Therefore, the protection of commercial secrets should also be limited to the scope of legal activity. Article 18, Paragraph 1, Item 7 of the FGIL appears to echo this stance by mandating that the government shall be restricted from making available to the public or providing information when "(m)aking available to the public or provision of the information about trade secrets or business operations of a person, legal person or group will hamper the rights, competitive position or legitimate interests of such person, legal person or group." In another words, the secrets of a business enterprise can only be guaranteed when they concern the legitimate rights and interests of the enterprise. Furthermore, except where it is necessary for public interest; for the protection of people's life, body, health; or is consented by the person concerned, government agencies have the obligation to protect the confidentiality of such information.

In addition, the trend for "information outsourcing" has already surfaced in the Taiwan government, and the legal hurdles in the way of procurement of citizen information will be a major impediment to outsourcing plans. The government does not necessarily have the capability to cope with the huge volumes of computerized

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[163] The exact wording of Article 4, Paragraph 4 is the following: "The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed."

[164] Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF.

[165] See Baumbach/Hefermehl, *Wettbewerbsrecht*, 1996, Paragraph 17, Rn 7.

information and will in the future increasingly rely on outsourcing the processing of such information to private companies.

In an investigation of the explosion of telephone usage during the 8 August 2009 flood disaster triggered by Typhoon Morakot conducted by a journalism scholar found that, although his application to carry out the research was approved by responsible authorities, the relevant information had been deleted by the privately-owned subcontractor only six months after the events. The civil servants responsible did not need to bear any direct responsibility for this action.[166]

In addition, besides the fact that data in subcontracted data bases are not only seen as "commercial secrets," fees are charged for their use based on the number of documents accessed. This situation creates major problems for poorly-financed academic researchers or journalists who often have no choice but to forgo their research.

In addition, current interpretations of other laws can affect the process of news coverage by journalists by giving police excessive discretionary power and thereby can result in infringement on the people's right to know. One example was the case of a reporter for *Apple Daily* on the entertainment beat who had been following a public figure for an extended period of time. In September 2008, he was fined by police NT$1,500 based on Article 89-2 of the Social Order Maintenance Act (SOMA). The constitutionality of such restrictions and the balance between the right of news coverage and the right of privacy were considered by the Grand Council of Justices in Constitutional Interpretation No. 689, issued on 29 July 2011. The Council decided that Article 89-2 of the SOMA, which permits fines of up to NT$3,000 against persons who "follow another person without proper reason and refuse to desist after appeals to cease" was not unconstitutional.[167]

Even though some news media in Taiwan have long infringed on the privacy of public and non-public personages and members of certain disadvantaged groups, the SOMA is the inheritor of the substance and spirit of numerous old laws and practices during which the police could circumvent normal legal procedures and directly define

[166] This experience was related by National Chengchi University Associate Professor of Journalism Chen Pai-ling during a seminar held by the Foundation for Excellent Journalism Award (FEJA) and is discussed in Sung Hsiao-hai (2011), "In the Face of Numerous Restrictions on the Freedom of Government Information, Can Reporters only Rely on Themselves?" 18 March 2011, available at http://www.feja.org.tw/modules/news007/article.php?storyid=721) (in Chinese).

[167] The issues for news freedom in this case are addressed in the *Annual Report on Taiwan News Freedom for 2011* issued by the Association of Taiwan Journalists, pp. 1-4 (in Chinese).

the guilt and issue fines or even detain citizens without any court hearings for "suspicious" activities such as disturbing the peace, infringing on good social customs and habits, spreading rumors, wearing camouflage, and carousing in the middle of night. In contrast to the broad discretionary powers of the police, the people who were the object of such punishment had very limited channels to apply for reversal or remedy.

Interpretation 689 indirectly acknowledged the power of the police to restrict journalists engaging in news coverage, which may allow power holders to use this case as justification to seriously restrict the freedom of news coverage by journalists. Again, this would be likely to have even more serious impact on numerous small media who lack both funds and influence as well as on citizen reporters.

In fact, relying on Article 89 of the SOMA and allowing police to issue at will fines of up to NT$3,000 is unlikely to have much genuine effect on protecting the right of privacy and curbing the stalking of ordinary citizens. If the state really wants to curb this kind of phenomenon, it should enact a new law that sets in place a clearly defined and more normal legal procedure and not persist in continuing this type of ineffective and improper legal procedure.

III. Concrete cases of obstruction of freedom of expression

Besides guaranteeing the rights of news freedom and broadcasting, Article 19 of the ICCPR also mandates that ordinary people also enjoy the freedom of expression of viewpoints. Article 11 of the Constitution also guarantees that "the people shall have freedom of speech, teaching, writing, and publication." However, numerous individual cases and enactments or revisions of laws and regulations have given rise to concerns as to whether the guarantees of freedom of speech in democratizing Taiwan will again be affected by political ideology, or even that the bottom line of fundamental human rights may be abandoned. The following examples are offered for the sake of alerting power-holders to this risk.

1. The incident of the destruction of the Takasago Volunteers memorial tablet.

During the period of Japanese colonial rule (1895-1945), the Japanese government recruited indigenous people from Taiwan to form a special military force to be deployed in the South Seas (Nanyang) military campaign. Descendants of the Wulai Atayal Takasago Volunteers organized a Takasago Volunteers Memorial Association

and began to collect funds to build a memorial in order to honor the spirit of their ancestors and preserve historical memory. The Takasago Volunteer Memorial Association followed legal procedures to apply to build a set of monuments in Taipei County (now renamed New Taipei City). The monuments, first built in the early 1990s, were moved to the Wulai Waterfall Park Zone on 8 February 2006. However, on 17 February 2006, the *China Times* ran a major report distorting the significance of these monuments as praising Japanese imperialism and, on the same day, legislator Kao Chin Su-mei (of the Non-Partisan Solidarity Union) demanded that the Taipei County government tear down the memorial. On the following day, the Taipei County government issued an order demanding that the Takasago Volunteer Memorial Association remove the monuments or else the county government would tear them down. On 24 February 2006, the Taipei County government dispatched police and construction workers to the site. Faced with this pressure, TVMA members, most of whom were middle-aged or elderly men who were unacquainted with the law, signed a statement consenting to the county government's removal of the monuments, unaware of the legal implications and consequences.

With legal assistance provided by the Taiwan Association for Human Rights and the Millet Foundation, the TVMA protested the action of public authorities to skip the necessary legal procedures and immediately tear down the monuments. This case also reflects the dominance of a subjective Han-centered interpretation of history that negates the validity of the indigenous peoples' own historical and cultural memory and freedom of expression. It is obvious that the New Taipei City government has not only violated the Article 19 guarantee of freedom of expression without interference, it has also illegally infringed on the guarantee of the right to be free from arbitrary or unlawful interference with private life and property, as well as and Article 15 of the ICESCR that ensures the right to participate in cultural life.

In March 2009, the Taipei High Administrative Court found against the Taipei County government and overturned its decision to destroy the monument.[168] Since the New Taipei City government is in the process of building a memorial park in Wulai Township on the theme of the Takasago Volunteers and to rebuild the memorial plaque within the new park and displayed goodwill by accepting the views of local elders, adding translation of the memorial plaque and other facilities and appointing the TMVA to manage the memorial park, the two sides decided to settle out of court.

[168] See Loa Iok-sin,"Aborigines pan Chou Hsi-wei," *Taipei Times*, 27 March 2009, available at http://www.taipeitimes.com/News/taiwan/archives/2009/03/27/2003439493.

2. In recent years, the Taiwan government has adopted a policy of improving relations with China. During the process of promoting exchanges with China, the ruling authorities have often engaged in self-censorship. As a consequence, the government has used its political judgment to constrain the right of free expression of the people. The best evidence of this trend is the numerous cases in which citizens have been restrained by police for waving or displaying the national flag of the Republic of China. Notable examples include the cracking down by police against citizens who waved national flags to "welcome" Association for Relations Across the Taiwan Strait Chairman Chen Yunlin (whose 2008 visit was described above), and the decision by the Taiwan host organization to block Taiwan university students who were displaying national flags to encourage the Taiwan team in the bleachers during the Third Asian University Men's Basketball Championship tournament in October 2010 in Taoyuan City.[169]

In addition, protestors from social disadvantaged groups who are petitioning government agencies or politicians have frequently been dispersed or arrested by police or other law enforcement or security personnel on charges of obstructing public affairs or violating the Assembly and Parade Act (this situation will be discussed further in the section on Article 21). Thanks to the interference of political factors, the arbitrary law enforcement actions by police have gravely infringed on the rights of free speech and expression of ordinary citizens in Taiwan.

3. For a long time, prisons have commonly suffered from overcrowding and a grave shortage of space. Besides harming the basic quality of living, the physical and mental health of inmates, and their prospects for rehabilitation, this situation also imposes unnecessary infringement on their right of privacy and also on their freedom of expression.

A notable recent case concerning the improper restriction on the writing and publication of articles by inmates occurred in 2011, when former president Chen Shui-bian desired to write a column for the *Next Weekly*.[170] The writing of inmates should be within the scope of protection of both the constitutional right of free speech and thought and the right of privacy. Chapter 9 of the Prison Act sets forth regulations

[169] See "Flag sparks controversy at Taoyuan basketball match," *Taipei Times*, 9 October 2010, available at http://www.taipeitimes.com/News/front/archives/2010/10/09/2003484915.

[170] Former president Chen Shui-bian is serving a 17-year sentence in Taipei Prison after being convicted for corruption in the development of an industrial park in Lungtan, Taoyuan County and other charges.

to cover visitation and correspondence by inmates, but its Articles 62 through Article 68 contain no restrictions on writing or authorship by inmates. Nevertheless, Article 81 of The Enforcement Rules of the Prison Act states: ". . . Essays written by prisoners, whose subjects are appropriate and do not offend the discipline and reputation of the prison, shall be permitted to be published in newspapers or magazines."

This clause in the implementation rules grants prison authorities a power to restrict the publication of articles written by inmates that exceeds the authorization of the primary law. Indeed, this clause grants prison authorities the power to carry out substantive censorship of the writings of an inmate under the excuse of reviewing "whether a subject is appropriate." It thereby infringes on the freedom of expression of prison inmates.

IV. Conclusions and Recommendations

(1) Protect Media Pluralism and News Freedom by Preventing Undue Media Concentration

In the wake of the incorporation of the ICCPR into domestic law, the Taiwan government has the responsibility to preserve media pluralism and the freedom of the press and expression. This includes both refraining from imposing government control over the news media and also preventing "undue media dominance or concentration by privately held media groups in monopolistic situations that may be harmful to a diversity of sources and views."[171]

It should be clear that the acquisition of the four print and television news media of the Next Media (Taiwan) by a consortium of tycoons whose associated conglomerates have major investments in China (and therefore are subject to influence by Beijing's authoritarian regime) and have through actions and speech demonstrated their unfitness to own or operate news media would create such harm and provide no visible compensating benefit for Taiwan citizens (especially in terms of greater access to more accurate and diverse sources of news and opinion). Hence, the Taiwan government has the obligation to protect the overriding public interest and fundamental human rights of freedom of expression and opinion and reject this transaction, which can be done based on existing law, notably Article 12 of the Fair Trade Act.

[171] General Comment 34, Paragraph 40.

Second, the government and the national legislature should promptly work together to enact robust legislation to restrain cross-sectoral media acquisitions and close the legal "loophole" concerning the overarching public interest in preventing harm to freedom of press and expression from media monopolization. Given the high entry costs of print, television, and radio media, and the growing involvement of conglomerates or individual tycoons in news media, such legislation should mandate measures for the protection of editorial autonomy in order to protect the social character of news media as a means for the realization of the right of citizens to know and as channels for free expression and speech, as well as to ensure labor rights for journalists.

(2) The Urgent Need for Public Media Reform

Public media should have professionalism and autonomy in terms of personnel and programming production. "States parties should ensure that public broadcasting services operate in an independent manner. In this regard, States parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence."[172]

In democratic countries, it is the task of parliament or congress to monitor public media, but such monitoring cannot be the impromptu manner of review and monitoring based on the individual preferences of legislators. The government should take the initiative to establish a review mechanism responsible to the public that can regularly evaluate the overall performance of public media.

In light of the rapid progress in radio and television culture worldwide and the experiences of and countries with a healthier radio and television environment, it can be seen that public media radio and television media can enhance and enrich national culture and play a decisive leadership role in spurring the development and prosperity of audio-visual and creative industries generally. The construction of Taiwan's public radio and television media still has huge room for improvement. The Campaign for Media Reform has proposed a substantial set of short-, medium- and long-term measures and objectives:[173]

[172] General Comment 34, Paragraph 16.

[173] See the "We Want A Good President Citizen Front" section on media reform drafted before the January 2012 presidential election by the Campaign for Media Reform, Taiwan Media Watch, the Association of Taiwan Journalists, and the Broadcasting Students Front, available at http://www.coolloud.org.tw/node/65863 (in Chinese) and http://mediawatchtaiwan.blogspot.tw/2012/01/blog-post_06.html (in Chinese).

1. In the short-term, the first priority should be revision of the Public Television Act and the resolution of the current internal governance problems within TBS and the addition of necessary financial support to the PTSF in order to restore TBS to healthy operations;
2. In the medium-term, a development blueprint for the public radio and television systems should be drafted and implemented that can effectively integrate and enliven the existing public radio and television resources and expedite their efficient use at a certain scale of operation in order to improve the overall radio and television environment; and,
3. In the long-term, expand the scale of services and productivity of the public radio and television system to spur the improvement of the public service effect and content of all kinds (new and traditional) so as to guide the continued development of our country's audio-visual and creative industries and enhance the quality of radio and television service that our people can enjoy.

(3) Ensure News Freedom and Regulate Embedded Advertising

In order to regulate the practice of government agencies and private enterprises to adopt the advertising method of buying space in print news media or program time on radio or television to embed particular messages or concepts, civic organizations have proposed the following measures. First, there should be further revision to Article 62-1 of the Budget Act to eliminate the 50% threshold of government investment in capital or donated funds for commercial enterprises or foundations so that all agencies or corporate bodies in which the government directly or indirectly invests will be regulated by this article when engaging in policy advocacy or propaganda. Second, a new Article 62-2 should be added to the Budget Act that would clearly require all policy advocacy advertising in newspapers, television, internet and radio broadcasting be clearly identified as advertising and prohibit the use of ambiguous terms such as "special sections," or "seminars" to evade the ban on the use of public funds to "buy news."

(4) Ensure that Disadvantaged Groups Have Voice and the Freedom of Expression

At a time when the historical perspective of indigenous people is not the same as that of Han people, the government has chosen to sacrifice indigenous peoples' culture and, in the name of executive measures, pressured indigenous peoples to concede to silence the voices of some protestors. Indigenous peoples' history and

culture should be respected and the government should not use the viewpoint of the Han nationality to judge the rights and wrongs of history and culture. In addition, the government cannot review or censor the content of indigenous people's buildings or memorials as conditions for permits. Instead, the government must make more efforts to provide assistance to efforts to preserve indigenous peoples' culture and history.

The government should also adopt the principle of proportionality with regard to the restrictions on the right of privacy and freedom of expression of inmates in correctional institutions, other than the necessary restriction on freedom of movement, and conduct a re-examination of the relevant articles in the Prison Act and make necessary revisions.

Article 21: Right of Peaceful Assembly[174]

I. Introduction

The years 2005 and 2006 saw a succession of people indicted under the Assembly and Parade Act (APA) for participating in protest actions, and for the year-end siege of the Presidential Building by the "red shirts."[175] This led to a debate in the Legislative Yuan over the proposed revisions to the APA. Unfortunately, the Democratic Progressive Party (DPP) failed to actively undertake its revision, partly owing to its not having a majority in the Legislative Yuan, and partly owing to conservative elements in the party advocating the restriction of assembly and parade rights in the name of safeguarding political stability. In late 2007, presidential candidate Ma Ying-jeou offered to "return the streets to the people" in his campaign's "Human Rights White Paper." The election of 2008 brought about a reshuffling of the political deck in both the executive and legislative branches, with the Kuomintang (KMT) once again holding dominance in both, yet the KMT failed to produce a timetable for revision of the APA. The inappropriate use of police force during the Chiang-Chen Meeting of November 2008 brought on popular indignation and protest, culminating in the student-led "Wild Strawberry Movement," with its demands for reform of the APA.[176] This met with hard-line resistance from KMT legislators, and today the APA remains as immovable as a mountain, with the executive and prosecution agencies as well as the courts, from prosecution to sentencing, continuing to fall back on a bad law long overdue for retirement in their handling of participants of peaceful assemblies and marches.

