Preventing Racial Hatred and Discrimination by Implementing ICERD

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A. No Law, No Case

It is guaranteed by Article 7 of the Constitution of Taiwan that "All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law." Article 10 of the Constitution Amendments further affirms that "The State affirms cultural pluralism and shall actively preserve and foster the development of aboriginal languages and cultures." "The State shall, in accordance with the will of the ethnic groups, safeguard the status and political participation of the aborigines."

The Constitutional Court of Taiwan has many interpretations concerning right to equality. However, we may say that there is no single constitutional interpretation focusing on racial equality.

Article 62 of Immigration Act provides that any person shall not discriminate against people residing in Taiwan on the basis of race. It also offers that any person whose rights are trespassed due to discrimination can file a complaint to the competent authority which enforces this Act that is the Ministry of the Interior. However, it is quite strange that no compliant by far. We find no other laws protecting racial equality, and thus it is a key reason that results no constitutional interpretation against racial discrimination.

B. Taiwan and ICERD

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was passed on 21 December 1965. The ROC signed the Convention on 31 March 1965 and ratified it on 14 November 1970 before she was forced to eventually leave the UN in 1971. The ICERD was the only core international human rights treaty ratified by the ROC by 1971.

It is supposed that the ICERD has domestic legal status in Taiwan. Nonetheless the ratification was 48 years ago, and few people know about it including judges. It is therefore difficult to implement the ICERD if there is no special legislation. Two approaches have been proposed. One is to enact a racial equality law; the other is to legislate an ICERD implementing act. Either way can achieve the goal of racial equality. However, it is suggested that a better approach is to incorporate ICERD standards of protections into domestic legal system.

C. Racial hatred and discrimination

Preamble of the ICERD emphasized that "any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere." It is ruled at Article 1 that the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Article 4 is one of key provisions of the ICERD that reads:

> *States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:*
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> *(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;*
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> *(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;*
>
> *(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.*

Every contracting state is therefore bear three obligations. First is to regard racial discrimination is a crime. Second is to prohibit organizations which promote and incite racial discrimination. Third is to prevent public authorities from promoting or inciting racial discrimination.

The ICERD Committee put much concerns on the ways to treat foreigners and issues related racial discrimination.

a. Ways to treat foreigners

In *L.K. v. The Netherlands*[1], the petitioner author, who is a partially disabled Moroccan citizen, visited a municipal subsidised house in Utrecht in August 1989. He was accompanied by a friend. Some 20 people had gathered outside the house shouting: "No more foreigners". Others said they would set fire to the house if he moved in and would damage his car. They later returned with a House Office official who was told by local inhabitants that they could not accept the petitioner as their neighbour, owing to a rule that "no more than 5 per cent of the street's inhabitants should be foreigners". When told that no such rule existed, the residents drafted a petition, which noted that the petitioner could not be accepted and recommended that another house be allocated to his family. [2]

The Committee opined that the remarks and threats made to the petitioner constituted incitement to racial discrimination and to acts of violence against persons of another colour or ethnic origin. The Committee therefore held that there was a violation of Article 4(c) of the ICERD. [3]

In *TBB-Turkish Union in Berlin/Brandenburg v. Germany*[4], the German cultural journal *Lettre International* published an interview with Mr. Thilo Sarrazin, the former Finance Senator of the Berlin Senate and member of the Board of Directors of the German Central Bank. In which Mr. Sarrazin claimed that most Arabs and Turks in Berlin have no productive function, are neither willing nor able to integrate, reject the German state, make no effort to educate their children and just produce "new little headscarf girls." The applicant, the Turkish Union, filed a criminal complaint "as the interest group of the Turkish citizens and citizens with Turkish heritage of Berlin and Brandenburg." The Office of Public Prosecution declined to pursue the case, based on the freedom of expression in Article 5 of the Basic Law.

The Committee found that Sarrazin's statements contained ideas of racial superiority, denied respect to the Turkish population as human beings, and depicted generalized negative characteristics of the Turkish population. It also incited racial discrimination in order to deny the Turkish population access to social welfare in accordance with Article 4(a). The Committee held that the criterion of disturbance of public peace, required under German law for a finding of incitement, does not adequately translate into domestic legislation the State party's obligations under the Convention to enact legislation to end racial discrimination and to condemn racist propaganda, in particular Article 4. The Committee therefore concluded that the absence of an effective investigation into the statements by Mr. Sarrazin amounted to a violation of Article 4 of the Convention.

b. Racial discrimination speech

In *The Jewish community of Oslo et al. v. Norway*[5], in August 2000, a group (the Bootboys) held a march in commemoration of Rudolf Hess. The Leader, Mr Sjolie made a speech in

