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Memo: HRJs in Taiwan Human Rights Reviews and Court Cases-Institutional Backgrounds and Initial Observations

D5.1 task 1

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Executive Summary

This memo summarizes the research questions posed, the desktop research conducted, and the preliminary observations made by Team Taiwan from Work Package 5 (Migration) over the first 20 months, spanning March 2023 to November 2023. During this research period, the team mapped out HRJ techniques used by the Taiwanese government and made observations to inform policy recommendations for the final research stage.

The team focuses on two distinct forums to understand whether and how the government employs HRJ:

1. State reports submitted to the committees of UN human rights conventions domesticated in Taiwan (reviewed during 2023).
2. Civil and criminal court cases regarding migrant workers (reviewed during 2024).

Our team identifies notable differences in the use of HRJ in each forum. While the UN human rights reports reveal at least five HRJ techniques employed by the Taiwanese government, court cases reflect a relative absence of HRJs. This contrast suggests that the features of each forum significantly influence the government's approach. Ironically, the human rights review procedure appears to incentivize the government's use of (potentially harmful) HRJ.

This momo concludes with tentative observations on strengthening institutional designs to help identify and prevent the government's irresponsible use of HRJs.

1. Introduction

This Deliverable aims to summarize whether and how HRJ is employed by the Taiwanese government in relation to migration policies within two forums: court cases and periodic international human rights reviews. The following sections outline the institutional backgrounds (Section 2), present our findings for each forum (Section 3), provide a brief typology based on these findings (Section 4), and conclude this Deliverable (Section 5) with tentative observations from the research conducted so far.

2. Backgrounds institutions

2.1 Judicial Review and International Human Rights Review

Deliverable 4.1 ("D 4.1") provides a detailed explanation of the Taiwanese courts' power of judicial review (Section 2.1 of D 4.1) and the special international human rights review procedure in Taiwan (Section 2.2 of D 4.1). For a comprehensive discussion of the institutional features of these two forums, please refer to the respective sections. Here, we briefly summarize key points regarding the judicial review powers of Taiwan's ordinary courts and the periodic human rights review.

Judicial Review:

Taiwan's ordinary courts possess the authority to review the validity of administrative regulations and statutes. While courts may refuse to apply regulations they deem invalid in specific cases, they cannot directly refuse to apply a potentially invalid statute. In such instances, courts must suspend proceedings and request a constitutional review from the Constitutional Court.

Furthermore, courts are not bound by legislative intent as expressed in preparatory work during the lawmaking process. Although courts may consider legislative intent as an interpretative approach, they are not obligated to do so. Generally, courts are free to prioritize the literal meaning of the statute, the holistic institutional purpose, or other interpretative frameworks over legislative intents expressed in congressional documentation.



Periodic Human Rights Review:

The special human rights review procedure is held in Taiwan rather than by UN human rights treaty bodies. This reflects Taiwan's isolation from the international human rights system. However, a silver lining of this exclusion is that the review procedure takes place locally, providing NGOs—both progressive and conservative—an accessible forum to participate. However, whether an increase in human rights discourse will result in improved quality of that discourse remains to be seen.

2.2 Migrant Worker Programs in Taiwan

While most of our focus is on low-skilled migrant workers, this subsection explains the relevant restrictions and regulations on them within the broader framework for foreign workers, providing readers with a more comprehensive understanding of the special programs imposed on low-skilled migrant workers.

Three Categories of foreign workers

Taiwan regulates foreign workers based on their perceived skill levels, categorized into three categories: professionals, the low-skilled, and the mid-level skilled. Each category faces distinctive regulatory environments. While foreign professionals are welcomed and favored, low-skilled migrant workers are strictly constrained in terms of rights and job mobility.

- **Foreign Professionals**

Foreign professionals include occupations such as managers, teachers, and technologists. They possess skills and expertise highly valued by the government and enjoy almost full job mobility during their stay. They are allowed to sponsor their families for reunification in Taiwan. Subject to meeting relevant qualifications, they may apply for permanent residency. Additionally, their work and residency permits are renewable without an upper term limit.