II. Responses to the State Report

(1) The APA continues to treat peaceful assembly and parade as a criminal offense: Response to Paragraph 267, Paragraph 268, and Paragraph 269 (pp 109-111) of the State Report

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[174] This section authored by Hsu Jen-shou (許仁碩), Lai Chung-chiang (賴中強), and Tsai Chi-hsun (蔡季勳), and translated by Lynn Miles (梅心怡).

[175] Translator's note: The name of the APA is also frequently translated as "Assembly and Parade Law." The "red shirts" refers to a wave of street protests against President Chen Shui-bian which peaked in 2006.

[176] Translator's note: When Chinese envoy Chen Yunlin came to Taipei for the "second Chiang-Chen Meeting" (the first meeting between the two envoys took place in China), he was the highest-ranking PRC official to have set foot in Taiwan, and a variety of protests occurred at various stages during his visit. The "Wild Strawberry Movement" was a movement of students who protested the actions of the police during Chen's visit and reform of the APA.

Although the State Report admits that Article 29 of the APA, which treats peaceful assembly and parade as a criminal offense, violates Article 21 of the ICCPR. However, it passes the blame onto the Legislative Yuan, which has failed to pass revisions of the law in third reading, while calling on the Council of Grand Justices to promptly issue a constitutional interpretation.

According to the Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the Covenants take legal precedence over domestic law, so that by 10 December 2011, any laws or administrative directives not complying with the Covenants have had to either have their revision process completed or else been abrogated, and if the revision process was not completed within the stipulated period, then, on the principle of later laws superceding earlier laws, application of the Covenants should have taken precedence from that point on. This means that the government authorities should no longer be enforcing the punitive statutory requirements of the APA; the APA cannot be used as grounds for issuing orders to disperse or taking other restrictive actions by the police at any levels, or for the prosecutors' taking up cases handed them by the police, nor for indictments, nor for rejecting appeals; at the same time, any cases which do reach the courts should be declared to have insufficient grounds for proceeding.

From the debate over whether Article 29 of the APA has lost effect, and from the fact that all levels of government continue to use the law to threaten and repress peaceful assembly and parade, once can clearly see how the Taiwan government has no understanding of the Covenants.

(2) Proposed revisions to the APA continue to avoid guaranteeing the "voluntary registration" spirit of peaceful assembly: Response to Paragraph 267 (pp 109) of the State Report

According to the ICCPR, the only restrictions that may be placed on the right to assemble and parade are "those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others." The purpose for any "voluntary registration system" for assembly and parade activities is simply to make it possible for the police to offer their services, such as directing flow of traffic and maintaining order, to facilitate the people in exercising their right to assemble and parade. Therefore, the justifiable reasons for not registering or applying for a permit are quite many, ranging from simply not requiring cooperation of the police, to an assembly arising as a rapid

response to sudden events, to the lack of an identifiable leader qualified to do the registering, to not wishing to allow the authorities to take evasive measures in advance when so alerted by the registration, and so on. Failing to register or apply in and of itself cannot, except for the aforesaid reasons of protecting public safety and health, constitute grounds for imposing controls. The State Report only discusses how the system should be changed to one of registration, while in past draft revisions to the APA submitted by the Executive Yuan, and in the points raised by the State Report such as "relaxing the registration deadline," "deleting the requirement concerning continuous punishment," "lowering the upper limit and deleting the lower limit for administrative fines," there's no departure from the principle of imposing punishments for simply failing to register within the allotted time. This is in clear violation of the intent of the Covenant's right-to-assemble guarantees.

III. Issues Neglected by the State Report

(1) Lack of timely and effective judicial relief

In the United States, Canada, and even Thailand, in response to security authorities' banning of an assembly or march or ordering it to disperse, one may petition the courts to determine the order's legality. In its Constitutional Interpretation No. 445 of January 1998, the Council of Grand Justices ruled that "[I]n restricting the rights of assembly and parade by law, the principle of necessity as provided in Article 23 of the Constitution, as well as the principle of clarity and definiteness of law, must be complied with. Thus, the competent authority, in deciding if said right of the people should be restricted, will have a clearly defined legal basis upon which to act; whereas the people, on the same basis, may also express their opinions under due process of law so as to preserve their constitutional right."[177] In implementing Article 16 of the APA, which lays out the appeals system by which the people may object to a security agency's order, the police authorities are allowed up to two days to send up their recommendation, while the higher level police authority is permitted up to two days to come to a decision, which in actuality robs the people of their right to an appropriate legal process for seeking a court injunction.

(2) APA Article 4 violates the Constitution, yet has not been abrogated

[177] The full text of Constitutional Interpretation 445 is available at http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=445.

Article 4 of the APA states, "Assemblies and processions may not advocate communism or national separatism." Constitutional Interpretation No. 445 has already ruled that this provision violates the constitutional guarantee of freedom of expression. However, we would like to go beyond this to point out that, if the competent authorities are not allowed to use Article 4 as a basis for evaluating applications for assemblies and parades, then why, with the constitutional right to so assemble and parade already established as a consensus, has there been no progress in the revision of this law for the last decade?

(3) Incidental assembly not guaranteed in accordance with constitutional intent

As Constitutional Interpretation No. 455 points out,

> Since it is exactly because of a natural disaster or other unforeseeable major accident that an assembly or a parade will be held, how can one be expected to have time enough to submit an application two days earlier? Since the decision to hold an incidental assembly or parade is triggered by the instantaneous response of the crowd to an unforeseeable major accident, it is not likely that any responsible person will submit the application two days earlier, nor is it likely that an assembly or a parade will be held two days after the occurrence of the major accident. As such, the system of approval simply should not apply in the case of an incidental assembly or parade. Article 14 of the Constitution guarantees the people's freedom of assembly, which does not prohibit an incidental assembly or parade. In view of the requirements listed in Article 9, Paragraph 1 of the Assembly and Parade Act, any and all applications for assemblies or parades not filed within the statutorily prescribed period due to the suddenness of the events will be denied for violation of the provisions of said Article 9. Restraining the people's constitutionally guaranteed fundamental right to assemble and parade in accordance with said provisions is not consistent with the Constitution ….

With the permit system of the APA still in force, and with the Wild Strawberry Movement being essentially a spontaneous assembly in response to the visit to Taiwan of Chen Yunlin, National Taiwan University Assistant Professor Lee Ming-tsung was indicted for "having failed to apply in accordance with the law, and leading the crowd in not dispersing."

(4) Violation of the principle of no restriction placed on peaceful assembly

Constitutional Interpretation No. 445:

> In order to ensure social order and safety, the constitutionally protected assemblies and parades must be conducted in a peaceful manner. Furthermore, the law shall not impose any restrictions thereupon unless an assembly or a parade is in violation of the law,

> provided that such law shall still be clear and definite in formulating its restrictive conditions….

Constitutional Interpretation No. 445 finds fault with the APA stipulation that assembly and speech rights may be curtailed on the basis of "facts showing the likelihood that national security, social order or public welfare will be jeopardized" (Article 11, Paragraph 1, Item 2), or where "there is likelihood that public safety or freedom will be jeopardized, or there will be serious damage to property" (Article 11, Paragraph 1, Item 3), saying that these "are neither specific nor clear enough":

> The mere basis on which the competent authority may either approve or deny an application for an assembly or a parade is the future possibility of occurrence instead of a factual showing of clear and present danger. As such, the said provisions are inconsistent with the constitutional intention of protecting the freedom of assembly. … in respect of the "likelihood that public safety or freedom will be jeopardized, or there will be serious damage to property," is it appropriate to deny other participants the right to hold an assembly or a parade if merely a couple of participants have acted to that effect? … In case any behavior breaches peace or order, resort to the penal provisions of the Social Order Maintenance Act should suffice. If an assembly or a parade is prohibited simply due to such a situation, the principle of proportionality will be violated.

So the Constitutional Court has held that in order for the legislative branch to restrict the right of the people to assemble and parade, three conditions must be met: (1) the action is not peaceful; (2) there is a clear and present danger, and (3) even where the action meets either of the first two conditions, it must not be the action of a small minority of the participants. So the laws as currently being carried out, from not granting permission in the first place to issuing orders to disperse, are overly broad and violate the constitutionally guaranteed rights of assembly and parade.

(5) At all government levels serious gaps in enforcement of the Assembly and Parade Act amount to violation of the principle of proportionality

Article 26 of the APA stipulates that, "in denying permission for assembly or parade, or restricting it, or ordering it to disperse, due fair and reasonable consideration must be given to the rights of the people to assemble and parade, as well as to equitable protection of other rights, applied in an appropriate fashion, and must not exceed the restrictions required to meet the objective." If, in issuing an order to disperse, the police have failed to apply appropriate consideration of the principle of proportionality, then the order to disperse is flawed. In its Interpretation No. 445, the Constitutional Court found that:

> the issues as to how the competent authority orders the dispersal of an assembly or parade, and in what manner it stops the assembly or parade from continuing, touch upon the appropriateness of the orders at issue and thus are questions of the facts. A criminal court, in weighing the offense and imposing a penalty, should make a precise determination as to whether the requisite elements of the criminal act are met. Needless to say, attention should also be paid to the existence of intent, especially, as a requisite element for the punishment of the act at issue.

As pointed out in the foregoing legal analysis, a ruling by the courts concerning alleged violation of Article 26 of the APA must be based on a review of the facts, and not merely confine itself to evaluation of the constituent elements of the administrative measures. At the scene of an assembly or parade, if the police violate the proportionality principle in issuing an order to disperse, then this does not constitute sufficient grounds for criminal liability under Article 29 of the APA.[178]

However, in actual practice, there have been many instances where, simply because the organizers of the assembly or parade had not secured legal permission, the police, failing to apply the principle of proportionality or to weigh the rights of the participants against other rights, took the expedient of issuing orders to disperse and then indicting those participants who failed to comply. As for the courts, in some cases they found the defendants not guilty.[179] But in the majority of cases, such matters were weighed only when determining the degree of criminal responsibility, the result being that even where the courts found that one action was "peaceful from beginning to end, and the scale of the assembly was neither large nor its influence great, nor did it pose a large danger,"[180] or that another "did not spill out onto the sidewalk or traffic lanes of Zhongxiao East Road, so did not pose a threat to the right of passage of the public, hence the scope of its impact was minimal,"[181] yet they rendered verdicts of guilty. These facts were only taken into consideration as a factor lightening the punishment. According to the proportionality principle, in such cases of peaceful assembly or parade posing no serious traffic hazard nor any threat to property or other rights, when other such rights do not take precedence over free speech rights, the police orders to disperse were legally defective in the first place. Therefore the defendants should have been found not guilty instead of simply reducing their sentence; however, the courts disregarded this fact.

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[178] However, another view holds that "when raising their warning placards during an order to disperse, the matter of length of time between placard raisings lies within the purview of the executive, and is not something to be weighed by the criminal court." See Taipei District Court 2008 Case No. Shang-yi-221.

[179] Taipei District Court 2007 Case No. Chu-yi-1 ("Red Shirts" case).

[180] Taipei District Court 2007 Case No. Yi-1 (case of Chen Shu-hua).

[181] Taipei District Court 2007 Case No. Yi-1874 (case of Wang Chiu-yueh and Chiang Yi-hao).

From this it may be seen that in carrying out their duties, the police have wholly disregarded the principle of proportionality, and that their orders to disperse have been excessive.

(6) Proportionality principle applied inconsistently in assessing validity of police orders

Aside from the question of the courts applying the proportionality principle in cases of disregarding police orders to disperse only to the sentencing phase of the trial, there is also the matter of inconsistent application of the proportionality principle by the courts. The most egregious example is that of the "Red Shirts" Case of 2007 (2007-Chu-yi-1), where the verdict found that, in the 1 October 2006 training assembly, the 10 October 2006 Siege of the Presidential Building, and the 3 November 2006 protest march against corruption and calling for the impeachment of the president, although none of the demonstrators had filed legal application for an assembly and parade permit, and although the scale of the actions was huge, still the court found that "the police were quite capable of controlling the situation, with no threat to public order, nor was there any clear and present danger, so it was evident that the inconvenience posed did not exceed the bounds of what must be tolerated by the people of a democratic society." It therefore ruled that so long as the "police could maintain sufficient control," their orders to disperse did not meet the test of the proportionality principle, and were therefore quite obviously defective.

In fact this was a relatively progressive and strict standard of evaluation. Unfortunately, it has not been applied to the majority of cases brought before the courts on charges of violating the APA. In the years 2009 to 2011, a series of prosecutions were brought, for events much smaller in scale than the massive "Red Shirts" protests, so that it could hardly be asserted that the police were "unable to control the situation," yet in these other cases the above strict standard calling for weighing of the principle of proportionality all went by the wayside. It was not as if evidence was lacking in these cases, or that there was any doubt as to the ability of the police to control the situation or the lack of impact on public order. However, the court reduced the consideration for deeming the dispersal order as meeting the standards of the proportionality principle to whether or not the police had given the participants an opportunity to publicly express their opinions: "It is clear that, with the efforts of the police to control the crowd making the chance of creating major impacts on traffic or order unlikely, the crowd including the two defendants had already been

given ample opportunity to express their opinion and voluntarily disperse."[182] The gap between the treatment of these two cases is indeed very wide.

(7) Handling of prosecutions by police and prosecutors: slipshod procedures, presenting of false evidence

Article 2 of the Code of Criminal Procedure reads, "A public official who conducts proceedings in a criminal case shall give equal attention to circumstances both favorable and unfavorable to the accused." This is to meet the obligation to be objective in criminal proceedings. But in so many cases we can see how the prosecution feigns ignorance of facts that argue in favor of the defendant and its slipshod handling of the indictment. Take the case of "Public assembly and driving in parade of public address (PA) vehicle (i.e. a car or truck with mounted loudspeakers) with plates 7723-HA."[183] The result of the evaluation was that "While there was a PA vehicle on site, most of the time it remained stationary at the location of the assembly, and it was only when the police approached and told it to leave the scene of the assembly that it proceeded to drive along the roads surrounding Taipei Railway Station, so it is hard to establish the fact that it was parading." Only after the masterminds were arrested and the police video recording of the event examined, was it discovered that "the four defendants had been arrested prior to the police raising of the warning placards."[184] That the authorities should resort to such practices as arresting the participants first and sounding the warning later shows the despotic manner in which they demand compliance, the slipshod way in which both police and prosecutors handle their cases, and the cavalier attitude they have toward the indictment, without so much as pretending to fulfill their duty of objectivity.

Worse still are instances where the police gave false testimony during the trial. As to whether one defendant has led the crowd in attacking the police, one testifying officer was liberal with the details: "It was Pan Chin-jung who incited them to do it. It was then that I was hit by a bottle. The whole crowd was throwing things, so it was impossible to tell who it was that threw the bottle that hit me. Other police officers were also hit."[185] However, during the trial of second instance, examination of the police video recording of the event revealed that not only was Pan Chin-jung not present at the scene at the time in question, but in the entire course of the assembly,

[182] Taipei District Court 2007 Case No. Yi-1874 (case of Wang Chiu-yueh and Chiang Yi-hao).
[183] Taipei District Court 2008 Case No. Yi-1240 (case of Lin Cheng-chieh).
[184] Taipei District Court 2010 Case No. Yi-2623 (case of Liu Yong et al).
[185] Taipei District Court 2007 Case No. Yi-4 (case of Chung Hsiu-mei and Pan Chin-jung), record of the Taipei District Court decision, 6 November 2007..

"no such behavior was seen, of the crowd being incited or of their throwing bottles at the police."[186] In this case, the police officers were in fact committing perjury.

The cavalier way in which evidence is dealt with is also reflected in the appeals process on the part of prosecutors. For example, as just described, in the case of Chung Hsiu-mei and Pan Chin-jung (2007 Case No. Yi-4), the police testimony had, upon subsequent examination of the video footage, been proved to be nothing but the figment of their imaginations. However, the prosecutor still appealed the verdict of the High Court "on the grounds that the verdict failed to explain why it did not accept the testimony, unfavorable to the two defendants, of Officer Chung Chao-cheng, who was at the scene."[187] In such clear-cut cases, appeals from the prosecutor's side are usually all rejected, yet the hapless defendant must bustle about responding to these groundless, outlandish appeals.

