

# Taiwan's Constitutional Dilemma: Transforming the Control Yuan into a 21<sup>st</sup> Century Ombuds Institution\*

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## Abstract

After the 2016 elections and the establishment of the new government, the protection of human rights in Taiwan faced new challenges. The new president declared she would establish a National Human Rights Institution in accord with United Nations' norms, thus provoking much discussion of the role of the Control Yuan. This paper aims at making a humble contribution to the discussion as an outsider from Hungary, a post-authoritarian East Central European country. The primary concern is how to choose a starting point for the transformation of the Control Yuan toward a new ombud's institution.

## Keywords

Control Yuan, European ombudsman institution, constitutional development in Taiwan, good administration, reform

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After the 2016 elections and the establishment of a new government, the protection of human rights in Taiwan faced new challenges. There was much discussion of the role of the traditional, but many times reformed, Control Yuan. The new president of Taiwan declared she would establish a National Human Rights Institution in accord with United Nations' norms, and there have been ongoing debates on the issue among the public, professionals and in civil society. The civil society of Taiwan showed its strength and potential in the civil disobedience campaign of the Sunflower Movement of 2014, and in other previous waves, and it is now an indispensable agent and shareholder of any new type of institutionalised human rights watch in Taiwan.

I would like to make my humble contribution to the discussion as an outsider from a post-authoritarian East Central European country, Hungary.<sup>1</sup> My essay tries to explain, from the point of view of a foreign visitor, a “spectator”, without any knowledge of Mandarin Chinese, but with long experience in the working of national and international “ombuds institutions”,<sup>2</sup> how to choose a starting point for the transformation of the Control Yuan toward this new role. I would like to contribute to the constitutional discourse in Taiwan, from my point of view, which may be useful for further consideration.

## Constitutional Engineering in Taiwan: Is the Control Yuan a Starting Point for a New Ombud's Institution?

The Control Yuan is rooted in the special experiment of the Republic of China's constitutionalism and statehood, and has survived through generations of statesmanship and constitutional scholarship in the 20<sup>th</sup> and 21<sup>st</sup> centuries China/Taiwan. However, in reforming it the experience of others, including of Europe, should also be consulted. Could it be developed into an

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- 1 It is necessary to mention the practical innovations and their implementation in Hungarian statehood, as I participated from 2007 to 2013 as ombudsman of Hungary, and I introduced the renewed Hungarian ombudsman institution into the Paris Principles based on the UN human rights system, as the National Human Rights Institution of Hungary, receiving the highest category “A” from the United Nations Human Rights Council. Some aspects of these experiences were analysed in a former article (Szabó, 2015).
  - 2 The original Swedish term ombudsman, was taken as a masculine, male term in Western languages known to me, like Ombudsmann (“Mann” being “male”) in German. We have since, the sixties of the 20th century, female representatives in the ombuds community, and the term “ombuds institution, person” etc. was proposed for use. I try to follow this term in this article, but when I refer to historical, or original institutions, like their labels, which use the traditional ombudsman term, I have to shift back to the traditional usage.

ombuds institution with a human rights profile? Could it be at the same time a National Human Rights Institution? I think that the present Control Yuan has the potential to become a new ombuds institution. But, in general, based upon international and regional experience with NHRIs, a national human rights institution is better developed as a brand-new institution (Gregory and Giddings 2000; Pergram, 2010; Goodman and Pegram, 2012).

The sanctioning power and the counterbalancing power of the Control Yuan do not fit into the image of a Western-type ombuds institution. In the West, these institutions do not have legally coercive powers. They provide alternative legal expertise, as recommendations, which may gain binding force through their acceptance by other powers such as the parliament, government or judiciary. These recommendations have no power of compulsion, and that is their special contribution to the rule of law (Diamandouros, 2006; Reif, 1993; Kucsko-Stadlmayer, 2006; Frahm, 2013; Asia–Europe Foundation, 2012). Of course, there are different solutions, and there are some binding decisions as well as sanctions, mostly in cooperation and co-decision with courts. But the main format is the professional, independent, civic-bound recommendation, and its implementation will depend on the prestige of the respective ombuds institution in the state and society. These types of institutions have an important role within the development of a new culture of human rights in a post-authoritarian setting, such as that of Taiwan. They have a translation-transmission role to import global/international and Western human rights culture. The ombuds, and other independent institutions are the resources for a new culture of human rights in countries with an authoritarian past and tradition (Letowska, 1998). The independent institutions are important gatekeepers between global human rights norms and local-national human rights cultures. The ombuds institutions in Europe and elsewhere today have the right and duty, to focus on both of their historically-developed functions: maladministration and human rights issues. The Universal Declaration of Human Rights and other UN and international human rights documents constitute a considerable range of human rights issues on the agenda of ombudsman institutions all over the world (United Nations, 2010; Equality and Human Rights Commission of the UK, 2010).

