

**Asian NGOs Network on National Human Rights Institution (ANNI)**

**Monitoring Report on the  
Performance of National Human Rights Institutions**

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**TAIWAN**

**THE LONG WAIT**

By

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## **I. INTRODUCTION**

Taiwan, forced to withdraw as a member-state of the United Nations (UN) in 1971, has become isolated from the process of human rights development led by that global body. The international human rights regime has gone through significant development in the past thirty years in terms of norm-setting, monitoring, institution building, and NGOs participation. Taiwan was totally left out from this developmental process.

At the national level, Taiwan, a colony of Japan for fifty years, was under the martial law rule of the Nationalist Chinese (i.e. KMT) for over four decades, until 1987. Although the constitution was restored when democratization began in the early nineties, its bill of rights section was primitive by post-war standards, and the function of judicial review by the constitutional court has been slow to develop.

In view of this situation, Taiwan's NGOs began to study and push for the establishment of a National Human Rights Commission (NHRC). In the mid-nineties, led by the Taiwan Association for Human Rights (TAHR), 22 NGOs formed an Alliance for the Promotion of an NHRC in 1999, a presidential election year.

The Alliance set up a working group to draft an NHRC Bill. Through months of intensive meetings and debates, the first draft bill for the NHRC was completed in the year 2000, followed by an international conference for further consultation. The Alliance's proposal for an NHRC was endorsed by most parties, and later adopted by the new Government on 20 May 2000, in the form of President Chen Shui-Bian's inaugural address.

To create and maintain pressure from all political parties, and to defend the integrity of its draft bill, the Alliance also began lobbying in the Legislative Yuan. President Chen's administration also submitted its own bill in 2001. Unfortunately, due to bitter political rivalry, the Legislative Yuan (where the opposition KMT party and its allies held a majority) failed to consider the bills by the year 2004, when the Government's term of office expired and Taiwan's first ever democratic rotation took place. According to domestic law, any bill not considered within a given term must to be resubmitted. Although the Government has now prepared a new bill, it has not yet been submitted. Meanwhile, the NGO Alliance is reorganizing itself to take advantage of the upcoming presidential election in 2008.

This following report bases itself on two sets of draft bills: that of the NGO Alliance of 2001 ("the NGO Bill"), and the Government's draft of 2006 ("the Government Bill"), which, as has been stated, has not yet been submitted. The NGO Bill consists of two parts: an amendment to the "Law on the Structure of the President's Office" (with a new paragraph to Article 17), and the "National Human Rights Commission Act". The Government Bill includes a similar amendment to the 'Law on the Structure of the President's Office' (with a new Article 17-1), the "National Human Rights Commission Act", and the "Executive Powers of the National Human Rights Commission Act".

## **II. INDEPENDENCE**

The Paris Principles emphasize that a national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text.

The NGO Alliance wants the proposed NHRC to be independent from the five major branches of government: the executive, legislative, judiciary, control and examination branches (the latter two are peculiar to the Constitution of Taiwan, and were introduced from China by the KMT regime). Achieving this will require constitutional amendments according to the NHRC constitutional status. This will be a difficult task in Taiwan, given the current state of the country's party politics. The Alliance has therefore decided that the NHRC should be placed under the President's Office – hence the need for the specific legal provisions contained in the amendment to Article 17 on the Commission's status.

The Government Bill has adopted this idea. With the amended Article 17-1, the proposed NHRC would operate alongside two other independent agencies that are also under the President's Office: the Academia Historica (i.e. national history archive) and the Academia Sinica, the national research institute.

To ensure the Commission's independence, the NGO Bill includes four key points: First, the Executive Yuan would have no power to reduce the Commission's annual budget (Article 12). Second, no commissioner could be removed from office unless he or she is found guilty of a criminal offence or has been indicted. Third, commissioners could not be prosecuted on the basis of what they say or how they vote during meetings (Article 14). Fourth, the Commission would have the power to enact rules for its meetings and procedures (Articles 20 and 21). The Government Bill does not include such elements.

#### **a. Relationship with the Executive, Legislature and Judiciary**

Both bills propose to grant the Commission the power to request relevant government agencies to provide opinions as to whether their promulgated regulations, policies or administrative measures infringe upon human rights, and to proffer remedial plans. They also propose independent powers of enquiry and the right to obtain documents from the government. The NGO Bill extends this to cover the provision of assistance from the police, army and relevant agencies (Article 7(2)).