(8) Police not held to account for inappropriate behavior

The offhanded extremes to which the police and prosecutors will go as outlined above point up the difficulty in bringing police to account for inappropriate behavior when it comes to assembly and parade rights. For the damages suffered by the defendant as a result of shoddy investigation work or even providing false testimony in court, the police are not required to bear any responsibility whatever. More serious yet, if the police overstep their duty to enforce the law, and thereby violate the freedom of movement of the public, even the existence of so many regulations restricting them from doing so hardly serves to make them accountable in practice.

For example, during the second Chiang-Chen Meeting of 2008, the police applied force in stopping the public from carrying the national ROC flag, arresting people, and even causing bodily injury. They could do whatever they liked, no matter that this stood in stark violation of the rights of the people to assemble and parade, and of their freedom of movement. Later, in the Control Yuan document listing proposed corrective measures, parts of the self-evaluation reports by the National Security Bureau and the Straits Exchange Foundation had been blacked out so as to prevent public scrutiny. Moreover, while the corrective document laid out the self-evaluation and punishments to be exacted by the National Police Agency, these were directed at police who had "been ineffective in keeping the public at bay,

[186] Taiwan High Court 2008 Case No. Shang-yi-341 (case of Chung Hsiu-mei and Pan Chin-jung): "It is evident that the police, while doing their utmost to see to it that the assembly did not spread to where it impacted on their ability to maintain traffic order in the vicinity, afforded the crowd, including the two defendants, sufficient opportunity to air their views before voluntarily disbanding."

[187] Taipei District Court 2007 Case No. Shang-1052 (case of Chung Hsiu-mei and Pan Chin-jung)

thereby causing difficulties for the guests" from China, and not at those who had abused their professional authority by obstructing the people's freedom of assembly and parade. Not only that, they even promoted the officer in charge for his success in maintaining order. There was not a word of reprimand in the corrective document for those officers who violated the public's right to assemble and parade.[188] In practice, the police culture of reward and punishment not only is of no help in safeguarding the public's assembly and parade rights, but actually encourages iron-fisted crowd suppression as a means to promotion, while giving demerits for weakness in maintaining public order.

With the uselessness of getting executive accountability, the victims sought relief from the courts, with incidents related to the Chen Yunlin visit generating no less than fourteen lawsuits from the public. But up to the present there has been no breakthrough. Take the case of documentary filmmaker Chen Yu-ching, who was arrested without cause in front of the Grand Hotel, where Chen Yunlin was staying. The judge pointed out that the officer "suddenly decided to take the final, most extreme of [rights-violating] measures, by taking the plaintiff back to the station, which is difficult to characterize as not violating the principle of proportionality." However, he still in the end found the officer not guilty, concluding that measures taken by "the aforesaid on-duty officer were inappropriate, but subjectively speaking, the officer believed that he was executing his duty in accordance with the Police Duties Enforcement Act."[189]

Similar views came to light in the case of three members of the public who were accosted by police for showing the Tibetan flag while walking in front of the Taiwan Cement Building on Zhongshan North Road, the route leading to the Grand Hotel. In the scuffle to deprive them of their flag, the police inflicted bodily injuries, among them a dislocated finger and a concussion. Although the police justification went no further than the empty assertion that "there was no telling what might have happened, had I let them pass" – clearly a violation of Constitutional Interpretation No. 445, which established the principal that the lack of "clear and immediate danger" made such action unconstitutional – still the judges remained undeterred, ruling against the plaintiffs, on grounds that the officers were following orders.[190]

Simply put, when it comes to implementation of the laws and police action in contravention of the people's assembly and parade rights, hardly ever does the executive branch make any effort to fix responsibility. As for the judicial branch, as

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[188] Control Yuan Public Report No. 2657, pp. 6–14.
[189] Taipei District Court 2008 Case No. Tzu-157 (case of Chen Yu-ching)
[190] Taipei District Court 2007 Case No. Tzu-147 (Taiwan Cement Building case). Also see Shih Hsiu-chuan, "Cross-strait talks: Women appeal ruling in police brutality case," *Taipei Times*, 22 December 2010, available at http://www.taipeitimes.com/News/taiwan/archives/2010/12/22/2003491585.

long as the police are subjectively determined to be carrying out duties, whether or not their work regulations conflict with the above laws, or whether they accord with the laws and regulations governing their professional authority, or whether the reasons behind their determinations and the rights violations they produce accord with the principle of proportionality, etc., the courts always hold that they need not be held to account for the violation of rights. Not only does this make a sham of Article 6 of the Police Duties Enforcement Act, but by failing to limit police use of force, a necessary element in the guarantee of the rights of assembly and parade is missing. Confronted as they are with the superior military force of the police, those who assemble and parade expose themselves to completely unpredictable dangers of state violence.

(9) Discrimination against foreigners

Two Japanese nationals, representatives of the victims of the Fukushima disaster, came to Taipei for an anti-nuke rally in Taipei on 30 April 2011; however, as they prepared to mount the stage to speak, they were threatened by the Taiwanese government, which said that they were not allowed to speak publicly. In another case, on 5 July 2011, several Taiwanese NGOs went together with Malaysian students in Taiwan to the Malaysian Friendship and Trade Centre (the de facto embassy in Taiwan) to protest the Malaysian government's repression of the Malaysian Coalition for Clean and Fair Elections (Bersih). Police on the scene personally threatened them: if any Malaysians present spoke out publicly, the police would notify the National Immigration Agency to deal with them. This effectively silenced the Malaysian students present who had been planning to speak at the petition event.

ICCPR General Comment 15, "The Position of Aliens Under the Covenant," states clearly that "each State party must ensure the rights in the Covenant 'to all individuals within its territory and subject to its jurisdiction' … irrespective of his or her nationality or statelessness." However, Article 29 of the Immigration Act stipulates, "Aliens who are visiting or residing in the State may not engage in activities or employment that is different from the purposes of their visits or residence." Although Paragraph 2 the article contains a partial exception clause ("The acts of filing petitions or participating in lawful assembly or procession by those aliens who reside legally shall not be subject to the aforesaid restriction."), the term "different from the purposes of their visits or residence" is frequently misconstrued to encompass everything from expression of opinion to assembly and parade activities. This clearly violates the principle of General Comment 15.

(10) Discriminatory structure of police hostility toward assemblies and parades

With martial law in Taiwan having been abolished some twenty years ago, assembly and parade rights should already have been normalized as a means for the exercise of citizen rights and the expression of opinion. The police should by now have adopted administrative neutrality towards assemblies and parades and focused on providing such services as traffic control and maintaining order. However, the cases described above indicate that, in actual practice, the police still hold hostile and tendentious attitudes toward assembly and parade activities. Aside from the question of accountability, antithetical attitudes are established during police training, a key factor in the formation of their prejudices. From the beginning of the martial law period, the police have selectively cited social psychology documents to buttress their case: they regard mass movements as the product of such negative emotions as impulsiveness and radicalism,[191] or conspiracies hatched by conspirators.[192] Therefore, the police believe that they are justified in using such methods as undercover operations, infiltration, control, and deployment of intelligence assets to deal with mass movements.[193]

Subsequent to the lifting of martial law, Taiwan's democratic development gradually introduced into police science the notions of assembly- and parade-related human rights. Consequently, the limits of police authority have begun to be taken seriously, along with excesses in practical execution. In the basic police training today, however, hostility towards assembly and parade rights remains as a legacy of earlier times. For instance: "Despite the pros and cons of crowd activity … because of the high degree of destruction and risk of crowd violence … crowd activity shouldn't be regarded as a cure-all for social problems, as those who threaten to coerce through crowd incitement are able to bring about disturbance of the social order." Only the negative aspects of the psychological features of crowds are mentioned: "lack of responsibility, blindness, narrowly focused, exclusionary, surfacing of subconscious tendencies," and "contagiousness, identification, irrationality, aggressiveness, along with other offensive features of crowd behavior supported by scientific points of view." All these negative characterizations are meant to prove the fact that crowds usually release their pent-up discontent, resentment, or rage through aggressive behavior.[194] Such prejudice is also reflected in many books by police officers with

[191] Chiu Hwa-jiun, "A Study on the Suppression of Mass Violence by Police," *Police Science Quarterly* (1980), volume 10, issue 4, pp 71-75 (in Chinese).
[192] Hwang Jhong Liang, "Management of Mob Behavior," *Police Science Quarterly* (1986), volume 16, issue 4, pp 87-93 (in Chinese).
[193] Chiu Hwa-jiun, "A Study on the Suppression of Mass Violence by Police," *Police Science Quarterly* (1980), volume 10,issue 4, pp 71-75.
[194] See Lin Han-tang, *Theory and Practice of the Prevention of Protest Activities* (Taipei City: Hwa Tai Publishing, 2006), 141, pp 84-94 (in Chinese).

practical experience. To cite one example, implementation of martial law is offered as an acceptable method of suppression: "under necessary circumstances, martial law can be declared by the local public security director in order to quell illegal activities conducted by conspirators and to prevent revival of their activities."[195] Or, another still continues with the old thinking that "social protests are linked to the Chinese communists or those harboring ulterior motives": "One of the three preconditions for a Chinese communist military attack on Taiwan is internal unrest, so if conspirators are able to trigger an incident involving bloodshed, they may succeed in fomenting internal unrest by saddling the government with the responsibility."[196]

According to a study of police behavior by Della Porta, a consequence of this hostility towards those involved in assembly and parade activities is that the police have constructed a kind of "field manual" based on their prejudice, which may mislead and magnify negative intelligence deriving from their own overzealous enforcement of the law and crowd suppression actions. The police tend to regard the crowd as "the enemy" and "the other," while their own reaction is seen as performing the necessary "coercive law enforcement" when push comes to shove in their contact with the crowd. Moreover, the police, acting as groups and with superior armed force and individual anonymity, are apt to lose self-control – the "red mist" of psychological parlance – thereby giving rise to conflict.[197] As mentioned above, the police in Taiwan, just as Della Porta warned, exaggerate the provocative danger and hostility posed by those assembling and parading. The response of the police literature to this potential for police violence is to regard the marchers as the ones who are bent on violating social order, while it is the "intrinsic professional ability" of the police officer to exercise caution when confronting situations where the "planners of the action have in mind the enticing of police to violence for dramatic effect." This only reinforces police antipathy towards the crowd all the more.[198]

(11) Unconstitutional administrative measures

Police enforcement of the Assembly and Parade Act is currently based on the administrative rules and regulations embodied in what is known as "Police Procedures for Dealing with Crowd Activities" (hereafter "Procedures"). Our comments here are

[195] Chen Pai-ching, *A Study on the Policy of the Taiwan Government in the Violation of the Assembly and Parade Act* (Master Thesis: National Chung Cheng University, 2007), pp 65-66 (in Chinese).
[196] Lin Wen-kuei, *A Study of Citizens' Demonstration on 18 March 2000: Crisis Management Perspective* (Master Thesis: National Taipei University, 2003), p 159 (in Chinese).
[197] Donatella Della Porta and Oliver Fillieule. "Policing Social Protest." in David A. Snow, S. A. Soule and H. Kriesi. eds, *The Blackwell Companion to Social Movements* (Oxford, 2004: Blackwell Publishing), pp 217-241.
[198] Lin Han-tang (2006), p 477.

based on the Procedures version that was presented in judicial proceedings on 25 June 1990.[199] It is also the version referenced in more recent court judgments.[200] Furthermore, we have confirmed that the National Police Agency has not issued any subsequent version on its police regulations website, in obvious violation of the government's promise to open up information to the public. The Procedures contain many regulations that abuse the Code of Criminal Procedure and the Police Duties Enforcement Act, and even infringe on fundamental civil rights. Take the collecting of evidence during assemblies and parades, for example: Article 9 of the Police Duties Enforcement Act stipulates that collection of evidence should only take place when the behavior of the participants in assemblies and parades and other public activities has harmed public security or public order. Notwithstanding, the Procedures call for video recording and the taking of photos with any type of assembly or parade – legal ones included. Essentially, this is the nature of police activity today, with the collecting of evidence even extending to the private residences of the participants as a precautionary measure.[201] There is an obvious conflict between fundamental civil rights and the Police Duties Enforcement Act.

In addition, the rules for tailing and surveillance laid out in Article 11 of the Police Duties Enforcement Act are only suitable for the following situations: "(1) the police find evidence that one or more suspects have violated a law punishable by a sentence of not less than five years' imprisonment; or (2), the police find evidence proving that that one or more suspects have participated in professional, habitual, mass, or organized crime." However, the Procedures contain several obvious violations of this law. For example, the police are asked to "actively channel" the participants from their place of residence,[202] and "follow the principal leaders to their gathering place, there to channel them, restrain them, and monitor their movements."[203] Or, after the crowd has dispersed, "some of the police remain, to follow and monitor them to make sure that they have really dispersed for good."[204]

Many other aspects of the Procedures are entirely without a legal basis or any grounds to regulate such measures, including "psychological countermeasure" actions, such as broadcasting music, shouting propaganda to alienate the crowds, and of plainclothesmen mingling with the crowds to spread rumors.[205] Since the Procedures conflict with many existing laws, the police quite obviously violate the laws. Instead

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[199] Wei Chien-feng, "Three Questions Concerning the Assembly and Parade Act," *Taiwan Bar Journal*, Vol 12, No 12 (2008), pp 87-94 (in Chinese).
[200] See Taipei District Court 1996 Yi No. 1 (Red Shirts Case).
[201] "Police Procedures for Dealing with Crowd Activities," Rules 1721, 1740, and 3330.
[202] Ibid., Rule 1330.
[203] Ibid., Rule 1412.
[204] Ibid., Rule 4860.
[205] Ibid., Rule 1534.

of abiding by the laws which stipulate that the police should protect peaceful assembly and parade, the police use the Procedures as a standard for limiting people's assembly and parade rights.

IV. Recommendations

(1) Hasten revision of the laws and constitutional interpretation

Revision of the APA in the term of the 7th Legislative Yuan was continuously stalemated, long since rendering Ma Ying-jeou's presidential election campaign call to "return the streets to the people" an unambiguous bounced check. ICPPR Article 21 plainly states that "the right of peaceful assembly shall be recognized," while the implementation law for the Covenants stipulates that the rights proclaimed by the Covenants will have the force of domestic law within country, and that any domestic laws which do not accord with the Covenants' provisions should be completely revised within two years. We herewith rebuke the 7th Legislative Yuan for its sloth and dereliction of professional duty, thanks to which individuals are still made victims of the APA. We hope that the 8th Legislative Yuan, elected in January 2012, will tackle its revision in earnest so that the basic rights of the people to assemble and parade may enjoy legal protection, and so that no further legal and social resources need be wasted on enforcement of a law which violates both the Constitution and the Covenants.

Appearing in the trial of Lee Ming-tsung, "head conspirator" of the Wild Strawberries Movement of late 2008, was Professor Lin Yu-hsiung of the law faculty of National Taiwan University. In his testimony, he stressed that "through a constitutional interpretation, the Constitutional Court should eliminate the Assembly and Parade Act on the grounds that it violates the ICCPR, which means reevaluating Constitutional Interpretation No. 445. The court should render a legal finding amicable to the Covenant, restricting the Act and its Article 29." So the APA clearly violates the ICCPR-guaranteed rights of the people to peacefully assemble. Originally the judge assigned to the case had scheduled sentencing for 9 September 2010, but, because the APA conflicted with the Constitution – both Article 14, which guarantees the right of the people to assemble and form associations, and Article 24, which guarantees freedom to the people – the judge postponed the ruling and called on the Constitutional Court to render an interpretation. With over a year transpiring without such a constitutional interpretation having been issued, many of the public and individuals belonging to social groups have in the meantime continued to be indicted under this odious law. Some of them have even been found guilty. The Taiwan

Association for Human Rights advocates that, while we await the outcome of this Constitutional Interpretation, in the interim all trials having to with this law should be suspended. Hopefully the Constitutional Court will respond to the wishes of the people concerning the APA, and explain clearly that it conflicts with constitutionally guaranteed human rights.