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[1] L.K. v.s. Netherlands, CERD/C/42/D/4/1991, 1 (1993).
[2] *Id.* at 2.
[3] *Id.* at 5.
[4] TBB-Turkish Union in Berlin/Brandenburg v. Germany, CERD/C/82/D/48/2010, 2-4 (2013).
[5] Rolf Kirchener etc. v. Norway, CERD/C/67/D/30/2003,1 (2005).

praise of Adolf Hitler and Rudolf Hess and referring to "Bolshevism and Jewry", the "robbing, rape and killing of Norwegians by immigrants", and the "daily plundering and destruction of the country by Jews". He called for "a Norway built on National Socialism". There followed a minute's silence in honour of Rudolf Hess and then the crowd repeated the Nazi salute and shouted "Sieg Heil".[6] In February 2001, the District Attorney of Oslo charged Mr. Sjolie with a violation of s. 135a of the Norwegian Penal Code. In March 2001, Mr. Sjolie was acquitted by the Halden City Court. The prosecutor successfully appealed to the Borgarting Court of Appeal. Mr. Sjolie appealed to the Supreme Court (SC) which, in December 2002 overturned the conviction by majority decision.

The Committee held that there had been a violation of Article 4 of the ICERD. The Committee considered that Mr. Sjolie's statements contain ideas based on racial superiority or hatred; the deference to Hitler and his principles and "footsteps" must be taken as incitement at least to racial discrimination. These statements were of manifestly offensive character and are not protected by the due regard clause of Article 4. The Committee emphasized that "the 'due regard' clause relates generally to all principles embodied in the Universal Declaration of Human Rights, not only freedom of speech. Thus, to give the right to freedom of speech a more limited role in the context of article 4 does not deprive the due regard clause of significant meaning, all the more so since all international instruments that guarantee freedom of expression provide for the possibility, under certain circumstances, of limiting the exercise of this right." Therefore the Committee concluded that Mr. Sjolie's acquittal was a violation of Article 4.

D. Implementation of Article 4 in Taiwan

Article 4 of the ICERD requests every contracting state three obligations. Among them one is to prevent public authorities from promoting or inciting racial discrimination. This is definitely what Taiwan needs to do with no need of further discussions.

One issue is to enact racial discrimination as a crime. Articles 153, 309 and 310 of Crime Code do not directly focus on racial discrimination. There is no law to rule that racial discrimination is a crime.

The other issue is to prohibit organizations which promote and incite racial discrimination. Article 2 of Organized Crime Prevention Act refers "criminal organization" as to "a structured, permanent or profit-seeking organization formed by more than three persons involved in threats, violence, fraud, intimidation, or offenses that carry a maximum principal punishment of more than five years' imprisonment." Article 4 of the ICERD refers racial discrimination organization to those who *promote and incite racial discrimination*. Only when racial discrimination is regarded as a crime a group of people involve in racial discrimination can be prosecuted as a criminal organization.

[6] *Id.* at 3.

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中文摘要

我國憲法第七條保障種族平等，大法官有許多關於平等權之解釋，但是缺乏有關種族平等之內容。入出國及移民法第 62 條任何人不得以種族因素，對居住於臺灣地區之人民為歧視之行為。同時規定得依其受侵害情況，向主管機關申訴。不過卻沒有任何案件。

《消除種族歧視公約》第 4 條是國際人權條約禁止種族仇視、優越及仇恨之起源規範。消除種族歧視委員會認為，不能容忍外國人入住，恐嚇將會放火並損害其房屋。主張外國人後代依然教育程度不佳、出生率卻較高、不願意融入社會，應禁止移民湧入並停止向移民提供社會福利言論。支持納粹及詆毀猶太人的演講。這些言論都構成種族歧視。

我國於 1966 年 3 月 31 日簽署《消除種族歧視公約》，並於 1970 年 11 月 14 日批准《消除種族歧視公約》，應認為《消除種族歧視公約》有國內法效力。不過必須面臨的困境是，批准《消除種族歧視公約》距今已有 46 年之久，如果沒有進一步之立法，恐怕人民難以知悉《消除種族歧視公約》之國內法效力。必須確認《消除種族歧視公約》有國內法效力，同時完整實踐所有《消除種族歧視公約》之規範。

我國尚未明文規定《消除種族歧視公約》第 4 條所稱之犯罪，因此必須先將種族歧視行為規定為犯罪，才能認定以犯種族歧視行為為宗旨之組織為犯罪組織。同時如有相關刑罰規定，自可適用於官方人員，當有官方機關提倡種族歧視，可對其人員處以刑罰。