If we reconstruct the development of the Control Yuan from its original idea to its present reality and problems, one of the main analytical aspect is how the idea of the honourable Dr Sun Yat-sen has been changed by the

amendments and legal and constitutional reforms in the R.O.C, first in the whole territory of China, and then in Taiwan (Caldwell, 2017; Control Yuan, 2011). Is this process an “erosion of power”, resulting in a “tiger without teeth” as some analysts, such as Ernest Caldwell, states?<sup>3</sup> Is it still one of the five ‘powers’ or branches of government as intended by Sun Yat-sen, a real ‘counterweight’ to the other four? The Control Yuan has received many new functions and it should/may receive even more as a fully developed ombuds institution. The function of human rights defence, the role of an ombudsman, should be developed further to fulfil this task.

Apart from Sun’ s tradition, rooted in the 19<sup>th</sup>–20<sup>th</sup> century encounter with the European tripartite balance of powers, and later in the writings of some American constitutionalists, we find the conception of a fifth power much earlier in European political thought in the works of the French liberal thinker, Benjamin Constant. Of course, Constant’ s ideas are very different to those of Sun. Constant, a French liberal, extended the tripartite powers of Montesquieu, and included publicity, the media, as the new fourth power, and a “neutral power” as the fifth power. He saw the fifth power as an arbiter among the four other powers in case of conflict, representing the whole of the political system/community/sovereignty above its particular parts/subsystems/powers. In Constant’ s era it was obvious that this “neutral power” was no-one else but the king of a constitutional monarchy. Yet in the 20<sup>th</sup> and 21<sup>st</sup> centuries this power is delegated to the ombudsman, to the Constitutional Court or to some other judicial committees. These new types of institutions in the analysis by the Australian political scientist John Keane, are referred to as “monitory democracy” institutions being neither representative nor elected nor powerful, but being neutral, professional, independent, investigative, and based on the “soft power” of publicity and civil society (Keane, 2009: 585–648).

There are good reasons for establishing a Western–type ombuds institution in Taiwan, as there is a need for an institution with an independent, non-party, pro-citizen character, with Visibility, Accessibility and Transparency (VAT) for all citizens. A special focus of the institution should be the defense of the rights of vulnerable people and fighting for equal

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3 His interesting book project of SOAS London will present the first comprehensive English analysis of the development of the Control Yuan. At the moment some preliminary publications are available, eg. Caldwell, 2017.

opportunity. The ombuds institution should also undertake human rights education for civil society: competitions, exhibitions, symbolic–symbol making-activities, and provide information on human rights for citizens and NGOs (in publications, periodicals, by websites, Facebook, social media, mass media and public debates).

Transforming the Control Yuan into an ombuds institution is a departure from the original idea of the institution as conceived by Sun Yat-sen and an anchoring of it to the functions of the present day ombuds institutions of the world. Following the constitutional reforms of the transition from authoritarian rule to democracy in Taiwan, the Control Yuan should be a newly formed institution, and acquire much more modern and postmodern state functions, too. From the point of view of the defence of human rights, all the original/traditional/imperial functions of the Yuan, i.e. the strict censorship of government officials, are, in my view, nothing but historical reminiscence, which do not necessarily help to fulfil the ombudsman function. But they make the image of the Control Yuan as an institution an over-complex one in constitutional terms, and much less transparent for civil society and the public than it should be.