- **Low-skilled Migrant Workers**

In contrast, low-skilled migrant workers, who currently come from Indonesia, Vietnam, the Philippines, and Thailand, are recruited for industries such as fishing, construction, manufacturing, and caregiving. They are restricted to the secondary labor market, which offers substandard jobs unattractive to nationals. Their job mobility is tightly controlled to ensure they do not compete with nationals for more desirable positions. They have no legal right to sponsor family reunification and are not eligible to apply for permanent residency. Low-skilled migrant workers are allowed to work in Taiwan for a maximum of 12–14 years and must leave as soon as their work permits expire or become invalid.

- **Mid-level Skilled Migrant Workers**



Lastly, mid-level skilled migrant workers represent a relatively new category designed to provide low-skilled migrant workers who have stayed for more than six years, or foreign graduates from Taiwanese institutions, with a pathway to permanent residency. This category includes industries experiencing a shortage of skilled workers, such as fishing, agriculture, and caregiving.

Selective	Differential	Treatments
Below are notable differential treatments of foreign workers:		

- **Coverage of the Labor Standard Act**

The Labor Standard Act (LSA) provides most workers with minimum statutory protections, including minimum wages, overtime pay, paid leave, and health and safety at work. In general, the LSA applies to workers regardless of nationality. However, certain industries fall outside the scope of the LSA, particularly those where low-skilled migrant workers are heavily concentrated, such as offshore fishing and live-in caregiving. This exclusion, although facially neutral regarding nationality, disproportionately impacts migrant workers.

- **Monthly Minimum Wage**

Low-skilled migrant workers who are protected by the LSA must be offered the statutory minimum wage, which is 28,590 NTD (875 USD / 9,665 SEK). However, live-in caregivers, who are not protected by the LSA, are subject to a contractual minimum wage of 20,000 NTD (612 USD / 6,762 SEK).

In contrast, the monthly minimum wage requirement for foreign professionals and middle-level skilled workers serves as a threshold for visa and residency eligibility, rather than a labor protection measure.

- **Foreign Professionals:** Must earn a minimum monthly wage of 47,971 NTD (1,463 USD / 15,781 SEK), approximately twice the statutory minimum wage, to qualify for work permits and residency applications.
- **Middle-Level Skilled Migrant Workers:** The monthly wage thresholds are as follows:
 - **Industrial Workers** (e.g., fishing, manufacturing, construction, slaughtering, and agriculture): 33,000 NTD (1,066 USD / 10,856 SEK).
 - **Institutional Caregivers:** 29,000 NTD (885 USD / 9,540 SEK).
 - **Live-In Caregivers:** 24,000 NTD (732 USD / 7,895 SEK).

- **Job Mobility**

As a general principle, foreign workers in different categories cannot easily shift between categories, even if they are overqualified. For instance, foreign professionals can seek a new job in the professional category, provided that the income meets the required threshold, but they cannot seek a mid- or low-skilled job. However, the work permit of foreign professionals is not tied to a specific job or employer, allowing for reasonable job mobility.



In contrast, the job mobility of low-skilled migrant workers is strictly limited. Their work permit is tied to a designated job and specific employer. They are not allowed to terminate the contract unilaterally before the expiration of their three-year fixed-term contract unless the employer is at fault legally or contractually.

Low-skilled migrant workers may change jobs after the expiration of the contract, provided they can find an eligible employer to hire them. Nonetheless, it is generally not possible for migrant caregivers to shift to a factory position, even if such positions are open to low-skilled migrant workers. This restriction (obstacles to shifting from caregiver to factory position) was imposed during the COVID-19 pandemic, when the supply of migrant workers sharply declined and the Taiwanese government sought to prevent existing caregivers from seeking vacancies in factories, which offered much better working conditions.

- **Reliance on Intermediaries**

It is well known that the intermediary industry increases the economic burden on migrant workers and could be a contributing factor to human trafficking and forced labor. However, Taiwan's low-skilled migrant worker program is structured in such a way that both the government, employers, and migrant workers are highly reliant on private intermediaries to manage the entire process of cross-border migration for low-skilled migrant workers, from entry to exit.

Direct hiring, where recruitment is managed and paid directly by the employer without the involvement of an intermediary, is available only in select sectors and to a relatively small number of migrant workers who benefit from successful direct hiring. The government fails to effectively manage the intermediary market and even legalizes the intermediary's monthly service fee: 1,800 NTD (54 USD/ 608 SEK) for the first year, 1,700 NTD (51 USD/ 574 SEK) for the second year, and 1,500 NTD (45 USD/ 506 SEK) for the third year and beyond. This means that an intermediary can expect to collect 60,000 NTD (1820 USD/ 20,267 SEK) over the course of a three-year contract. In comparison, the market for foreign professionals does not exhibit such a close and institutionalized reliance on the intermediary industry.