The NGO Bill would grant the Commission the power to review the constitution, as well as legislation and regulations. In addition it would allow the Commission to propose amendments to each of the above, and to legislative bills, to bring them into line with international human rights standards. While the NGO Bill emphasizes that the legislative branch must comply with international human rights standards, the Government Bill would merely require the Commission to formulate and review any laws, regulations and policies intended for the promotion and protection of human rights. Under both bills, the Commission is required to send its reports to the Legislative Yuan.

To prevent overlapping jurisdiction with the judicial branch, both bills state that the Commission cannot accept complaints that are under judicial review or the subject of litigation. While the Government Bill seeks to grant the Commission the power to ask the courts for an interpretation of the constitution (Article 10 of the Executive Powers of the National Human Rights Commission Act), the NGO Bill does not.

#### **b. Election of Commissioners**

The NGO Bill proposes 15 commissioners, with the President appointing eight and the Legislative Yuan electing seven. The commissioners themselves would elect the chairperson and two deputies, so as to avoid direct administrative appointments. The chairperson would lead meetings and bear responsibility for the general affairs of the

Commission. The deputies would assist the chairperson in the performance of functions (Article 10). The Government Bill proposes 11 commissioners, all appointed by the president, who would also appoint the chairperson and a deputy (Article 3).

NGOs want the commissioners to be appointed from three groups: (a) those who have made a special effort for, or contribution to, protection and promotion of human rights or minority rights in particular; (b) those who have demonstrated expertise on human rights, or who have made a special contribution to related research or education; and (c) those who have served as judges, prosecutors, lawyers or have participated in other judicial works contributing significantly to human rights protection. It is also explicitly required that the appointment of commissioners would give consideration to diversity in society (Article 11). The Government Bill only contains (a) and (b), and does not emphasize the diverse representation of society (Article 4).

Both the NGO Bill (Article 13) and the Government Bill (Article 4) require that the commissioners exercise their powers independently and that they do not participate in activities of political parties.

The NGO Bill defines commissioners as officers of “special appointment rank”, who are not classified as general civil servants. Their term is for six years. However, during the first appointments, the President and the Legislative Yuan would respectively appoint three commissioners for three-year terms (Article 10), to avoid political influence and to maintain continuity as far as possible. Commissioners would be eligible for re-election or re-appointment once. They would not be able to serve in other government bodies or to engage in professional practices.

The Government Bill defines commissioners as officers of the highest civil servant rank. They would be appointed for four-year terms (Article 3). There is no special rule on the first appointment or to prevent commissioners from serving in government agencies or engaging in professional practices. Commissioners would be eligible for re-appointment.

Other aspects covered by the NGO Bill relate to the Commission’s operations. First, it would be able to establish specialized committees as it deems necessary (Article 15). Second, it could appoint domestic and foreign consultative advisors, on the strength of powers to make such provisions (Article 16). Third, commissioners, on their own initiative, would be able to appoint four to six persons as assistants, specialists or researchers (Article 17). Fourth, administration would be divided into five departments (Article 18), for operational effectiveness and efficiency.

The Government Bill contains similar provisions on the appointment of domestic and foreign consultative advisors and administrative staffing (Articles 7-12 and 14). It further states that the Commission would be able to establish specialized committees and that the Commission it could appoint human rights investigators and researchers (Article 13).

### **c. Financial independence**

To ensure the Commission’s financial independence, the NGO Bill states that the Executive Yuan would have no power to reduce its annual budget (Article 12). It means that the Legislative Yuan is the only branch that can see to the Commission’s finances. This provision is not found in the Government Bill.

### **d. Relationship with other domestic human rights mechanisms**

The Control Yuan (an ombudsman institution, one of the five branches under Taiwan's Constitution) is vested with powers of impeachment, censure and auditing. It can also propose corrective measures, take written complaints from the people arising from official misconduct, carry out investigations, and examine the disclosure of assets by public functionaries. As the Control Yuan is a constitutional institution and holds power to investigate any administrative misconduct, it has opposed any proposal that grants the NHRC the role of receiving individual complaints and the power to investigate.