The situation is much the same as an imaginary “régisseur” or director of a movie, or theatre-piece, who would assign every, or at least many roles to a specific actor, though these could be more efficiently distributed among other actors in the play. The favoured actor cannot play all the roles with the same skill, and the theatre-going public would be disappointed if he/she tried to do so. Among countries with progressive and democratic statehood in the 21st century, the use of sanctions, impeachment, control of state finances (except, for the latter function, in Israel) do not belong to an ombuds-type institution anywhere else. In case of the Control Yuan, constitutional changes have resulted in a multifunctional institution, where functions of a judicial nature—some analysts call it a “quasi-judicial” organ—and of an audit, i.e. “quasi-executive”, function overlap. Furthermore it has retained a “quasi-representative” function, as it is led by a body of 29 members, which is totally unnecessary today. The nature of the whole institution is not clear enough. The whole complex of the different institutional elements of a president, vice-president, members, their committees and plenaries still bears the stamp and profile of the former and totally superficial representative function, as if it were a type of upper chamber of the Legislative Yuan.

The postmodern ombuds institutions serve as corrective powers of the constitutional system. The other powers, such as the judiciary, representation and executive should fulfil their tasks, without a shadow-judiciary, shadow-representative, shadow-executive and shadow-constitutional balancing agent like the Control Yuan watching over them. As many different functions cross and hinder one another, and there is a need to constantly balance between different roles, none can be properly fulfilled. The procedural and organisational statute of the Control Yuan today is a sophisticated system of multi-levels of decision-making, built upon different majorities and thresholds by members, or combined with co-decision-making with other institutions. In my opinion, a new system as an ombuds institution could be built on a smaller group, a smaller committee, or an individual-led institution. It would make it much easier and much more efficient as well as transparent, and would perform much better for the public. The performance of the Yuan shocked and disappointed the Sunflower movement, other protesters and the matured and sophisticated public and civil society of Taiwan, who demand, according to my impression, a real “watchdog” institution based upon 21<sup>st</sup> century Western models (like in the direction of the National Human Rights Commission in South Korea).

In the R.O.C., the transformation of the Control Yuan into a 21<sup>st</sup> century, postmodern ombuds institution will require a lot of constitutional engineering. It is not so easy to change an originally coercive-disciplinary-imperial-based control institution into a modern/postmodern civil society-based ombuds institution, tearing down the parliamentary theatre facade. But in a time of political reform, this process should go forward, to rebuild the Control Yuan into a new institution for human rights protection and a controller of maladministration in Taiwan. Taking any of the possible routes, I would strongly argue, that the human rights function, as in the post-authoritarian settings in Southern and Eastern Europe, as well as in South America or Korea should be dominant and transparent. The function of control of maladministration, where the existing Yuan has certain merits, has to remain, but without any sanctioning power. Rather it should rely on the legitimacy and prestige of an Western-type ombuds institution, without the reminiscences of imperial China-based censorship.

The reasons for this are as follows. First, the defence of human rights is the main demand of civil society and currently it is not institutionalised

elsewhere in the R.O.C. system. Meanwhile, secondly, the function of control of maladministration is based upon another conception and professional tradition/skill. There is no need for a “29 headed dragon” leadership or the present management of the Yuan. Instead, clear cut charismatic leadership by one person accepted by civil and political society as an embodiment of the spirit of the whole institution is called for, as I argue in the latter parts of this article.

A specific trait of the present Control Yuan in the R.O.C. is the combination of the functions of auditing and ombudsman. This is unique, and only Israel has something similar. In Israel there was a severe conflict concerning the direction within the organization, with one faction which wanted to separate the functions of the ombudsman from that of auditing, whilst the winning majority constituency preserved the original combination.<sup>4</sup> In my opinion, a cleansing of the traditional Chinese censorship-disciplinary power, of the pseudo-representative character, and the historically grown audit function of the Yuan could be the starting point to building an ombudsman institution for the 21<sup>st</sup> century R.O.C. The new functions could help to build up a new culture of human rights, to control corruption in government agencies, and to be a constructive part of “the neutral power” and “monitoring democracy” of the constitutional system.

I am not sure that the five-power-system in its present form, especially its relations of checks and balances, is sustainable. I am convinced, rather, that the whole constitutional system of the R.O.C. needs general reconsideration within the frame of a newly conceived and value-based constitutional reform, which will rectify the many inconsequent compromises between the tradition of an authoritarian past with temporary context-bound solutions adopted during the different and divergent stages of democratization over the last 25 years in Taiwan.