3. Mapping out HRJ¹

3.1 HRJs in Periodical Human Rights Review

Our team observes whether and how the Taiwanese government employs HRJ to respond to criticisms of its failures or shortcomings in implementing migrants' human rights by reviewing states' periodical

¹ This section reiterates our research presented in our previous memo, Mapping out HRJs, written in January 2024.



international human rights reports submitted to the committee. We identify that the following techniques are used to defend the status quo:

- **Hierarchy of Rights:** The government prioritises A rights to counterbalance or undermine B rights.
- **Substitution of Stakeholders:** The government overlooks X stakeholders who are highly adversely impacted by a policy while emphasising Y stakeholders who are less affected.
- **Misappropriation of Concepts:** The government redefines the contents of rights and state obligations in a way that deviates from UN practices or authoritative interpretations.
- **Facade of Paternalism:** The government labels a restriction as a ‘benefit’ or ‘right’ (for the benefit of those who are restricted).
- **Confusion of Slighter Limitation:** The government suggests a less severe limitation is a ‘benefit’ or ‘right’.

For examples:

Categories of foreigners	HRJ examples	Techniques
Industrial and domestic migrant workers	♦ Deprivation of migrant workers’ right to work (i.e., no right to terminate employment and change employer unilaterally) and freedom of movement is counterbalanced by nationals’ right to work.	Hierarchy of rights/Substitution of stakeholders
	♦ The requirement of frequent health checks imposed on migrant workers is deemed a necessary means to protect nationals’ right to health.	Hierarchy of rights/Substitution of stakeholders
	♦ The failure to protect foreign domestic workers (caregivers) with labour law is defended by workers’ freedom of contract.	Misappropriation of concepts
	♦ Fixed-term contracts of migrant workers are said to protect workers’ exit and ‘leave’.	Misappropriation of concepts
Marriage immigrants	♦ Extraterritorial interview requirements for marriage immigrants to get a visa and resident permits are said to combat human trafficking and to ealize foreigners’ right to family reunions.	Façade of paternalism

Asylum seekers or stateless people	♦ The act of temporarily suspending deportation or transitioning to a third country as an ad hoc response to asylum requests in absence of asylum law is considered a way of fulfilling international human rights obligations under ICCPR.	Confusion of slighter limitation
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3.2 HRJs in Periodical Human Rights Review

The five techniques discussed above can be grouped into two categories: **inappropriate balancing** and **distortion of rights**. This categorization aims to emphasize the connection between various rhetorical strategies (as shown above) and traditional judicial legal reasoning and activities.

- **Inappropriate balancing** includes the rhetorics of “Hierarchy of Rights” and “Substitution of Stakeholders.” This involves conflicting interests among right-bearers, with the state’s balancing of these conflicts being uneven. For instance, Taiwan’s restriction on job mobility for temporary migrant workers has drawn criticism. Low-skilled migrant workers cannot unilaterally terminate their contracts within the three-year term unless their employer is at fault. This restriction is widely criticized as a key driver of forced labour, as it severely limits migrant workers’ right to work. The Taiwanese government justifies this policy as necessary to protect Taiwanese nationals’ right to work. By emphasizing the weight of nationals’ rights, the government shifts focus, downplays migrant workers’ rights, and reframes the issue as one of protecting nationals.
- **Distortion of rights** encompasses the rhetorics of “Misappropriation of Concepts,” “Façade of Paternalism,” and “Confusion of Slighter Limitation.” This category involves unfounded or harmful interpretations of rights rather than conflicts between them. An example is the government’s restrictions on the entry of marriage migrants. Applicants from certain jurisdictions must undergo intrusive interviews to prevent sham marriages—a goal that may appear legitimate. In practice, however, these interviews are often humiliating and violate personal privacy. The government defends the process by claiming it upholds marriage migrants’ right to family reunification. This intrusive measure is reframed not as a limitation but as a realization of rights. Notably, in the context of immigration measures, where migrants are vulnerable rights holders, the language of rights can easily be weaponized against them.

3.3 HRJs in Court Cases

Search Strategy, Results, and Limitations

Our team used the keywords [‘migrant workers’ & ‘human rights’] to search the official Judgment Database, retrieving 1,228 cases as of 17th November 2024. We then excluded cases from the Supreme Court and Courts of Appeal—approximately 200 cases in total—and focused solely on district court cases.