To resolve the jurisdictional conflicts, the NGO Bill states that the NHRC shall not admit any case that is under investigation by the Control Yuan (Article 5). However, NGOs believe that a NHRI is different from an ombudsman. While the latter focuses on irregularities in administration, the main duty of the NHRI is to promote and protect human rights. Both may investigate government agencies but do so from different viewpoints. Therefore, NGOs would prefer the NHRI to co-exist with the Control Yuan. In this respect, the NGO Bill states that the Commission, when receiving complaints or making enquiries into human rights violations of its own volition, would be able to suspend its investigations or assistance, if relevant government agencies were handling the case. The NGO Bill also requires the relevant government agencies to inform the Commission of the outcome of such cases (Article 5). This would allow the Commission to continue its monitoring function even when issues were being reviewed by the Control Yuan.

### **III. MANDATES**

#### **a. Protection of rights**

The Government's Executive Powers of the National Human Rights Commission Act focuses on existing laws, regulations and measures that may violate human rights protection by Commission or omission, as well as cases that do not fall under the mandate of the Control Yuan or that are being examined by the judiciary (Article 6). It requires the NHRC to refer cases to the Control Yuan on matters where the latter has jurisdiction (Article 17). The Commission should not intervene in cases before the courts (Article 6).

In the NGO Bill, the Commission may perform similar functions of reviewing existing laws, regulations, measures, and of suggesting changes. It can also delegate investigatory power to specific agencies or groups, scholars or experts (Article 7, Paragraph 3). The Commission will have the power to impose fines ranging from NT\$10,000 to NT\$110,000,000 on those who violate its orders (Article 9).

The Government's Executive Powers of the National Human Rights Commission Act proposes that commissioners may delegate power only to human rights investigators, who are on the staff of the Commission. The fines would range from NT\$30,000 to NT\$300,000.

#### **b. Promotion of rights**

Under Article 2 of the NGO Bill, the Commission's functions include proposing national human rights policies; undertaking and promoting research and education in the field of human rights; as well as preparing national human rights reports, both annual and thematic.

The Government Bill sees the Commission's functions as falling within three main areas: the examination of laws, the review of administrative procedures and the

investigation of individual complaints. There is no explicit stipulation requiring for the Commission to promote human rights. It appears that the Government believes this function is covered by Article 2(5), which provides that “other promotion of domestic and international protection of human rights” is one of the functions of the Commission.

#### **IV. INTERACTION WITH NGOs**

The NGO Bill expressly stipulates that the Commission must co-operate with civil society, international organizations, other NHRIs and NGOs in promoting human rights protection (Article 2). The Government Bill is less specific on this matter, but empowers the Commission to engage in any issue relating to the promotion and protection of human rights. It is the Government’s view that the provision sufficiently enables the Commission to interact with NGOs. However, it must be pointed out the provision does not make it a legal duty for the Commission to co-operate with NGOs. Much will depend on how the Commission undertakes its functions.

#### **V. RECOMMENDATIONS**

##### **➤ To the Government:**

1. It was seen as a positive move for President Chen Shui-Bian to announce that the establishment of a NHRC was a top priority and to send a bill to the Legislative Yuan. However, the Government Bill requires much amendment to fully comply with the Paris Principles, as pointed out earlier in relation to appointment, internal powers and the financial independence of the Commission.
2. If the Government is committed to establishing a NHRC, it should have sent its new Bill to the Legislative Yuan by now. Since it has not yet done so, we urge it to revise its bill as soon as possible and submit it for legislative deliberation.

##### **➤ To Opposition Parties:**

3. One reason that the Legislative Yuan did not pass the initial Government Bill by 2004 was that opposition parties formed the majority in the body at the time. They dominated the Procedures Committee and kept the bills off legislative agenda despite their pledge in the presidential election of 1999. Since human rights should not be a partisan issue, the motive behind such conduct is difficult to decipher. We urge the opposition parties to look at this issue from the human rights viewpoint, not through the lens of party politics.

##### **➤ Involve NGOs in the Process:**

4. During its drafting process, the Government did not invite human rights NGOs to provide their views, except during the initial stages. We urge the Government to involve NGOs in its revision process for a new bill, in accordance with the Paris Principles.

##### **➤ International Cooperation and Pressure:**

5. Given Taiwan’s peculiar, if not unique, international situation and status – the country is definitely part of the global village of human rights, yet is excluded from the formal international human rights regime by geo-politics – international pressure and assistance is sorely needed if progress is to be made on the establishment of a national human rights institution in the country.