Beyond that, as regards guarantees to foreigners of the right to assemble and parade and otherwise freely express their opinions, Article 29 of the Immigration Act should be revised to read that foreigners " … lawfully staying or residing [in the ROC] be allowed to petition and legally assemble and parade" so that foreigners staying in Taiwan temporarily may also be thoroughly guaranteed the rights of free speech and assembly.

As for related administrative regulations which are outmoded, there should be a public process of reformulating the system of related regulations, so that those regulations governing police action which conflict with current law are thoroughly abolished, along with methods which unnecessarily constrict the right of assembly and parade. Methods employed by the police should be especially constrained, and professional procedures which meet the requirements of peaceful assembly enhanced.

(2) Abuse of power by security agencies: censure and accountability

We have here analyzed the ways in which the APA is employed. Not only have people been victimized by indictments and prosecutions under the APA, but they have had to face the arbitrariness with which prosecutors bring indictments and the dereliction of professional duties and illegal methods by executive agencies and police units. Confronted with the arrogance of those in power, for those prosecuted under the APA, what is really reflected in the implementation of the APA are the bureaucratic culture of systematized and institutionalized mutual protection of one bureaucrat for another and a sham system of legal recourse comprising grossly outmoded administrative regulations. Social reform in Taiwan has in recent years covered a number of areas, including a system of evaluation and removal of judges and prosecutors, which was motivated by the desire to keep worthy judges and prosecutors while establishing a credibly independent judiciary. As for the police, beyond revising the law so as to eliminate their being shielded from prosecution, a system should be put in place whereby they are required to wear identifying badges on their uniforms; where identifying individual officers responsible for violations is impossible, then the commanding officer at the scene should be held accountable.

(3) Nurturing a police education that encourages self-reflection

When it comes to assembly and parade activities, the police are the ones among the public sector who are standing at the front lines in dealing with the public. In confronted with the mentality of those assembling or parading, the police on the scene should maintain a measured response and judgment. The crux lies in how to implement and enhance understanding of human rights in the system of police education and on-the-job training. Through the Covenants, human rights education in the public sector should especially aim at the proper execution of police duties, while looking at how police in other countries are able to maintain a neutral stance in their managing of assembly and parade activities. This will go a long way in remolding public trust in public servants. Taking the example of foreigners in Taiwan who lack citizenship, the National Immigration Agency and the police should understand that the two Covenants are not only addressed to the rights of ROC nationals, so as a Covenant signatory, the ROC should be safeguarding the human rights of everyone, while the police should not enjoy unbridled power and use laws which violate the two Covenants to threaten foreigners who wish to express their opinions or to assemble and parade.

Article 22: The Right of Association[206]

I. Introduction

The current legal framework regarding the right of the formation of civic organizations in Taiwan has its roots in the "Statute on the Organization of Civil Associations During the Extraordinary Period" promulgated by the Republic of China government in 1942 before it controlled Taiwan. Afterward, the KMT government on Taiwan imposed martial law (effective on 19 May 1949) and continued to use the 1942 law to severely restrict the people's right of free association. Even after the lifting of the martial law decree on 15 July 1987, the government used the 1942 law as the foundation for the "Statute on the Organization of Civil Associations Effective During the Period of National Mobilization for Suppression of the Communist Rebellion."

In 1992, the name of this law was amended to the Civil Associations Act (CAA), but its content continues to emphasize the restriction of rights and government interference, and it continues to lack any spirit of positive protection or guarantees for the right of association. For example, the formation of political, social, or professional organizations must all be based on the stipulations of the CAA. However, the CAA adopts a relatively relaxed attitude toward the formation of "political organizations" (i.e. political parties), which can be established immediately upon submission of an application to the competent authority (for political parties, this is the Ministry of Interior; for social and professional associations, it may be other central or local government agencies); this is a "reporting system." In contrast, the CAA stipulates strict regulations for the formation of social associations organized by ordinary citizens. First, it requires that their applications must be submitted and approved before they can be officially formed; this is a "licensing system." In addition, it places numerous administrative restrictions and constraints on the right of association and the self-governance of civil associations.

II. Responses to the State Report

(1) The Civil Associations Act excessively restricts the right of association: Response to ¶ 271 (p. 111) of the State Report

The State Report admits that the requirement in the CAA that at least 30 initiators

[206] This section was authored by Tsai Chi-hsun (蔡季勳) and translated by Dennis Engbarth (安德毅).

are required to apply for the establishment of a civil organization creates difficulties for the formation of ordinary civil organizations and that the state should reflect on this restriction and make improvements in the future.

In addition, the stipulations in the CCA regarding the number of people who must attend a meeting of members for a quorum (from half to two thirds) abrogates the autonomy of ordinary civil associations to use their own by-laws and democratic procedures to decide what is needed for effective resolutions. That the law stipulates quorums for meetings of private associations tramples upon the principle of ordinary democratic procedures that a simple majority of attending members is sufficient, abrogates the power of members to make valid decisions on important matters, and strangles the vitality of civil associations. It is truly absurd legislation.

Moreover, CAA Article 61, in Chapter 10 regarding "Supervision and Punishment," stipulates that if a civil association is established without applying for a permit or registration and is not dissolved during the time limit set by the regulating authority, "the principal plotter will be condemned to a fixed term imprisonment or penal servitude of up to two years." In other words, the people's right of association is not only contingent on coping with the administrative bureaucratic paperwork of the application procedures and official establishment, but social organizations which have not received the qualifications of a corporate person may be determined by the regulating authorities to be in violation of the law and even liable to criminal punishment. Even though apparently the regulating authorities have not yet used these provisions to dissolve organizations or to file criminal charges against "principal plotters," the very retention in the existing law of such stipulations for criminal punishment transparently transgresses the spirit of the ICCPR.

Article 17 of the CAA not only imposes restrictions on the number of directors, it explicitly stipulates that "a chairperson of the board of directors shall be elected by the directors from the standing directors, or elected by and from the directors if there is no standing director." In 2008, the Kaohsiung County Teachers' Association (now the Kaohsiung Education Union), in order to encourage members to take a more active role in association affairs and to realize direct democracy, decided to revise its by-laws to stipulate the direct election of its chairperson by its members. However, the regulating authority vetoed this reform by declaring that direct elections conflicted with the CAA requirement of indirect elections (i.e., members elect directors who choose standing directors who chose the chairperson). The KCTA filed an administrative lawsuit, but on 25 January 2010, the Supreme Administrative Court

ruled that the original decision was valid. In order to expose the improper restrictions on the operation of social organizations imposed by the CAA, a continuation of martial law era clamps on direct exercise of democratic rights, the KCTA resolved to submit a request for an interpretation of the constitutionality of the CAA's prohibition of the direct election of an association's chairperson to the Council of Grand Justices (where it is still pending).[207]

III. Issues Neglected by the State Report

(1) Regulating authorities improperly interfere in the affairs of civil associations

When the Taiwan Urban Renewal Victims Alliance applied to the MOI for registration, its original application stated the organization's name as the "Taiwan Urban Renewal Victims Human Rights Association." However, the application was rejected by the MOI on the grounds that "the aims and tasks of urban renewal involve professionals, and the initiators should have related academic and experiential backgrounds." A second application was submitted under the name of the "Taiwan Urban Renewal Victims Association," but the MOI Social Affairs Department (which is in charge of processing such applications within the MOI) asked for advice from the MOI's Construction and Planning Agency, which replied: "The term 'victims' in the name...such usage could mislead the public into believing the biased and mistaken impression that urban renewal has victims." The application was therefore rejected. Only with the third application, under the name of "the Taiwan Urban Renewal Justice Promotion Association," could the new organization receive official permission to register from the Ministry of the Interior.[208] In February 2002, a similar case occurred when a group of persons wanted to form a "Pirate Party," following the examples of the Pirate Parties of Austria, Finland and other countries (parts of the Pirate Parties International movement which advocates freedom of information, copyright reform, and the protection of privacy in the internet era). However, the MOI rejected the application on the grounds that piracy was a criminal offense and that the name of such an organization would lead to misunderstanding among the public that

[207] See the news release entitled "The Second Anniversary of the Passage of the Two Covenants: When Will the Civil Association Act Lift its Restrictions?" released by the Kaohsiung County Teachers' Association on 2 February 2012, available at http://www.coolloud.org.tw/node/57238 (in Chinese).

[208] Taiwan Urban Renewal Victims Association, "The Anniversary of the February 28th Incident has Just Passed: Is the Interior Ministry Reimposing the Martial Law Rules on Assemblies and Speech?" 1 March 2012, available at http://www.coolloud.org.tw/node/66880 (in Chinese). Translator's note: since an organization's name in English or other languages besides Chinese is not part of the registration procedure, all these name changes occurred only in the official Chinese name of the organization; it has all along presented its English name as Taiwan Urban Renewal Victims Association.

organized crime was being advocated.[209]

The interference by the regulating agencies in the names of civic associations is based on subjective judgments on whether the titles are appropriate. They even use outdated and erroneous laws or regulations to reject applications for the registration of civil organizations due to objections by the state about the names chosen by the people initiating the civic associations. From such examples, we can see that the government's review process for the formation of civic organizations is not only a formalistic confirmation of whether related documentation is complete. In fact it constitutes interference in the substance of the proposed organization and frequently turns into a suppression of free speech or an even more inappropriate infringement on the people's right of association.

During the past two years, when all government ministries and agencies were required to review whether laws or regulations under their purview violate the two covenants, the MOI has made certain revisions to the CAA. Apparently it believes that it has transformed it into a law which imposes a low level of regulation and respects the right of free association of the people and democratic processes. Nevertheless, the fact that the law continues to be arbitrarily applied to restrict social organizations gives rise to doubts as to whether the responsible authorities have a correct understanding of the CAA, or whether they intend to continue its use as an instrument for the restriction of the people's right of free association.

For example, the aforementioned Taiwan Urban Renewal Victims Alliance received an official document from the MOI on 29 February 2012 stating that its use of the wording "Urban Renewal Victims Alliance" instead of the officially approved "Urban Renewal Justice Promotion Association" on the internet violated Article 58 of the CAA and demanded that the association remove all instances of the wording "Urban Renewal Victims Alliance" from its website.[210]

Article 58 of the CAA is one of the most controversial in the entire act because it

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[209] "Ministry of the Interior rejects Pirate Party name," *Taipei Times*, 27 February 2012 http://www.taipeitimes.com/News/taiwan/archives/2012/02/27/2003526490, and "Interior Ministry Rejects Pirate Party Organized by Scholars," Central News Agency, 28 February 2012 http://tw.news.yahoo.com/%E5%AD%B8%E8%80%85%E7%B1%8C%E7%B5%84%E6%B5%B7%E7%9B%9C%E9%BB%A8-%E5%85%A7%E6%94%BF%E9%83%A8%E4%B8%8D%E5%87%86-033713002.html (in Chinese).

[210] Taiwan Urban Renewal Victims Association (press release),"Can the Urban Renewal White Terror be Rehabilitated?" Cool Loud, 7 March 2012 http://www.coolloud.org.tw/node/67082 (in Chinese). See also "Taiwan: Stop the Forced Evictions of the Urban Renewal Victim Families" http://www.tahr.org.tw/node/1030 (in English).

grants excessive discretionary powers to regulating authorities. According to Article 58, if a civic association violates a law or its constitution or encumbers public welfare, the regulating authority may warn it, cancel its resolution, or stop whole or a part of its business. However, the so-called encumbrance of public welfare is a matter to be determined subjectively by the regulating authority, a clause that clearly violates the stipulation of Article 22(2) of the ICCPR that no restrictions may be placed on the exercise of this right other than those which are prescribed by law. In addition, if Article 58 is to be utilized to deal with violations by a civic organization of its own constitution, regulating authorities should use strict standards to judge whether there have indeed been by-law violations, based on complaints submitted by members or the public. Otherwise, the use by administrative agencies of this article as rationale for the impositions of restrictions or sanctions would constitute government interference in the people's right of free association.

IV. Recommendations

(1) Accelerate revisions of related laws

During the first phrase of review of whether the Civil Associations Act violated the two covenants in 2011, the MOI only proposed excising sections that had been rendered invalid due to being declared "unconstitutional" by the Constitutional Court. It did not seriously or thoroughly reexamine the act or implement improvements based on the substance and spirit of the guarantees embodied in the two covenants.[211] For example, the MOI has yet to propose revisions that would change the registration of civil associations from a "licensing" or "approval" system to a "notification" or "reporting" system, reduce government interference, lower the thresholds for formation, eliminate restrictions on the autonomous operation and internal organization of civil associations, or eliminate the criminal sanctions in the chapter on "supervision and punishment" and return to the spirit of ordinary civil law.

In addition, it is absurd that both ordinary civic associations and political organizations (political parties) are both placed under the purview of the CAA, but are

[211] For example, Article 2 of the CAA, which banned civil associations from advocating "communism" or "separatism", was struck down by as unconstitutional by the Council of Grand Justices in Constitutional Interpretation 644 issued on 20 June 2008. See Hsu Shih-jung, Lee Shao-yun, Kyo Yem-ju and Syu Pei-ran, "Defending Civil Society: Report on Laws and Regulations Governing Civil Society Organizations in Taiwan," World Movement for Democracy, Washington DC, 2011 http://www.wmd.org/sites/default/files/Taiwan_2011.pdf. For the full text of Interpretation 644, see http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=644. The deletion of Article 2, along with the deletion of Articles 36, 40, and 53 and the amendment of Articles 5, 37, and 56, was promulgated on 15 June 2011.

subject to different intensities of regulation. In the future, the MOI should consider whether it is necessary for political parties to be included under the regulation of the CAA.[212]

Cooperation between the state and the private or civic sector is necessary for a flourishing civil society and democratic governance, in order to ensure the sustenance and deepening of democratic political life. Therefore, the government should propose a comprehensive and thoroughgoing revamping of the CAA based on the spirit of the ICCPR as the top priority in ensuring the people's right of free association.

(2) Re-examine and improve training for civil service staff

In order to regulate civil associations, the MOI has used the legal authority of the CAA to issue administrative orders that continue to impose various kinds of administrative restrictions and constraints on the autonomy and self-governance of civil associations, such as the "Implementation Guidelines for Intensifying Supervision of All Levels of Civic Associations," "Regulations Regarding the Procedure for Establishment of Social Organizations," and the "Regulations on Election and Recall in Civil Associations."

For decades, these unreasonable regulations and administrative decrees have caused persons wishing to organize civic associations to run into innumerable bureaucratic brick walls, as well as creating unnecessary work for staff in the regulating agencies in charge of enforcing these outdated rules.

For example, the Academia Sinica Community Development Association in Taipei City recently sent a formal request to the MOI Social Affairs Department to deal with the fundamental problem and excise Article 5 of the "Implementation Guidelines for Intensifying Supervision of All Levels of Civic Associations." In the end, the MOI's reply only stated that it would include the related ancillary regulations when it carried out a comprehensive revision of the CAA, but that, before such a revision, the association would continue to be required to notify in advance the concerned District Office in Taipei City before it held any board meetings. In fact, such subsidiary

[212] Translator's note: Draft bills for a separate "Political Party Act" have been proposed repeatedly for over ten years, but have consistently failed to be seriously considered by the Legislative Yuan. See, for example, Teng Sue-feng, "Democratization Forges Ahead – Laws Drafted to Regulate Political Parties," *Taiwan Panorama*, October 2002, available at http://www.taiwan-panorama.com/en/show_issue.php?id=2002109110065e.txt&table1=2&h1=About%20Taiwan&h2=Politics and Central News Agency, "Talk of the Day: KMT assets in spotlight again," 31 August 2012, available at http://www.taiwannews.com.tw/etn/news_content.php?id=2013470.

implementation guidelines may be amended by the regulating authority on its own, to take the initiative to make necessary revisions to correct its errors and protect human rights. However, the MOI's response instead fit the bureaucratic custom of avoiding action whenever possible.[213]

From this example it can be seen that the mentality of civil service staff remains passive and reactive, preferring to embrace the outdated and deeply flawed CAA and related regulations to regulate and manage civic associations, even though this law and its subsidiary rules violate the spirit of the ICCPR. In the future, the government should intensify human rights education for MOI personnel so that they can genuinely grasp the aim and the spirit of the two covenants and understand how the utilization of existing laws and regulations contravene the covenants and cease to continue to use authoritarian notions and habits to interfere with or restrict the people's right of association.