The limitations of the current research are twofold:



- Exclusion of Administrative Court Cases**
 While we excluded only a small portion of the search results, cases from administrative courts of appeal are among those excluded. This exclusion may raise concerns about potentially missing significant cases for mapping out HRJ. Government agencies, often appellees in such cases, are typically in a position to defend the law and may be more inclined to invoke HRJs. To address this limitation, we selected noteworthy cases and traced all judgments involving the same party to analyze developments across all levels of ordinary and administrative courts for a comprehensive view. Additionally, we plan to review cases from administrative courts of appeal by the end of the 24th month.
- Narrow Research Scope**
 We did not include other categories of migrants, such as marriage immigrants or asylum seekers, nor did we focus on specific rights (e.g., the right to family reunion) as keywords. Given the large volume of cases, our current time and manpower constraints do not allow us to broaden the research scope. If necessary, we plan to refine our search to examine whether issues identified in periodic international human rights reviews also appear in court cases. We intend to address this limitation by the 30th month.

Findings

First, the district court cases reviewed include both civil and criminal judgments. Our team focused primarily on criminal cases, as civil cases are generally not relevant to HRJ.

Second, we found that human rights rhetoric and concerns most often arise in criminal cases where migrant workers are found guilty of offenses and face deportation after serving their penalties. In such cases, the human rights of migrant workers can either serve as a positive factor to spare them from deportation or, conversely, as reasoning to justify it. For our purpose of mapping and understanding HRJ, this category of cases is, by definition, not HRJ and therefore not directly relevant, as it is the judges—rather than the government—who invoke human rights language to support their decisions. However, these cases provide a valuable comparative perspective, and we further explain our observations below.

Third, it is striking how rarely HRJ is observed in criminal cases overall. While courts occasionally reference human rights to balance interests or apply proportionality in their reasoning—standard judicial practices—we did not observe prosecutors using human rights language to justify prosecutions or punishments.

Human Rights Balancing in Deportation Order Cases

There are two Taiwanese laws that may lead to a deportation order against migrant workers who commit criminal offenses: one administrative and the other criminal. On the one hand, Article 95 of the Criminal



Code states that foreigners who are sentenced to imprisonment may be deported after serving their sentence. Consequently, a criminal judge must decide whether to order deportation following the imprisonment of a migrant worker. On the other hand, Article 73 of the Employment Service Act stipulates that the work permit of a migrant worker shall be annulled if the worker "has been in serious violation of applicable laws and regulations." Therefore, the Ministry of Labor may decide to annul the work permit of migrant workers found guilty of a criminal offense, which would result in deportation independently of the criminal court's deportation order after execution.

- **Criminal sanction to deport**

A majority of migrant workers' criminal offenses involve drunk driving or riding—usually on an electric bicycle rather than a scooter or car². Criminal courts often cite the following paragraph, either to spare deportation or to justify it: *"The decision whether to deport the foreign offender is subject to an overall assessment of the crime and the probability of the offender's becoming a social safety concern. The court should make such a decision with great care, with particular attention to the proportionality principle so that it protects both human rights and social safety."* (Supreme Court Judgement 94-nien-tai-shang-tzu No. 404).

Regardless of the court's decision, the key point here is that using individual human rights (migrant workers' rights) to counterbalance the pursuit of collective interests (social safety or order) represents a classical liberal assumption about the function of individual rights and the role of courts.

- **Administrative sanction to annule work permit**

However, even if a guilty migrant worker is not ordered to be deported by the criminal court, the Ministry of Labor can still impose a separate administrative sanction by annulling the work permit of any migrant offender, which will result in deportation. The Control Yuan (Taiwan's Ombudsman, which has also housed the Human Rights Committee since August 2020) expressed concern that this administrative punishment is excessively severe and conducted an investigation in 2019.

In its investigation report, the Control Yuan emphasized that migrant workers' equal human rights under the ICCPR and ICESCR must be protected. A deportation order severely impacts a migrant worker's right to work, as it not only results in the loss of their current job but also bars them from reentry in the future. Therefore, migrant workers' right to seek justice and challenge such an order should be safeguarded. Moreover, deportation orders should only be imposed on offenders of serious criminal

² Taiwan sets a strict standard for driving safety: a person driving or riding any mobile vehicle with an exhalation alcohol concentration of 0.25 milligrams per liter or more, or a blood alcohol concentration of 0.05 percent or more, is subject to up to three years of imprisonment, even if no one is harmed (Article 185-3 of the Criminal Code).



offenses; otherwise, migrant offenders face discrimination, which violates the principle of equal protection.