If the goal of the reform of the Control Yuan is a new ombuds institution, I would propose to leave the Yuan's original conception decisively, and formulate a well-conceived ombudsman institution with much less differentiated powers and functions. The current Control Yuan should exercise control over maladministration in the executive branch but without any sanctions, just by criticizing and scandalizing, in cooperation with civil

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4 Personal information given to the author during his official visit to Israel in March 2008.

society organizations and the mass media. The new ombuds Control Yuan should focus on the protection of human rights, again without any sanctions, and human rights education, and be much more transparent for civil society, performing the role of the partner of civil society and of critical publicity.

## European/Hungarian Experiences: Lessons for New Organizational and Constitutional Issues in Taiwan Regarding a New Ombuds Institution

### 1. The unified protection of human rights

The protection of human rights is realized by the differentiated constitutional institutions (Courts, Constitutional Court, Prosecution, etc.) in cooperation with one another. The operation of a unified ombuds institution could meet these requirements much more effectively than an internally divided one. Moreover, by integrating the forums of citizen's complaints, it could obtain a comprehensive picture of the change of structure and the dynamics of the citizens' complaints. Thus the social and political problems could more easily be recognized and treated in a more effective way.

### 2. The advantages of integrated operation

A unified ombuds institution is needed in a unitarian state, because it corresponds to the predominating institutional forms of democratic control, such as the Constitutional Court, High Court, Prosecution, etc. Effective and integrated operation would multiply the power and significance of the ombuds institution.

### 3. Transparency and dynamism

The uniform system of organization of a national ombuds institution ensures a concentration of resources as well as innovative and dynamic resource-allocation in well-thought-out projects. At the same time, the uniformity would promote the efficiency of allocation of resources and tasks based on common general basic principles, strategies and programmes. Transparency of activity should make it possible for each and every citizen to gain a transparent view of global human rights and national or local situations.

#### 4. Leadership with charisma

A responsible independent and charismatic leader trusted by civil and political society, such as a president could well serve as a personification of the uniform ombuds institution more effectively than a differentiated leadership structure with internal checks and balances as with the present Control Yuan. The significance of the person chosen to head the ombuds institution is important, and her/his personalised “philosophy” guiding the action would help frame the problems, the strategy for solutions, and the alliances and adversarial relations with institutions and agencies. A type of “spiritual unity” based upon this “philosophy” should be encouraged in the institution, including among the staff, if possible mobilizing them, giving them space for initiatives, creativity and growth. They should feel that this is not just the job of a public servant, but a “mission” and not exclusively for the ombudsman, the elected leader, but for all of them. The ombuds person should be an independent, creative, trusted and accepted person, who is widely known and acknowledged by the public and civil and political society with a clear individual style of engagement. In Eastern Europe former leading actors of the anti-communist movement, were given this position, symbolizing the anti-authoritarian and pro-human rights struggle of civil society during transition.

#### 4. Public and social prestige

In a country in which uniformity prevails, a unified ombuds institution has higher prestige than in a country with a multiplicity of ombuds institutions. It is very common in Western European practice for this position to be occupied by a former member, or even a former president, of the Constitutional Court, the Supreme Court, or the Media Control Authority. Their high professional career, their experience of serving the country and the public interest, their networks in the land and abroad, are enormous advantages for the ombuds institution.

#### 5. Rentability versus Representation?

It makes no sense, as in the present Control Yuan in Taiwan, to employ so many leaders for “maintaining the independence and differentiation of voices” of a democratic institution. Pluralism in external activities tends to have a reverse effect on an institution which serves, but does not represent,

society. Ombuds institutions are not political institutions, as they are not based upon political society, and they neither have to represent the voters nor the actual composition of the parliament. Since the mandate is generally 6 years, not being bound to changing majorities in elections, their composition should not be tied to the representation of any given political majority. An independent ombuds institution could be run by an individual charismatic leader, disregarding political representation, which is not the basis for the legitimacy of an ombuds institution. To my mind, the legitimacy of the institution relies neither on plurality or representation but on the exceptional professional knowledge and widely accepted human rights engagement of the leader(s).

### Conclusion: Transforming the Control Yuan

Let us first suppose that a new uniform human rights defender institution is established along the lines of a Western ombuds. In that case how should the Control Yuan be reconfigured? A diffusion of disciplinary powers, assigned to various ombudsman institutions, is to be observed in western Europe as well as in the post-communist EU member countries. Hence the present disciplinary functions of the Control Yuan may be retained in some way. In general, it should retain control over maladministration but without the power to issue sanctions. Decisions of administrative control organs should be under judicial review, which is incompatible with the autonomous constitutional status of the European-type ombuds institution.