[213] "Chiu Hei-yuan: Monitoring of Civil Associations Should Not Be Excessive," *China Times*, 12 December 2011 http://news.chinatimes.com/focus/501010133/112011121200410.html (in Chinese).

Article 24: Rights of the Child[214]

I. Introduction

Regarding Article 24, the State Report mainly lists policy examples and explains legal articles without clarifying the actual situation. A number of sexual assault and bullying cases that occurred on school premises between 2007 and 2011 are described below.

II. Response to the State Report

(1) Continued sexual assault on school campuses, and a school out of control: the Affiliated School for Students with Hearing Impairments of National University of Tainan: Response to State Report ¶ 311 (p. 124) and ¶ 316 (p. 127)

Regarding sexual assault cases, the State Report merely lists sexual assault related laws such as the Sexual Assault Crime Prevention Act, but does not mention the continued occurrence of sexual assault incidents on school premises. Between 2007 and 2011, the Humanistic Education Foundation has handled numerous cases of sexual assault in schools. Several more severe cases involving teachers sexually assaulting students and students sexually assaulting fellow students are listed below:

1. Sexual assault by teachers:

Table 3: Sexual Assault Cases in Schools (teachers assaulting students) 2007-2011

January 2007	The chief of physical education, surnamed Chung, at National Chi Mei Senior High School in Kaohsiung sexually assaults female students
March 2008	A male homeroom teacher teaching fifth graders at Shang An Elementary School in Taichung City sexually assaults several male students. In March 2010 the court hands down a prison sentence of 19 years and six months. The Control Yuan orders the Taichung City Government and Shang An Elementary School to take corrective measures.
February 2009	A homeroom teacher surnamed Sun at National Tseng-wen Senior Agricultural & Industrial Vocational High School in Tainan sexually

[214] This section was authored by Chang Ping (張萍), Joanna Feng (馮喬蘭), and Chen Yu-chi (陳郁琦), and translated by Susanne Ganz (金樹曦).

	assaults several female students and takes nude pictures of them. Sun is sentenced to 73 years in prison, of which 27 years must be served. The Control Yuan censures the school's principal, surnamed Lin.
February 2009	National Chi Mei Senior High School in Kaohsiung stalls firing Chief of Physical Education Chung who has sexually assaulted female students over a long period (see January 2007 above). On 30 March, the Humanistic Education Foundation stages a protest in front of the school holding banners that criticize the school's faculty evaluation committee.
April 2009	Student Affairs Director Chen at National Chi Mei Senior High School in Kaohsiung sexually assaults several female students.
May 2009	A teacher at Kaohsiung Municipal Cianjhen Senior High School indecently exposes himself to several female students, but is not fired. The Humanistic Education Foundation stages a protest in front of the school, holding banners that criticize the school's faculty evaluation committee.
July 2009	The chief of physical education, surnamed Tien, at Taiping Elementary School in Hualien, who is also in charge of gender equality, sexually assaults four students. He is handed a 54-year sentence, 18 years of which must be served. The Control Yuan impeaches school officials who knew about the incidents, but did not report them, including the previous and the incumbent principal.
December 2009	Parents take legal action after teacher Huang at Kaohsiung Municipal Jhengsing Junior High School sexually assaults junior high school students in Tainan. Although Huang has been indicted, the school allows him to teach because it does not know about the indictment. Subsequenty Huang is handed a suspended prison sentence.
February 2010	A special education teacher at Kaohsiung Municipal Chien Chin Junior High School indecently exposes himself to special needs students, but is not fired. The Humanistic Education Foundation puts up a banner in front of the school in protest.
2010	The chief of the Disciplinary Section at New Taipei Municipal Lujiang Junior High School indecently exposes himself to several male students with incidents happening over a long period of time, but the school turns a blind eye to the matter. The Control Yuan impeaches the principal, the director of student affairs, and the

	section chief.
October 2011	Complaints are received stating that Director of Student Affairs Chen, who was fired from National Chi Mei Senior High School for sexually assaulting students, took advantage of his wife's position as director of the Xinguo Branch of Tuku Elementary School in Pingdong County to serve as tutor in summer school classes and for the Ministry of Education's *Night Angel Illumination Program*, an after-class schoolwork assistance scheme, in 2010. He continued to approach students during these events.

The cases mentioned above expose many problems such as schools having knowledge of, yet concealing or failing to report sexual assault incidents, so that even more students get hurt. Due to the lack of effective gender equity education in schools, students are afraid of those with authority and, in such unequal power relationships, lack the ability and courage to resist acts by teachers that violate their physical boundaries. Students do not know about avenues for filing sexual assault complaints. Schools assist the victimizing teachers with the suppression of evidence, play down the incident, and advise parents against accepting an investigation under the Gender Equity Education Act. When student victims go public and report the assault, they often become a target of public criticism and are accused of intending to harm the teacher. The vast majority of victims have not been granted statutory assistance under the Sexual Assault Crime Prevention Act including psychological counseling and legal aid. Teachers' covering up for each other in faculty evaluation committees is rampant, yet there is not a single mechanism in place for monitoring the operations of such committees.

2. Sexual assaults by students (Affiliated School for Students with Hearing Impairments of National University of Tainan)

In October 2010, the Humanistic Education Foundation handled complaints concerning eight incidents in which students sexually assaulted fellow students at the Affiliated School for Students with Hearing Impairments of National University of Tainan (herein called Tainan School for Students with Hearing Impairments). In November, foundation officials visited the school's principal and asked him to launch an investigation in line with the law. With the help of lawmakers, a mediation meeting was held in December 2010 with the Central Region Office of the Ministry of Education (MOE), the school, and the ministry's Special Education Unit participating. In the meeting, the MOE was urged to supervise and assist the school in preventing sexual assault as required by law. Another meeting was held in mid-June 2011, again

initiated by lawmakers and with the same participants, which demanded that the MOE appraise special education schools as stipulated by the Special Education Act (since 2003 the MOE has never conducted any appraisals, in violation of the Special Education Act), but the Central Region Office rejected the demand for school appraisal on the grounds that no appraisal indicators had been set.

While a number of old cases surfaced between December 2010 and June 2011, new incidents continued to occur. Among these, the Gender Equity Education Committee discovered in late April 2011 that a junior high school student had been victimized over a long period; however, even after the school was officially notified of the case, the student continued to be victimized in early June. The school director even told the student's parents "we can't guarantee the safety of your child." The Humanistic Education Foundation felt compelled to report the crimes in a letter to the MOE, raising the number of incidents from 8 to 128, including the case of a student who had been routinely victimized since second grade in elementary school. The 128 incidents involved 38 victims and 38 offenders, including 12 victims who subsequently turned victimizers. The scenes of the sex offenses included classrooms at the school, restrooms, the dormitory, bathrooms, the library, on the school bus, at the teacher's or a student's home, or on the train. Of the total, 39 incidents happened on the school premises, 50 at the dormitory and 31 on the school bus, which means the school premises, including classrooms and restrooms, were the scene of the crime in 30 percent of the incidents, while the dormitory, including bedrooms, bathrooms and restrooms, accounted for another 40 percent. Most unbelievable is the fact that one quarter of the incidents happened on the school bus. It is regrettable that the MOE, eager to play down the severity of the situation, kept refusing to acknowledge that the number of incidents was much higher than the 71 incidents admitted by the school.

The investigation found the following reasons why such a severe epidemic of sexual assault could happen at this special education school:

1. Failure to implement sex education. Although the school is a special school for the hearing impaired, students with hearing impairments are as intelligent as ordinary people so they can be taught.
2. Teachers and administrative staff had a questionable attitude, claiming that the children were just playing or that they were following their biological drives. They turned a blind eye and did not report, investigate, or address the incidents, which aggravated the situation.
3. The school environment is problematic. From first grade in elementary school students sleep together in large shared bedrooms (their duvet covers are even pulled

away during inspections), instead of doors, the bathrooms have only plastic curtains, and the rule is that these curtains must not be closed when someone is showering (so that the supervisor can continously monitor the situation). As a result, the students grow up, from childhood on, in an environment without proper self/other boundaries.
4. Problems with management and control. Teachers and administrative staff ignored the incidents that happened in the dormitory or on the school bus for a long time and did not deal with them.[215]

Although the State Report calls these incidents "a serious violation of human rights," it only states that the government should continue to reflect on related issues and seek improvements. But is does not propose any concrete measures as to how the situation on school campuses could be improved with regard to sexual assault. Therefore, the Shadow Report urges the government to propose concrete policies as

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[215] Following is evidence for the school ignoring the incidents:

(1) Student A counts among those who sexually assaulted schoolmates. When student A was in second grade of elementary school, a dormitory manager witnessed how an older schoolmate sexually assaulted him in the bathroom, but the dormitory manager did not report the incident. Student A was also once sexually assaulted on the school bus, but when he told his homeroom teacher, the teacher said: "He is a good kid, but you are bad!" When he told the dormitory manager about it, the manager said: "I won't listen, I don't want to hear it!" The school did not only fail to report the incidents, it also failed to notify the parents. When the parents were informed many years later that student A would have to move out from the dormitory, the situation had already become so severe that the case of student A was sent to prosecutors for investigation.

(2) Student B, who also sexually assaulted younger schoolmates, was sexually assaulted by an older student in his second year of junior high school. As a senior high school freshman, he was again sexually assaulted by older schoolmates and classmates in the dormitory. But the school again did not report the incident nor notify the parents. Student B twice reported to the life counselor: When he told him that older schoolmates took turns screening porn videos in the dormitory, the life counselor replied: "I know, that's a secret." He did not immediately put a stop to the screenings and did not report the incident.Later on student B discovered that the dormitory manager himself watched porn videos in his room.

(3) Male student C once told the dormitory manager and teachers that a certain schoolmate had mounted him, but nothing happened.

(4) One day, a junior high school girl, who was sitting in the last row of the school bus, began to scream because she was sexually assaulted by a group of students. When student C heard the screaming, he immediately rushed from the front of the bus to the center to ask the school bus escort for help. But the escort only said "Go back to your seat, don't bother!"

soon as possible and to speed up their implementation so that children can be spared from the nightmare of sexual assault in school.

(2) Frequent Bullying on School Campuses: Response to State Report ¶ 313 (p. 126)

As the State Report points out, there were 855 reported bullying cases, including 625 confirmed cases and 230 suspected ones. The State Report also notes that the government has "devised substantial strategies" to put an end to bullying in schools, but it fails to describe what these substantial strategies are.

With regard to addressing the bullying problem, the Shadow Report raises five points of criticism:

1. President Ma Ying-jeou has declared that the following principles are to be observed when dealing with bullying: proactively uncovering bullying incidents, quickly dealing with them, cooperating with investigators, and explaining the situation to the public. Ma's statement perfectly reflects the limitations of Taiwan's current approach toward handling bullying prevention: It lacks love, compassion, and understanding. In contrast to Britain's anti-bullying policy, which emphasizes the importance of every single child, Taiwan seems to be flaunting its "crime prevention." How can we devise educational approaches if we are beholden to such a mindset?

2. Taiwan's anti-bullying policy presently emphasizes reporting and bringing the perpetrators to justice. Even Education Minister Wu Ching-ji has declared that bullies will be sent to prosecutors and put on trial. Japanese experiences, however, show that using great external pressure to suppress obvious forms of bullying such as physical bullying will result in other, less visible, forms of bullying. By using high-handed approaches to stop bullying, the problem cannot be truly solved.

3. Foreign researchers widely agree on the importance of establishing children's sense of self worth. Some researchers have also pointed to the importance of peer support systems. However, the question is, how are we going to establish such systems and assist children in learning to build positive social relationships if our policy tends to "criminalize" bullying and divides children into two opposing camps of bullies and bullying victims. If we are unable to place the focus on helping children develop "social skills," how does then defining the term "bullying" help practically?

4. The MOE's information campaign strategy emphasizes reporting via its bullying hotline and keeps reiterating the slogan "anti-bullying." This approach is not only hardly conducive to improving values and professional expertise, but also actually undermines this crucial issue. Information campaigns in other countries virtually always focus on the rights of children, and promote respect and tolerance. They also attach importance to improving teachers' professional skills (Britain's Anti-Bullying-Week initiative focuses on teacher training) and emphasize schools' educational responsibilities.

5. It is very difficult to explain to the international community why the MOE's Department of Military Training Education is in charge of bullying prevention work. Indeed, it is hard to explain the capacity and role of military training instructors in the first place. The mere existence of these instructors is a remnant of history. The rationale behind the system is control, which echoes the direction of current policy. However, the experiences of other countries in addressing bullying show that it takes professional expertise and education to achieve positive effects, to solve and prevent bullying. The MOE has put the Department of Military Training Education in charge of bullying because its mindset is geared toward control and management instead of education and guidance. Schools shun their educational responsibilities and shift them onto social workers or the family. But bullying and school violence both occur on school premises. School administrators and faculty should not shirk their educational responsibilities. Moreover, as Prof. Taki Mitsuru, a researcher at the National Institute for Educational Policy Research in Tokyo, has pointed out, any attempts to address bullying need to begin with education. Regardless of what measures are taken, whether be it peer support programs or social skills development, treating violence with violence is out of the question.[216]

III. Conclusions and Recommendations

Regarding sexual assaults and bullying in school, the Humanistic Education Foundation makes the following suggestions:

(1) Education authorities should actively guide schools to report sexual assaults and accidents at school. Principals that cover up or play down cases, or protect teachers who committed sexual assault, should be regarded as unfit for the job. Education authorities at all levels should mete out the most severe punishment to

[216]Joanna Feng: "Is such a "Fight Against" Bullying Useful?" *Humanistic Education Journal* No. 268, October 2011.

principals, administrative educational staff, or school inspectors who, in violation of the law, do not report cases. In particular, principals who commit serious violations of the law pursuant to Article 7 of the "Performance Assessment Regulations for Principals of Public Schools for Grades K-12" should be recorded a major demerit, be temporarily suspended or dismissed from office, and not be allowed to participate in the principal selection process at other schools pursuant to Article 9-1, Paragraph 2, of the National Education Act, which states "A principal who is unfit or incompetent, and is confirmed unfit or incompetent following an investigation by the responsible education administration agency, shall be subjected to a reassignment of duties or other appropriate disciplinary action."

(2) The government should put together teaching materials based on actual case studies to assist all students to establish the concept that everyone has the right to control over their body, and to muster the courage to reject any acts that overstep physical boundaries. Children should be enabled to learn how to distinguish between "love and abuse." At the beginning of each semester, schools should explain to students in a public setting what their rights are and how they can lodge complaints (against violations of those rights). Schools should also promise to protect all students and ensure that every student grasps the concept of the right of control over one's own body, and has the courage to say "No" to acts that overstep physical boundaries.

(3) The revision of the Special Education Act in 2009 changed the school appraisal system from conducting appraisals once or more every two years to once or more every three years. However, in fact no appraisals have been carried out at all since the Act was originally promulgated in 2003. Therefore, the MOE must implement the appraisals as stipulated by the Special Education Act. Moreover, it should give all children appropriate sex education in accordance with the law.

(4) The shocking discovery was made in the case of the Tainan School for Students with Hearing Impairments that many teachers at such schools still are unable to communicate in sign language. The government should completely overhaul its selection criteria for boarding school type special education schools and special education teachers and related policies. It should even consider linking special education budgets to the number of students to ensure the quality of special education.

(5) Regarding the several dozen students who were sex offenders at the Tainan School for Students with Hearing Impairments, including victims that became victimizers, the government should do its best to provide offenders and their families with medical specialists and psychologists to help them heal.