However, the Administrative Supreme Court (ASC) has taken a more conservative stance toward challenges against administrative orders to annul work permits. In a notable case, the administrative court of appeal revoked the Ministry of Labor's order to annul a work permit, citing the Control Yuan report. However, the ASC disagreed, ruling that Taiwan adopts a zero-tolerance policy toward drunk driving, as protecting nationals' lives and physical safety is a significant legislative concern. The ASC emphasized that all foreigners should be aware of the severe consequences of drunk driving. The appellant's drunk driving not only endangered the lives and safety of others *but also his own*. Since life is the highest legal interest, the administrative order to annul the work permit was deemed appropriate.

In short, the ASC's approach aligns more closely with HRJ: it justifies severe administrative sanctions against migrant workers for causing even a minor traffic hazard by prioritizing both nationals' and migrant workers' own life and physical safety. This approach demonstrates the techniques of "Hierarchy of Rights" and "Substitution of Stakeholders." It presents a sharp contrast to cases where courts are willing to consider the specific circumstances of individual offenders in making their decisions.

4. Typology: Contrast of HRJ in Two Forums

We then populate the HRJ typology table with the examples discussed above to facilitate further comparison and theory-building across work packages. Note that we do not use the entire table at this moment, as we aim to draw the reader's attention to the division and contrast between Types A and B (the leftist column) in the context of Taiwanese migration policy, which we consider the most critical step in the typology effort.

Forum	Examples	Statutory Basis	Alleged public Interests	Techniques	Category	Type A or B
Periodical Human Rights Report	Depriving MWs job mobility	Employment Service Act	Avoiding unemployment of nationals	Hierarchy of Rights; Substitution of Stakeholders	Inappropriate balancing	A6: positive rights (nationals' employment opportunities) to restrict negative rights (MW's job mobility)



	Marriage migrant visa interview	Immigration Act	Preventing human trafficking and visa fraud	Façade of Paternalism	Distortion of Rights	A1: positive obligations (facilitating family reunion) to restrict negative rights (right to privacy)
Court Cases	Departing MWs with criminal offences	Criminal Code	Life and physical safety; Safe traffic	N/A (Not HRJ)	N/A (Not HRJ)	B3 (Not HRJ, Life, safety and healthy)
	Annuling work permit of MWs with criminal offences	Employment Service Act	Life and physical safety; Safe traffic	Hierarchy of Rights; Substitution of Stakeholders	Inappropriate balancing	A2: positive obligations (protecting life and safety) to restrict positive rights (right to entry, remain and right to work)

5. Concluding Remarks: Toward Theorizing HRJ

This Deliverable concludes by proposing three hypotheses that can be further tested at the final stage of the research:

1. Features and Audience of the HRJ Forum

The curious contrasts between HRJ as presented in periodic human rights reports and its absence in court cases merit further investigation. Ironically, the human rights review procedure seems to incentivize the government to adopt unjust balancing or distort the interpretation of human rights. On the positive side, the government's self-defense is not necessarily consolidated or accepted by courts or international human rights review committees. This underscores the importance of considering the roles of the judiciary, human rights committees, and civil society in screening out harmful HRJ.

2. Inappropriate Balancing: Harder to Identify and Resist

Inappropriate balancing and distortion of rights are two problematic forms of legal reasoning that we generally expect the judiciary to screen. However, our preliminary observation suggests that inappropriate balancing is more difficult to recognize as a distinct phenomenon requiring a new theoretical approach. It is often framed as reasonable disagreement within a vibrant democratic society. This highlights the need for further explanation of when and why HRJ, in the form of balancing, could become particularly problematic.

3. Malicious Distortion of Rights: Preventing Harmful Discursive Power



Compared to inappropriate balancing, distortion of rights often appears malicious and is easier for courts to screen out. Nevertheless, when the government enjoys a wider margin of discretion in rights implementation, courts may still defer to the government's interpretation, thereby consolidating the distortion. This emphasizes the importance of maintaining alternative narratives of rights to counter the government's distortion and prevent harmful discursive power.