Cooperation with the Judicial Yuan may be further established, as European ombuds institutions already have it, though not those institutions based on US types. All traces of a pseudo-representative, “pluralistic” function of the Control Yuan, and the excessive number of elected members, with the differentiated fraction-type division of labour among them, should be reduced or better deleted. One of the important present day functions of the Yuan should be done by a separate institutional system. For example, a new, independent State Audit, as in every country except Israel, would be needed in Taiwan.

The legitimacy of the new institution should be further based on control over maladministration, and a certain degree of control over the personnel and rulings issued by the courts. The main function might be the longer arm of civic control, rather than being an agent of the attorney-type bureaucratic,

fiscal control, with sanctions and other legal consequences. The new ombuds institution should be complimentary to the investigative power of the Legislative Yuan itself, and not monopolise this function. It may retain the name, Control Yuan, but maybe a new name would be better.

How can the independence of the elected leaders be secured? This should involve a combination of professional, neutral nomination and responsibility based on majority political decisions.<sup>5</sup> Professional organizations, such as the Academia Sinica, top university law faculties, top human rights NGOs, and Chambers of Lawyers should take part in the process of nomination either by their qualified majority or consent. In this way a long, deliberative process precedes the nomination. Then, the candidates undergo a public hearing and discussion at committees of the Legislative Yuan and if supported by them, a decision of parliament by a two thirds majority of secret votes will select the head of the institution, the president, and by a simple majority the two vice-presidents for six years. In the case of a lack of majority votes, new nominations should be held by the respective professional organizations again for the vacancies, so that the professional community and a political decision may be combined, with lot of hard work. Eligibility to the presidency requires that the candidates must reach the age of sixty and have twenty years of scientific or high-level legal practice as well as a law degree/scientific degree.

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5 Meanwhile the prestige of the ombuds institution is bound in almost every case to a procedure, that is hardly regulated, and to a type of legitimacy depending on political independence. This is based on the selection of the members, the legal standing and investigative powers of the institution. In only one country in the world, Austria, have political independence and personal autonomy been successfully replaced by the political involvement and engagement of all sides.

This is done as follows. The members of the Austrian ombuds institution are all leading politicians of the three biggest parties in parliament. Following a very sophisticated statute and procedure, they are bound to reach consensus in all of their common decisions and recommendations as a homogenous unit, the Austrian Ombudsman Board (Volksanwaltschaft). In this way the implementation of their recommendations is assured. Furthermore, the main political parties will accept these recommendations immediately, or very soon. During my time in office in Hungary, a number of key Austrian politicians were members of the Board. The delegate on the Board of the Christian-Democratic Party later became the Minister of the Interior. The Social Democrat member led the special committee of the Austrian Federal Parliament (Bundesparlament) for constitutional reform. This committee had a longer lifespan than that of the Board and was of great importance. Members of the Austrian Ombudsman Board are not politicians whom their political communities would like to put aside. In the rest of the European Union, unfortunately, they are and the post is treated as a farewell honour, the last stage of a political career. In Austria, on the contrary, the members of the Board are active members of their Party and involved in parliamentary politics.

In a modern society it is hard to guarantee independence. But one should give it a try. Who else will defend the defenders of human rights from the push and go of politics, if not one who is politically neutrally, of a strong and autonomous personality, wholly dedicated to human rights, and enjoying high consent and support from civil and political society?

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# 台灣的憲政困境：監察院轉型為 21 世紀的監察使制度

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## 摘要

經過 2016 年的總統大選並成立新政府後，台灣的人權保障工作迎來新的局面。新總統宣佈將依據聯合國標準成立國家人權機構，因此引發台灣社會針對監察院應扮演何種角色的討論。本文作者來自於匈牙利，一個後威權時代的中東歐國家，試圖基於自身在匈牙利的經驗，以謙遜的態度為台灣的相關討論提供一些建言。最主要的焦點，在於討論監察院如何採取一個適當的起點，轉型為一個新的監察使機制。

## 關鍵字

監察院、歐洲監察使制度、台灣的憲政發展、良善的政府、改革

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