(6) As for the issue of bullying, in the article "What we can do to Face Bullying in School,"[217] two experts who were interviewed, Lee Ming-shinn[218] and Huang Li-ya,[219] proposed the following proactive approaches:

1. The government should adjust its attitude toward bullying by clearly stating that it "opposes using bullying to stop bullying and advocates love, compassion, and understanding."
2. Community resources should be pooled to convene bullying incident committees that are headed by professional staff so that schools of all levels are furnished with the powers, knowledge, and skills that it takes to handle such incidents, and to address the fact that grassroots teachers are often too busy to handle them themselves. By sharing community resources, social workers, counselors, and parents can work together as members of such committees.
3. Actively punishing schools that cover up bullying incidents. Punishment should not be based on the number of incidents, but on whether any incidents have been covered up. For example, if a school is located in an area with few resources and a high incidence of bullying, and the school has the will to deal with the issue proactively but needs resources, the state's function should be to provide resources and support. When fighting bullying, "zero bullying" should not be made the yardstick for evaluating the situation. Instead everyone should be encouraged to speak out and actively deal with bullying.
4. Accept that patience is required to understand the causes of such behavior. Only after efforts have been made to diagnose the reasons behind children's behavior can a good way of handling the incident be devised. It should not be simply a process of labeling those involved as victimizers/victims/onlookers and then suspending them from school while society declares "this has nothing to do with us."
5. Programs to address bullying must be carried out with schools at the core. The government should invest relevant resources to improve the professional skills of teachers in all schools, so that they can address bullying on the spot.
6. A school support system must be established with a focus on professional expertise.

[217] Huang Fu-hui: "What we can do to Face Bullying in School," *Humanistic Education Journal* No. 259, January 2011.
[218] Professor at the Department of Curriculum Design and Human Potentials Development of Dong Hwa University.
[219] Deputy director of the southern office of the Humanistic Education Foundation.

Article 25: The Right of Political Participation[220]

I. Introduction

The section of this Shadow Report regarding Article 25, concerning the right of political participation, will discuss the distinction between the right of suffrage and the right to be elected and use concrete facts to highlight how the right of election and the right to be elected have been substantively infringed. These infringements include phenomena that directly influence the right of voters to cast ballots, such as the reality that although each adult citizen has one vote, the value of their votes are clearly not equal as well as the possibility of persons with physical or mental disabilities being able to exercise their right to vote. In addition, there are numerous restrictions in the Referendum Act that constrain and shrink the right of direct democracy. Moreover, distortions within the electoral system itself, including the delineation of electoral districts and the determination of candidate election deposits, serve to exclude small political parties and disadvantaged groups from the political system and infringe on the rights of the people to participate in politics and to be elected to public office.

II. Responses to the State Report

(1) The doors to public policy deliberation are shut tight, and the people have no way to monitor or participate: Response to ¶ 322 (p. 130) of the State Report

The State Report should have offered explanations and re-examination of how the government guarantees the people's participation in politics and public affairs, but its discussion of Article 25 only responded to the questions raised by the public regarding the insufficient citizen participation in the review of environmental impact assessments (EIAs). On the surface, it adopts the method of "balanced reporting" in describing the opposite views of the government and the public. However the paragraph lacks substantial content in addressing the questions raised by people at the public hearings when the government was preparing the report. Moreover, the paragraph evaded comprehensive re-examination of the aspects of the legal code and implementation and instead manifested the perfunctory working of government institutions at all levels and their hypocritical and ostrich-like mentalities.

The current government has delegated authority to agencies on all levels to set

[220] This section was authored by Chen Yu-chi (陳郁琦) and Echo Lin (林仁惠), and translated by Dennis Engbarth (安德毅).

their own limits regarding "public participation in political affairs." For example, the scope of public participation in EIA reviews is laid out in the "Key Points Regarding Attendance by the Public in Environmental Impact Assessment Reviews" officially announced by the Cabinet-level Environmental Protection Administration in 2009. However, the insufficient intensity in the design of "public participation" and the lack of transparency and clarity in the review process have caused the current degree of public participation to be a formalistic exercise in which the processes of implementation and execution have sparked numerous disputes and widespread disapproval.

The first article in the EPA's rules states their purpose is "for the sake of realizing public participation in the process of EIA review and ensuring order in the meeting site." Nevertheless, in the process of implementation, the EPA always uses the pretext of "ensuring order in the meeting site" to impose measures to "limit" or even "refuse" public participation, such as strictly limiting the time for members of the public to express their views and the number of speakers from the public. It also sets up procedures to separate the public from the review meeting (e.g., restricting the public to watch closed circuit television in a separate room, with heavy security outside the room). Usually the final EIA conclusions are made in a closed-door meeting without any transparency to the public. Such measures have the opposite effect from the statement made in the report by the EPA that it "should try its best to respect the people's rights to participate in various public affairs..."[221]

All types of government-directed development and construction plans impose major impacts on the health rights, water rights, and work rights of local residents. However, the government not only does not engage the affected residents in comprehensive dialogue, but also deliberately restricts the right of public participation in the processes of policy formation, decision-making, and review. Government agencies are reluctant to provide clear and sufficient guarantees for public participation in the legal instruments governing review of EIAs, but similar restrictions and limits on public participation in political affairs are prevalent in other

[221] Numerous media reports describe how public demands to participate or attend EIA reviews have been rejected or obstructed or featured restrictions on the number of people who could observe or speak at the hearings. Chu Shu-chuan (in "Third Phase Expansion of Central Taiwan Science Park approved as EIA Commissioners are Silenced" on the "Environmental Reports" ("*Huanjing Baodao*") blog, 31 August 2010, http://shuchuan7.blogspot.com/2010/08/blog-post_31.html (in Chinese)) reported that on 25 August 2010 "barbed wire fences kept the people away from the door of the Environmental Protection Administration building while torrential rains from a typhoon struck again and again" and "farmers from Houli and environmental protection organization activists held a news conference in the rain." See also Loa Iok-sin and Shelley Shan, "Activists warn EPA on Houli," *Taipei Times*, 26 August 2010, available at http://www.taipeitimes.com/News/taiwan/archives/2010/08/27/2003481417.

government ministries and agencies as well. Too many incidents have shown that there are insufficient legal guarantees for the people's participation in the conduct of public affairs, as defined in General Comment No. 25 ("The right to participate in public affairs, voting rights and the right of equal access to public service"), issued on 12 July 1996 by the United Nations Human Rights Committee: "the exercise of political power, especially in the exercise of legislative, administrative and regulatory powers," including "all aspects of public administration as well as international, national, regional and local government policy-making and implementation." [222]

(2) Excessive deposits for candidates establish a barrier to electoral participation for economically disadvantaged people: Response to ¶ 323 (p. 131) and ¶ 332 (p. 133) of the State Report

General Comment No. 25 states that "(c)onditions relating to nomination dates, fees or deposits should be reasonable and not discriminatory." It further stipulates: "No distinctions are permitted between citizens in the enjoyment of these rights (the right to participate in public affairs, voting rights and the right of equal access to public service) on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." However, the State Report only mentions that the government will carry out an re-examination based on the spirit of the covenants but does not make any mention of substantive policy plans with regard to the election deposit system.

The legal grounding for the existing election deposit system can be found in Article 32, Paragraph 1 of the Civil Servants Election and Recall Act (CSERA) which stipulates: "When being registered as a candidate, a person shall pay the deposit, and the amount shall be publicized by the election commission in advance." For example, Resolution 401 approved by the Central Election Commission (CEC) on 4 April 2010, set the deposits that had to be provided by candidates for the December 2010 election of the mayoral or city council posts in Taiwan's five major metropolitan districts (Taipei City, New Taipei City, Taichung City, Tainan City, and Kaohsiung City) at NT$2 million and NT$200,000, respectively, and stipulated that any candidates that failed to win votes at least 10% of the eligible electorate would not have their deposits refunded.

Taiwan's Green Party is now currently challenging the constitutionality of the

[222] General Comment No. 25 is available at http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb.

election deposit system in the courts. Green Party Executive Committee Member Sung Chia-lun, who ran unsuccessfully for a seat on the Taipei City Council in the December 2010 election, has related that rulings of the Taipei High Administrative Court on Case No. 219 issued on 30 June 2011 and of the Taiwan Supreme Administrative Court on Case No. 2273 issued on 15 September 2011 were based on the following reasoning: "The legislative intent of the establishment of the election deposit system was to prevent candidates from abusing registration for election and to require candidates to cautiously and seriously participate in elections and thereby avoid a waste of social costs and resources due to willful electioneering; therefore it is necessary for the maintenance of social public benefit if regulated within a rational scope."[223]

The currently existing election deposit system makes it impossible for persons without financial power to exercise their constitutional rights on the basis of parity. It thus transgresses not only the stipulation of the ICCPR on the right of political participation, but also the right of political participation on a free and equal basis guaranteed to the people by the constitution. Furthermore, by closing the doors for political participation for the disadvantaged and poor, it is a form of unfair discrimination based on economic and social status.

(3) The lack of assistance measures blocks persons with physical or mental disabilities from exercising their right of suffrage: Response to ¶ 332 (p. 133) of the State Report

General Comment No 25 states that it is unreasonable to restrict the right to vote on the ground of physical disability. Furthermore, it calls on States to take positive measures to overcome specific difficulties, such as adopting photographs and symbols to ensure that illiterate voters have adequate information on which to base their choice. The State Report only acknowledges that current measures taken to facilitate exercise of the right to vote by people with physical or mental disabilities still cannot fully satisfy the needs of the disabled and requires further improvements, but it does not mention any such concrete measures or policies for improvement.

Disabled lawyer Lee Ping-hung has written: "People with physical handicaps wish to vote, but their opportunity to cast their ballots is often affected because polling stations often do not have barrier-free space and they are unable to enter polling places. Even more serious is the fact that persons with serious physical disabilities

[223] Sung Chia-lun, "Return Politics to Us," *TAHRPAS Quarterly*, Taiwan Association for Human Rights, Winter 2011 (published 2 February 2012) pp. 26-29, available at http://www.tahr.org.tw/node/114 (in Chinese).

often rely on special "rehabilitation buses" for transportation, but the lack of sufficient buses means that many people are unable to go to polling stations, and thus have their right to vote abrogated."[224]

With regard to voting by blind or visually impaired people, Lee Ping-hung related that "when visually impaired persons arrive at polling stations, they first have to get special voting instruments (usually a plastic rectangular frame that is designed to fit the ballot and has embossed numbers that match the numbers on the ballots). Family members or polling workers help the visually impaired person enter the voting booth and match the ballot and the plastic frame and have the blind person put the stamp in the proper squares for their choices and then help them put the stamped ballot into the ballot box.[225] Visually impaired persons often complain that this method makes it difficult for them to know whether they have voted correctly, and some visually-impaired persons have proposed that the existing method of voting should be changed. Moreover, there are also some persons with acquired blindness who have not studied Braille characters and cannot use this method to vote, and this fact affects their opportunity to exercise their right to vote."

It is evident that persons with physical or mental disabilities still experience numerous difficulties in the voting process. Regardless of the existence of various legal regulations, given the actual objective operating process and the government's failure to provide active assistance to persons with disabilities, it remains impossible for persons with disabilities to enjoy a user-friendly voting environment that is fundamentally equal to ordinary people.

(4) The distortion of political participation of indigenous peoples as "small tribes are sacrificed while the big tribes succeed": Response to ¶ 343 (p. 138) of the State Report

The General Comment No. 25 states that the enjoyment of these rights of political participation cannot be subject to discrimination for reasons of race, skin color, gender, language or any other reason. The State Report only cites Additional Articles 4 and 10 (Paragraph 12) of the Constitution and mentions, "For the electoral district, the CSERA is to be followed." However, Haisul Palalavi, an assistant professor at Shih Chien University in Kaohsiung, pointed out that, in actual practice, the main

[224] Lee Ping-hung, "A Preliminary Exploration of the Right of Suffrage for Persons with Physical or Mental Disabilities," *TAHRPAS Quarterly*, Taiwan Association for Human Rights, Winter 2011, 2 February 2012, pp.17-18, available at http://www.tahr.org.tw/node/114 (in Chinese).
[225] Translator's note: In Taiwan, ballots are marked with a stamp provided by the election authority.

problem in indigenous peoples political participation has emerged as the "delineation of election districts," including the division into "highland indigenous people" and "lowland indigenous people" and the continuation of the system of single non-transferable votes (SNTV) in multiple-member constituencies.[226] This system fosters the problem of "the small tribes are sacrificed, the big tribes succeed."[227]

In addition, the adoption of the election districts (into nationwide constituencies for highland and lowland indigenous peoples) has also created numerous other problems:[228]

(i) Both the "highland" and "lowland" constituencies are in fact nationwide constituencies, since indigenous peoples registered in either division may reside in any part of the country, and the voters are extremely highly dispersed. Thus candidates must try to cover the entire country during their campaigns. This creates a situation favorable to candidates who have strong political party backgrounds, who are incumbents, who are famous, and who have hefty financial resources. This system thus hinders the participation of indigenous persons who do not have backing from political parties or who lack large financial resources.

(ii) The prevalence of coordinated voting by political parties may distort the people's will. Political parties hope to capture a majority of seats and thus nominate enough candidates to win a majority in the nationwide indigenous constituencies. However, the nature of SNTV elections spurs candidates from the same party to compete with each other and even mutually engage in cutthroat competition to dig out votes from their comrades, since it is easier for each individual candidate to try to appeal to his party's faithful supporters than to cultivate new supporters. This tendency is not favorable for cooperation and coordination among indigenous candidates of the same party, and it encourages vote-buying and other forms of electoral corruption. Likewise, the adoption of multiple member constituencies makes it difficult for indigenous candidates to avoid mutual antagonism, cutthroat competition, and mutual personal attacks. The wounds caused by such intense

[226] Translator's note: The terms "highland" and "lowland" are those used in the official translation of the Constitution; however, they are often rendered as "mountain" and "plains," which may be closer to the Chinese meaning. The SNTV system means that voters cast one vote; in a multi-member district, as both the indigenous districts are, all of the top vote-getters will be elected (e.g. if there are three seats, the first, second, and third highest vote-getters will get them). This leads to unusual political dynamics, as discussed below.

[227] Haisul Palalavi, "An Evaluation of the Election System for Indigenous Peoples," *TAHRPAS Quarterly*, Taiwan Association for Human Rights, Winter 2011, 2 February 2012, pp. 19-22, available at http://www.tahr.org.tw/node/114 (in Chinese).

[228] Ibid.

electoral competition also affect the degree of tacit cooperation among indigenous lawmakers in the Legislative Yuan after the polls.

(iii) Owing to the excessive size of the constituencies, candidates are often exhausted by travelling all over Taiwan for votes and need considerable financial resources to pay for such travel, a factor that also encourages the spread of money politics. The larger the constituency, the more important organization becomes in the campaign and therefore the greater becomes the necessity to rely on major political parties and tendencies for successful candidates to put the interests of their political party above those of the indigenous peoples whom they were elected to represent.

(iv) The excessive size of the constituencies in this system makes it almost impossible for candidates from indigenous peoples with relative small populations to win election into the national legislature. Thus, it fosters the phenomenon of "big tribe monopolization" of politics among Taiwan's indigenous peoples.

(v) Since most incumbent legislators are from the indigenous peoples with large populations, the contestation within the indigenous peoples' political stage and the expression of indigenous peoples political views further magnifies the problem of inequality by "strengthening of large tribes and weakening of small tribes."

(vi) Since the constituencies are too large, the victorious candidates are unable to serve the needs of their entire district and, due to the geographic duplication of constituencies (since all parts of the country are covered by both regular district constituencies and indigenous peoples' constituencies), competition frequently emerges between legislators serving their constituents that causes waste in administrative resources.

(vii) Besides causing waste in time and resources used by indigenous legislators in serving their scattered constituents, the huge varieties in geography and character of voters in these nationwide highland and lowland constituencies also makes it virtually impossible to cultivate specialized or professional lawmakers within the indigenous community.

(viii) Finally, the excessive size of constituencies spurs elected legislators to focus their attention on certain groups of voters or special interests, such as the voters (especially supporters) in the heartland of their own tribe, and makes it difficult for other voters to monitor their legislative performance.

III. Issues Neglected by the State Report

(1) Numerous limitations on citizen referendums that manifest direct democracy (the right of suffrage)

General Comment No. 25 regarding Article 25 of the ICCPR stipulates that elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights. In addition, persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to a referendum or plebiscite. However, issues regarding citizen referenda are entirely absent from the State Report's section on Article 25 and the right of political participation.

In fact, Taiwan's Referendum Act officially took effect on 2 January 2004, and the first two referendums in Taiwan's history were conducted in tandem with the 20 March 2004 presidential election. The two questions addressed bolstering national defense (with 45.17% of the eligible voters casting ballots) and negotiating with China (with a 45.12% turnout). In tandem with the 22 March 2008 presidential election, four referenda were held, addressing repossessing the Chinese Nationalist Party's party assets acquired during the period of its authoritarian rule (26.08% turnout), opposing corruption (26.08% turnout), Taiwan's entry into the United Nations under the name of "Taiwan" (35.82% turnout) and a "pragmatic" effort to "re-enter" the UN (35.74% turnout), respectively. These six referenda all failed to receive valid passage, even though all received far more "yes" than "no" votes, because they failed to reach the threshold of the 50% turnout quorum for valid required by the Referendum Act.[229]

[229] Significant factors in the failure of the referenda on defense policy, negotiations with China, KMT party assets, and whether Taiwan should apply for entry into the United Nations were boycott movements launched by the KMT to urge citizens not to collect ballots for these referenda. This experience confirms the judgment of specialists in direct democracy that "participation quorums are fundamentally wrong because they give unequal weighting to the votes of supporters and opponents of an initiative, provoke calls for boycotts and negate the role of the mandate in direct decision-making." See Jos Verhulst and Arjen Nijeboer, "Direct Democracy: Facts and Arguments about the Introduction of Initiative and Referendum," p. 21. Democracy International Brussels, 2007, available at www.democracy-international.org. The "Code of Good Practice on Referendums" adopted by the Venice Commission of the Council of Europe on 17 March 2007 recommends that "no provision be made for rules on quorums." Available at http://www.venice.coe.int/docs/2007/CDL-AD%282007%29008-e.asp#_Toc208711733. The reasons given include that quorums encourage "a proposal's opponents to abstain instead of voting against it," "encouraging either abstention or the imposition of a minority viewpoint is not healthy for democracy," and "there is a great temptation to falsify the turn-out rate in the face of weak opposition."

Even more grave is the manner in which critically important issues have been prevented from even being put on the ballot for decision by citizens due to the design of the Referendum Act and the manner in which it has been implemented.

For example, beginning in July 2009, the Democratic Progressive Party and the Taiwan Solidarity Union launched four referendum petition campaigns to put the question of whether Taiwan should sign a controversial "Cross-strait Economic Cooperation Framework Agreement" (ECFA) with the People's Republic of China (PRC) proposed by the KMT government on the ballot. These campaigns collected over 430,000 signatures of citizens supporting the various petitions calling for either a vote to authorize (or not authorize) the government to engage in negotiations with Beijing for such a treaty or, after ECFA was signed in late June 2010, for its ratification by Taiwan citizens through referendum.[230]

However, all four petitions were vetoed by fewer than 20 members of the "Referendum Review Committee" (RRC) set up by the Referendum Act. For example, in its review of the fourth petition calling for a referendum on ECFA on 5 January 2011, the RRC vetoed a petition signed by over 100,000 citizens by a 10 to 4 vote with 2 abstentions and 5 members absent.[231] Due to both the decisions of the RRC to keep numerous referendum topics off the ballot and the act's high participation quorums, there has not been a single successful national referendum or initiative since the Referendum Act took effect.

The aspects of Taiwan's Referendum Act that have attracted the strongest public criticism are undoubtedly its excessively high threshold for people's initiatives and

[230] The Referendum Act requires a two-stage petition process: First a petition signed by at least 0.5% of the total eligible voters in the previous national election must be certified by the Central Election Commission and its topic permitted by the Referendum Review Committee, after which the petition must be signed by at least 5% of the total electors before it can be placed on the ballot. Article 2 defines valid referendum issues as the "initiatives on legislative principles" and "initiatives or referendums on important policies" or "referendums for amendment of the Constitution." Article 35 mandates the RRC, whose members are indirectly appointed by the party caucuses of the Legislative Yuan based on the share of seats and is therefore dominated by the Legislative majority, to certify whether the proposed topic is in accordance with the scope of valid national referendum topics as defined in Article 2 and certify that no referendum on the same topic has been held during the previous three years.

[231] Huang Wei-chu and Su Yung-yao, "ECFA Referendum: Referendum Review Committee Kills it Four Times in a Row," *Liberty Times*, 1 January 2011, available at http://www.libertytimes.com.tw/2011/new/jan/6/today-t1.htm (in Chinese). For an English-language report, see Loa Iok-sin, "Committee once again says no to referendum bid," *Taipei Times*, 6 January 2011, available at http://www.taipeitimes.com/News/front/archives/2011/01/06/2003492788. The content of reasons cited by the RRC for rejecting the four proposals indicated that that commission had overstepped its mandate to review whether proposed referendums concerned legislative principles or government policies to prejudging whether the proposals should be put on the ballot based on their content.

petitions, the excessively high turnout quorum, and the lack of clarity in the powers and accountability of the RRC (not to mention the questions regarding on the basis of what standards it can "review" initiatives submitted by the people).[232] These features have turned the dream of the people to use direct democracy mechanisms to decide upon major public policy issues to became nothing more than a fantasy, and they have turned the Referendum Act into an object of popular ridicule as a "birdcage referendum act" that ties the hands of the people.

(2) The single-seat, dual-vote system has severely weakened the political participation of small parties (the right to be elected).

In addition to stipulating that within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another, the UNHRC's General Comment on Article 25 of the ICCPR emphasizes that the drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters. However, the systematic shortcomings of the single-seat, dual-vote system as currently applied for national legislative elections have not only created inequalities in the value of ballots due to the way in which the electoral constituencies are drawn but has also greatly constricted the space for the development of small political parties in

[232] During the course of these hearings, the Referendum Review Committee followed the lead of statements by President Ma Ying-jeou and other senior government officials in citing several grounds for rejecting the proposals. Government officials from President Ma Ying-jeou on down emphasized that the ECFA would "only concern economics" and "would not impinge on sovereignty" and that "almost no countries ratify FTAs by referendum." Taiwan Solidarity Union Chairman Huang Kun-hui stated that the proposal's call for an ECFA between Taiwan and the PRC be ratified by national citizen referendum constituted an "initiative" aimed at the "Statute Governing Relations between the People of the Taiwan Area and the People of the Mainland Area" and thus met the requirement of Article 2 and that the ECFA was a "major government policy" that was also a valid subject for a referendum. See Dennis Engbarth," Taiwan opposition appeals Cabinet veto of ECFA referendum," Taiwan News, 30 September 2009, http://www.taiwannews.com.tw/etn/news_content.php?id=1070166. The government's claims also neglected the precedents of referendums to ratify free trade agreements, most notably, the December 1972 referendum which ratified a FTA between the Swiss confederation and the then European Economic Community in which the Swiss federal government decided to take the legally unnecessary step of submitting the pact to the Swiss people as a "mandatory referendum" precisely because it "was the first vote on European integration." See "Ma is wrong on ECFA referendum in Taiwan," *Taiwan News* editorial, 6 April 2010, available at http://www.etaiwannews.com/etn/news_content.php?id=1220012. Statements made by RRC spokesmen in the wake of the rejections of petitions in June 2010 and January 2011 maintained that the TSU petitions had been rejected because they were phrased in a positive manner ("Do you agree with the governments signing the Economic Cooperation Framework Agreement with China?"), but since the intent of its initiators had been to overturn the "fixed government policy," it should have been phrased in a negative manner and require the support of a dual majority to pass and overturn the signing of the treaty. In fact, the format of the TSU referendum proposal had fit exactly the pattern of direct democratic "ratification" votes for treaties or major policies in normal democratic states, including the Swiss referendum in December 1992 on the FTA with the EEC. See "KMT uses 'double speak' to spike Taiwan referenda," *Taiwan News* editorial, 9 June 2010, available at http://www.etaiwannews.com/etn/news_content.php?

Taiwan.

On 12 January 2008, Taiwan held the first national legislative election using the new system, in which voters cast one vote for "first past the post" single-seat constituencies and a second ballot for political party lists on a nationwide at-large basis. Overall, the KMT won 81 of the 113 seats, followed by the DPP with 27 seats, the Non-Partisan Solidarity Union (NPSU) with three seats, and the People First Party (PFP) with one seat. All other small parties (more than ten had registered party lists) failed to win a single seat. Although the system of at-large political party lists is usually intended to allow small parties an opportunity to win at-large seats, in Taiwan the threshold for being allocated any seats was set at 5% of the at-large party votes. Therefore, although small parties in aggregate received 12% of the ballots in the at-large voting, these ballots were dispersed and none of the small parties won an at-large party seat (the seats won by the NPSU and PFP were district seats), demonstrating how the 5% threshold squeezed out the possibility of small parties entering the Legislative Yuan. In the 14 January 2012 Legislative Yuan election, the Taiwan Solidarity Union (TSU) and the PFP managed to win, respectively, three seats and two seats in the at-large party list poll. They were able to top the 5% threshold mainly due to riding on the coattails of other parties or major political figures.

In addition, the gap between the distribution of votes and the distribution of legislative seats caused a distortion in the will of the people as expressed in their votes and contradicted in substance the stipulation of the General Comment on Article 25 of the ICCPR that the method of allocating votes should not distort the distribution of voters. In the voting for 73 single-seat constituencies and six indigenous peoples' seats in the 12 January 2008 Legislative Yuan election, the KMT received 53.5% of the 9.89 million valid ballots cast but won 61 or 77.2% of 79 seats available, while the DPP gained 38.2% of the votes but received only 13 or 16.4% of the seats. At large voting was more proportional, as the KMT received 20 or 58.8% of the 34 seats with a 51.2% vote share, compared to the 14 seats or 41.1% won by the DPP with its 36.9% vote share. In total, the KMT secured 81 or 71.7% of 113 seats, compared to just 27 or 23.9% for the DPP.

This disproportionality of votes and seats was only moderately improved in the 14 January 2012 Legislative election. The KMT won a comfortable majority with 64 seats or 56.6% of the 113 available seats, compared with 40 seats or 35.4% for the DPP, even though the ruling party received less than a majority of the votes cast (48.2% of votes for district seats and just 44.5% of at-large ballots), compared to the

DPP's 43.8% vote share in constituencies and indigenous districts and 34.6% in party list voting.

In addition, with regard to the relationship between the allocation of seats and the votes cast in the second at-large party ballot, National Taiwan University Professor of Law Yeh Chueh-an has written: "The improper design of the at-large system made it impossible for many ballots cast for political parties to be allocated for seats and thus the opportunity for the political tendencies of over one million citizens to be represented was entirely lost. Small parties and policy viewpoints that are relatively unrelated to the KMT or DPP also lost their opportunity to be expressed in the national legislature."[233]

Even though the Taiwan Solidarity Union and the People First Party managed to win three seats each in the 14 January 2012 legislative poll, both parties (which before 2008 had sizable legislative caucuses) were only able to pass the threshold by riding on the coattails of other parties or major political figures. Moreover, over 840,000 voters, or 6.39% of the 13.16 million valid votes, which were cast for seven small parties which did not make the threshold, were thereby excluded from representation. In the January 2008 legislative poll 1.16 million votes (11.86% of 9.78 million valid ballots) were thus excluded.[234]

The imbalances between single-seat constituencies, the gap between large and small parties in the at-large lists or the disproportionate allocation of seats and the distribution of votes all distorted the initial distribution of the ballots cast by voters. The deepest wounds were suffered by both the small parties and disadvantaged groups. At the same time, the huge gap between the allocation of seats and the distribution of votes violated the political participation rights of the voters.

(3) The improper drawing of electoral districts caused inequalities in the value of ballots

The principles of "one person, one vote" and "all votes are equal" are universal and fundamental requirements for the right of political participation. The General

[233] Yeh Chueh-an, "A discussion of electoral reform from the standpoint of the right of suffrage in the constitution," *TAHRPAS Quarterly*, Taiwan Association for Human Rights, Winter 2011, 2 February 2012, pp. 33-34, available at http://www.tahr.org.tw/node/114 (in Chinese).

[234] Figures are sourced from the Central Election Commission election database http://db.cec.gov.tw/histMain.jsp?voteSel=20120101A2 (in Chinese).

Comment on Article 25 of the ICCPR stipulates that State parties must apply the principle of "one person, one vote" and that, within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another, and the drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters. However, we have discovered that, in the actual operation of the political laws and regulations, there are extreme degrees of inequality in the value of ballots in different constituencies in the election of the national legislature of the Republic of China. Nevertheless, the State Report makes entirely no mention of these grave inequalities in the value of ballots.

The unequal value of ballots is a phenomenon generated by the improper drawing of election districts. Under the first past the post system, in single-seat constituencies the winner takes all even if the margin is only one vote, and all other votes cast in the poll are rendered useless. When the election system was changed in Taiwan during the constitutional amendments of 2005, the previous system of single non-transferable vote (SNTV) and multiple-member districts was changed to the single-seat system. In the wake of these changes, huge gaps emerged in the "value" of ballots in various districts. These were highly exacerbated by the requirement in Additional Article Four that each country must have at least one legislator. This means that one legislative seat each has been granted to Penghu County (population 90,000), Kinmen County (population 70,000), and Lienchang County (the Matsu island group, population 9,000). When the rest of the districts were delineated by the CEC, Hsinchu County (population 470,000) and Yilan County (population 460,000) also were granted only one seat each. Hence, compared to the value of votes cast by citizens in Hsinchu County, the value of the ballots cast by voters in Lienchang County was 48.6 times greater, those cast in Kinmen County was six times greater, and those cast in Penghu County were 5.2 times greater. In 2008, a Hsinchu County citizen surnamed Chen and an Yilan County citizen surnamed Fang filed a suit protesting the unequal value in ballots, but the Executive Yuan on 12 June 2008 rejected the appeal. On 11 August 2008, the two citizens filed an appeal to Administrative Court, which was rejected on 19 August 2010.[235] On 10 November 2011, activists from numerous civil society organizations held a press conference to publicly express support for the two citizens filing an application to the Council of Grand Justices for an interpretation on the constitutionality of the unequal value of ballots due to the drawing of election districts (as well as a petitions from a third person challenging the constitutionality of the

[235] Wu Shu-chun, "Suit on Unequal Vote Value Fails; Application Filed for Constitutional Interpretation," *United Daily News*, 12 September 2010 (in Chinese).

election deposits system).[236] The Council has yet to issue its decision.

IV. Conclusions and Recommendations

Below the Shadow Report offers recommendations on six issues related to the rights guaranteed by Article 25.

(1) Promote citizen participation in public affairs

Regarding the inadequacy of existing laws in ensuring public participation, the government should begin to draft legislation with clear guarantees for citizens to exercise their right to participate in the process of government policy making. Civil society organizations (CSOs) propose that such legislation should use the Aarhus Convention as its fundamental reference in providing three necessary pillars to support public participation, namely access to information, public participation in decision-making, and access to justice in environmental matters. The Aarhus Convention links "environmental rights" and "fundamental human rights," and advocates that only through participation by all citizens can the goal of sustainable development be realized. The Aarhus Convention has been lauded by former UN secretary-general Kofi Annan as the boldest and most ambitious international convention in the movement for environmental democracy promoted by the United Nations.

Only if the government uses clear legal instruments to guarantee the right of the people to participate in the conduct of public affairs and thoroughly demands all levels of government to re-examine and revamp so-called "Key Points for Public Observation" will it be possible to realize Article 25 of the ICCPR.

(2) Eliminate the system of election deposits and adopt "publicly financed elections"

As discussed above, the requirement of substantial election deposits to run for public office imposes a considerable burden on disadvantaged groups, small parties, and independent candidates. The government should eliminate the election deposit system and instead adopt public financing of elections. According to long-time social activist and former legislator Chien Hsi-chieh, publicly financed elections would strictly restrict candidates and political parties to accept small-scale contributions and

[236] See Green Party, et al. press release "Return Politics to the People!" 10 November 2011, available at http://www.coolloud.org.tw/node/64883 (in Chinese).

set a ceiling for such contributions, and violators of this ceiling may be liable to have their victory annulled. Candidates and political parties will enjoy equal resources in terms of publicity, campaign activities, and access to media resources, all of which will be financed with public funds. This method will serve to stem the current limitless explosion of money politics and actually conserve social resources.[237]

In addition, publicly financed campaigning requires a set of restrictive mechanisms. For example, the system of "election deposits" should be eliminated. Instead, a relatively low threshold of "petition signatures" or the "votes received in previous elections" can be used as a basis for political parties without legislative seats or independent candidates to secure qualification for nomination or an independent candidacy, thus ensuring that only people with a certain degree of public support contest elections and thus avoid explosion of candidacies and waste of public resources. The government should adopt the institution of "publicly financed elections" and "the elimination of election deposits" as long-term objectives and, in the short-term, lower the scale of existing election deposits in order to allow citizens to have more equal opportunities to participate in the political process.

(3) Adopt a mix of measures to assist persons with disabilities exercise their right to vote

The government should sign the United Nations Convention on the Rights of Persons with Disabilities to provide a legal foundation for measures to ensure the exercise by persons with disabilities of their right of political participation and a mix of methods to expedite voting by people with various types of physical or mental disabilities (such voting by telecommunications). With regard to administrative measures, government agencies should invite representatives of persons with all types of physical or mental disabilities to discuss suitable voting methods and conduct education and training sessions with election officials and workers so that they can better understand the needs of persons with disabilities. In addition, there are still many persons with disabilities who are unaware of the existing legal guarantees for the right of participation for persons with disabilities. Government agencies should provide an information platform to disseminate such knowledge or commission civil organizations of persons with disabilities to carry out such dissemination work in order to ensure that all persons with disabilities are aware of their rights.

[237] Chien Hsi-chieh, "Reforming an election system that 'abrogates the right of suffrage'," *TAHRPAS Quarterly*, Taiwan Association for Human Rights, Winter 2011, 2 February 2012, pp. 31-32, available at http://www.tahr.org.tw/node/114 (in Chinese).

(4) Reform the election zone delineation system and ensure the right of political participation for indigenous peoples and minority groups

As noted above, there are four major problems concerning the exercise of the right of political participation by indigenous people. First, the government should replace the outdated and divisive notions of highland and lowland indigenous peoples and abandon the nationwide multi-member districts with SNTV voting which causes so many ills.

Second, the government should enact legislation to ensure channels for political participation for indigenous tribes with relatively small populations, such as the Tao, Tsou, and Thao, who have virtually no opportunity whatsoever to elect representatives to the national legislature or assemblies in major cities.

Third, the government should start respecting the views of indigenous people with regard to the method of election in indigenous peoples' constituencies and take the initiative to hold public hearings, seminars, and explanation meetings to seriously solicit the views of indigenous people about reform of the election system and election districts. Up to the present, such meetings have rarely been held and their results have been disregarded. For example, the majority of indigenous peoples have advocated the elimination of the highland and lowland electoral division for many years. However, during the deliberations over the last set of constitutional amendments in mid-2005, the dominant parties gave priority to the views of incumbent indigenous legislators, whom did not want any alterations in the districts to affect their re-election chances.[238]

Fourth, there should be reserved positions in election agencies to ensure the participation of indigenous peoples and ensure pluralism in decision-making. The CEC, which is the highest national agency for the planning and supervision of elections, has never had a commissioner from any of Taiwan's indigenous peoples. This lack means that the CEC lacks access to the concepts and views of indigenous peoples and pluralistic perspectives from ethnic groups when it is discussing election

[238] Translator's note: At that time, the Democratic Progressive Party controlled the executive branch and the Kuomintang controlled the Legislative Yuan. In the National Assembly elected by proportional voting for political parties, the DPP held 127 of the 300 seats, followed by the KMT with 117 seats, the TSU with 21 seats, and the PFP with 18 seats. As a three-fourths majority was necessary for passage of any amendments, both the DPP and KMT had to agree in order to secure passage for any changes. Of the eight indigenous legislators elected in December 2004, seven were from the KMT-controlled "pan-blue alliance" including four KMT members, two from the PFP and one from the NPSU, along with one legislator who was a DPP member.

related issues or dealing with electoral affairs.

(5) Revise the Referendum Act to return power to the people

The Referendum Act was created in order to implement the right of direct democracy to citizens as guaranteed by the Constitution. However, the present Referendum Act features numerous restrictions that obstruct the possibility of the exercise of direct democracy by Taiwan citizens. Therefore, the government should immediately repair the Referendum Act through revisions such as the following:[239]

(i) sharply lower the signature thresholds for the proposal of referendum issues and the petitions to put proposed referendums on the ballot;

(ii) eliminate the Referendum Review Committee;

(iii) eliminate the excessively high 50% turnout quorum for the valid passage of referendums;

(iv) revise Article 2 of the Referendum Act so that it does not restrict referendums on any aspect of public affairs, with the exception of salary or personnel matters; and,

(v) revise Articles 13, 16, and 52 to eliminate the prohibition on the initiation of referendums by government administrative agencies and minorities in the Legislative Yuan.

Such changes, at a minimum, are necessary to allow the Referendum Act to return power to the people and genuinely exercise direct democracy mechanisms.

(6) Reform the election system into a single-seat, dual-ballot "linked" system[240]

In Taiwan's current "unlinked" election system, the number of legislators is fixed (now at 113), and the two types of seats (district and party list) are calculated separately. In the operation of this system, small parties face very constrained room

[239] Huang Kuo-chang, "People's Political Participation in 2010: A Year of Setback and Regression," in the *Report on Human Rights in Taiwan: 2010* (in Chinese), Taiwan Association for Human Rights, Taipei, Taiwan, 2010.

[240] Translator's note: Such a system is also known as "mixed-member proportional" (MMP) system, as opposed to "mixed-member majoritarian" (MMM). MMP is the system currently in use in Germany, New Zealand, etc., whereas MMM is used in Japan, Russia, etc. as well as Taiwan.

for development, especially given the combination of a low ratio of party-list seats and a high threshold of 5% of valid ballots to qualify for party list seats. As a result, small parties were almost entirely excluded from the new Legislative Yuan in the January 2008 poll, and only two small parties won seats in the January 2012 election. This system has turned national politics into a two-party game in which small parties and disadvantaged groups are relegated to the sidelines.

Therefore, the government should initiate a revamping of the election system and change the current single-seat, dual ballot system into a "linked" system. A "linked" system would use the second ballot (for political parties) as a benchmark to decide the total number of seats that each party should win. In such a system (as is currently used in Germany), after the results of district seats were known, seats would be allocated from the party lists in order to bring each party up to the total number of seats determined by the share of votes received on the political party ballot. In this manner, each party's share of votes and seats can become closer matched. This method will be more favorable toward ensuring the development and meaningful political participation of small parties. Through boosting the number of at-large seats for proportional representation and lowering the threshold for entry, smaller parties would have more access.

(7) Resolve the problem of the unequal value of ballots

In order to remedy the situation of inequality of the value of ballots, the government should re-examine the delineation of legislative election districts and promote revision of the constitutional guarantee that each country has at least one legislator. Article 35 of the CSERA stipulates that "electoral districts … should be re-organized [better translated as "comprehensively reviewed"] every ten years," but current inappropriate delineation of legislative election districts has caused a serious problem of "unequal value" in the ballots of our citizens in violation of the Constitution and the principles of Article 25. Thus, we should not have to wait another decade for a review.[241]

Furthermore, the Shadow Report calls on the Council of Grand Justices to accelerate the pace of the review of the question of "whether the drawing of election districts that causes the value of votes to be unequal violates the constitution" so that every ballot cast by each voter can have equal value.

[241] Huang Kuo-chang (2010).

Article 27: The Rights of Minorities[242]

I. Introduction

With regard to Article 27 on the rights of minorities, the State Report provides a list of laws or programmatic declarations, but it does not make any mention of the reality in which the current institutions have harmed the right of minority peoples (along with other citizens) to participate in political affairs.

II. Responses to the State Report

(1) The State infringes on the traditional territory and culture of indigenous peoples: Response to Paragraph 355 (p. 141) of the State Report

The State Report mentions that, based on the stipulations of the Indigenous Peoples Basic Law, "indigenous peoples can hunt wild animals, pick wild plants and fungi, harvest minerals and stones, utilize water resources and engage in other non-profit activities legally for the sake of their traditional culture, rituals or self-use within aboriginal regions.'' In the same breath, the State Report also related that mentioned that "revisions to related laws is necessary to consolidate the afore-mentioned details'' and that "the rights of aborigines to traditional and cultural rituals are not automatically verified as a result of stipulation by the IPBL.''

Among the cases of infringement on indigenous peoples culture and traditional regions, one well-known example is the Smangus case. During its rampage through Taiwan on 1-2 September 2005, Typhoon Talim blew down a large Taiwan zelkova tree near the remote indigenous Atayal village of Smangus in Hsinchu County. The fallen tree blocked the only road linking the village with the outside world, and three youth from the village took the initiative to repair the road and moved the tree to its side. On 7 October, staff from the Forestry Bureau of the Council of Agriculture arrived at the village to take care of the rare tree and chopped it up for removal and only left a stump buried under mud and rock. With the approval of the village assembly, youth from the village dug out and removed the stump and remaining roots and hoped to turn the wood into a work of art.

In the view of the indigenous community, the removal of a tree that is unable to

[242] This section was authored by Ms Chen Yu-chi (陳郁琦) and translated by Dennis Engbarth (安德毅).

live and grow and re-use its wood to create a work of art to symbolize the community was not a deliberate act to harm natural ecology; moreover, they considered that the right of ownership of plants in public land should belong to all of the people in the indigenous community in common. However, the exercise of these traditional indigenous values led actually resulted in the indictment of the three Atayal youths by prosecutors on charges "burglary of primary forest products or forest by-products'' under Article 52 of the Forestry Act. On 28 April 2007, the Hsinchu District Court convicted the trio and sentenced them to six months in prison and a fine of NT$160,000 each on the grounds that, while the tree was inside the boundaries of the indigenous village, the government, on behalf of the public, owned the tree. However, Article 20 of the Indigenous Peoples Basic Law which had been promulgated on 5 February 2005 mandated that "the government recognizes indigenous peoples' rights to land and natural resources.'' Therefore, the Atayal people refused to accept the judgment and appealed it up to the Supreme Court and, finally, on remand, the Taiwan High Court acquitted the three youths on 3 February 2010.[243]

(2) The judicial rights of indigenous peoples: Response to Paragraph 359 (p. 142) of the State Report

The State Report acknowledges that the IPBL requires the government to ensure the judicial rights of indigenous people and that an indigenous peoples court or tribunal may be established. Even though action has been delayed due to special circumstances, the State Report still affirms that the formation of an indigenous peoples court should be evaluated and formed as soon as appropriate in order to respect traditional customs, culture and values of indigenous people. However, the fact that the government has yet to draft any concrete plan to establish an indigenous peoples court or tribunal has resulted in the situation that numerous judicial cases involving indigenous people are still handled unfairly in the judicial system dominated by the Han nationality.

Case Study

On 19 February 2003, Wang Chuan-fa, the leader of the indigenous Tapango Village in Chiayi County of the Alishan Tsou People, and his son Wang Chien-kwang were driving along Route 169 to attend a funeral ceremony. Passing his family's leased land at the No. 117 Forest Compartment, they discovered that a

[243] See Loa Iok-sin, "High Court acquits three Atayal in Smangus case,'' *Taipei Times*, 10 February 2010 , available at http://www.taipeitimes.com/News/taiwan/archives/2010/02/10/2003465656.

sedan had been parked on the border of his leased land and that a Han person (Chen Teng-mao) was loitering there.

Wang and his son got out of their own car and asked Chen what he was doing there. Chen replied that he was in the mountainous area collecting honey. Wang and his son discovered in Chen's car that the latter had a bottle of honey and drew the conclusion that Chen had trespassed on their land and had thus stolen the honey. Therefore – according to Wang Chien-kwang with Chen's agreement – they put the honey in their own vehicle and planned to go to the police to report the incident after attending the funeral, and the two sides got in their respective cars and drove away.

However, at 6:50 pm the same evening, Chen first went to the Tapango police station and gave a report that accused Wang and his son of seizing the honey from him by force. Later that evening, Wang Chuan-fa and his son were returning home to Tapango after the funeral in Shanmei Village when they ran into a police checkpoint and were immediately taken into custody and required to stay overnight in the Jhuci Precinct in Chiayi County. During questioning, the police not only did not respect the fundamental cultural differences between the Han and indigenous peoples, but used crude and violent methods to handle the case. Moreover, a news release issued by police announcing the "solving'' of the case declared that "occupying aboriginal land is Wang's habit.''

On 22 August 2003, Chiayi District Prosecutor Wu Chi-hua indicted Wang and his son of robbery based on Article 325 of the Criminal Code and, on 27 August of the same year, the Chiayi District Court pronounced the two guilty of robbery and sentenced them to six months imprisonment, although their sentences were suspended for two years as first time offenders. Wang and his son refused to accept the verdict and on 8 September 2003, filed an appeal maintaining their innocence, but on 12 January 2004, the Taiwan High Court rejected their appeal. The Millet Foundation, the Taiwan Association for Human Rights, and other NGOs assisted the pair to file a special appeal on 1 November 2004, [244] but the Supreme Court rejected the appeal stating that it was "difficult to handle.''[245]

[244] Jimmy Chuang, "Legal aid groups helping Aboriginals find justice,'' *Taipei Times*, 18 September 2004, available at http://www.taipeitimes.com/News/taiwan/archives/2004/09/18/2003203343.

[245] Wang Chuan-fa ultimately died at the age of 75 in February 2008 without achieving justice in his case. See *Taiwan Lihpao*, 12 February 2008, available at http://www.lihpao.com/?action-viewnews-itemid-6863 (in Chinese).

The IPBL stipulates that "the government recognizes indigenous peoples' rights to land and natural resources.'' Furthermore, Article 15 of the Forestry Act states: "If the forest is located in the traditional territory of aboriginal people, the aboriginal people may take forest products for their traditional living needs.'' However, Han people still believe their preconceived notion that indigenous people "poach'' from "state owned land'' to "profit.'' Courts conducted by persons of Han nationality also have not fulfilled the requirements of the ICCPR to respect minority traditions and culture and have even crudely and rudely denigrated the cultures of Taiwan's indigenous peoples.

In January 2010 in the Maolin District of Kaohsiung County (subsequently merged into Kaohsiung City), there also occurred a case in which seven persons of the Rukai tribe who had collected driftwood were indicted and convicted based on the Forestry Act. The seven Rukai persons had gone to the traditional Rukai area of Malishan to collect driftwood in the wake of a typhoon to make wooden implements for basic living and not for profit. However, they were nonetheless indicted under Article 52 of the Forestry Act for attempting to steal forest products and were sentenced to several months imprisonment and the payment of fines of NT$40,000 each. The Han-dominated court did not investigate the scope of the traditional lands nor did it make reference to the IPBL, but rather totally disrespected the traditional areas and culture of the Rukai people.[246]

III. Conclusions and Recommendations

The initial judgments in both the incident over the Smangus tree case and the Tsou People honey case obviously contravened Article 27's guarantee of the rights of members of minority groups to enjoy and practice their cultures, especially in the light of the elaborations in General Comment No. 23.

Therefore, we recommend that the government should adopt the following measures with regard to the judicial rights of indigenous peoples and other related issues:

1. Bolster the respect for plural and diverse cultures among judicial officers at all

[246] For more detail on this case and its significance, please refer to Chen Chu-shang, "Returning to the Bumpy Road: Examining the Situation of Indigenous Peoples' Land and Resource Rights in the National Justice System in the light of the Atayal Zelkova Tree Incident and the Rukai Driftwood Incident,'' *Cultural Studies Monthly*, 27 September 2012, available at http://www.csat.org.tw/journal/Content.asp?Period=132&JC_ID=621 (in Chinese).

levels of courts, administrative and law enforcement personnel, and legislators;

2. In order to reduce inequities in the results of judicial cases of indigenous peoples due to cultural gaps, the Judicial Yuan should put forward a concrete plan and timetable to establish an indigenous peoples' court or tribunal as stipulated by the IPBL, whose design incorporates respect for traditional customs, cultures, and values of indigenous peoples and which employs judicial officials who have received training related ethnic culture to be responsible for hearing judicial cases involving indigenous peoples; and,
3. In terms of the legal code, the government needs to apply the principles of the IPBL when implementing the Forestry Act and other statutes and, even more urgently, actively promote the enactment of the long-delayed Indigenous Peoples Autonomy Act. During the legislative process of deliberation of this act, the government should invite a wide range of persons representing Taiwan's indigenous peoples to participate in the legislative process and allow indigenous people to participate in the decision-making process on matters directly impinging on their lives. In addition, the majority Han people must make the effort to respect cultures distinct from their own and not use a self-centered mentality to deal with Taiwan's indigenous peoples and other minorities.