

# National Human Rights Institution and National Preventive Mechanism 'within' the Control Yuan

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## Abstract

Recent years have witnessed remarkable progress in democracy and human rights in Taiwan. In addition to the ratification of several United Nations treaties and the establishment of a peculiar treaty review mechanism, Taiwan has decided to take a step further and set up its own human rights watchdogs that shall actively monitor the achieved human rights commitments.

On a thorny path towards establishing a National Human Rights Commission (NHRC), a vivid discussion was held on what institution shall carry out these important tasks. At the end of the day, the Control Yuan (ombudsman institution of Taiwan) have emerged "victorious" and became the authority that accommodates both, the NHRC and the National Preventive Mechanism (NPM), a torture monitoring body.

Intriguingly, instead of applauding these unparalleled human rights commitments, the establishment of the NHRC and the NPM by the Control Yuan received rather a lukewarm welcome from civil society and scholars. The reason for such a hesitant response lies in the ambiguity of the institutional settings of the Control Yuan and concerns that its archaic

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organization and functioning are far from present-day demands for effective human rights monitoring. The critical voices echo concerns as to whether this reform is actually a “window-dressing” or it has indeed the potential to create truly effective oversight bodies for Taiwan.

If the latter holds true, does the current structure of the Control Yuan provide the NHRC and NPM adequate room to become self-confident actors which are fully independent on both, external forces and internal institutional bonds? What, then, should be the best choice for the structure of these bodies, their composition and working strategy? And how should these new mandates be separated between the current members of the Control Yuan, or more precisely among the commissioners of the NHRC?

### Keywords

Control Yuan, National Human Rights Commission (NHRC), National Preventive Mechanism (NPM), Paris Principles, Optional Protocol to the Convention against Torture (OPCAT), ombudsman.

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On 10 December 2019, the Legislative Yuan passed the *Organic Act of the Control Yuan National Human Rights Commission (NHRC Organic Act)*.<sup>1</sup> On the basis of this law, the Control Yuan<sup>2</sup> has established the National Human Rights Commission that is assigned with human rights mandate according to the Paris Principles.<sup>3</sup> This long-awaited moment is an important milestone in Taiwan’s democratization process and demonstrates its determination to respect, protect and fulfil fundamental human rights. In addition, on 10 December 2020, the Executive Yuan has passed a draft of the implementation act of the *United Nations Convention against Torture (UNCAT)* and its *Optional Protocol (OPCAT)*.<sup>4</sup> As a result, a torture

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1 In Chinese: 監察院國家人權委員會組織法。Organic Law of the Control Yuan (監察院組織法) and Organic Act of the Control Yuan Committees (監察院各委員會組織法) have been amended accordingly.

2 The Control Yuan is the highest control body of a state and it also represents the control branch of Taiwan Government.

3 Principles relating to the Status of National Institutions (The Paris Principles) adopted by the United Nations General Assembly resolution 48/134 of 20 December 1993.

4 In Chinese: 禁止酷刑及其他殘忍不人道或有辱人格之待遇或處罰公約施行法草案 ([https://www.moi.gov.tw/chi/chi\\_act/Act\\_detail.aspx?sd=2&sn=910](https://www.moi.gov.tw/chi/chi_act/Act_detail.aspx?sd=2&sn=910)). Latest update 7 May 2021.)

monitoring body for the prevention of torture and ill-treatment in places of detention (National Preventive Mechanism, NPM) will be established. On the basis of the draft of the implementation act, the NPM is going to be established within the Control Yuan.<sup>5</sup>

Besides its indisputable positive impact on the human rights situation in Taiwan, the ongoing human rights reform is also sending a clear signal to the international community. It shows Taiwan's determination to stand alongside liberal democracies around the world and uphold the universal values of liberty, human dignity and equality for all under its jurisdiction.

However, observations from NHRIs and NPMs around the world show that the human rights watchdogs are not “born” overnight and that substantial reforms are always needed to make them truly functioning. It has been found that various shortcomings may arise during the establishing process, which can subsequently affect their proper functioning. Thus, a State must be vigilant in adopting a particular legal framework and in designing its organizational structure and operating rules.

Since it has been determined that the Control Yuan<sup>6</sup> will carry out the mandate of both, the NHRI and the NPM, this paper neither analyses the establishing process in Taiwan<sup>7</sup>, nor does it assess various models for the NHRI and NPM.<sup>8</sup>

It appears that the question today is not which institution should fulfill a new human rights mandate, but how the chosen institution – the Control Yuan – should be reformed to become truly effective NHRI and NPM (for example, how the organizational framework and the mode of operation within the Control Yuan shall be amended). This dilemma will be the subject of the present analysis.

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5 On the basis of my observation and discussion with NHRC’s members in December 2020, it appears that the NPM will be established under the auspice of the NHRC (10 members of the Control Yuan), however, this model has not yet been determined.

6 This paper refers to the “Control Yuan” as the whole institution that is composed of 29 members.

7 Please refer to the article written by Song-lih Huang and Yibee Huang that summarizes and assesses the establishing process of the NHRC in Taiwan: Huang, Song-lih & Huang, Y. 2020. “The Promotion of a National Human Rights Commission in Taiwan: Our Expectation for its Authority and Functions.” *Taiwan Human Rights Journal* 5, 3: 89-100.

8 Asia Pacific Forum of National Human Rights Institutions. 2017. “Taiwan NHRI Assessment Report 2017.” in [https://covenantswatch.org.tw/wp-content/uploads/2015/12/Final-Taiwan\\_NHRI\\_Assessment\\_Report\\_2017](https://covenantswatch.org.tw/wp-content/uploads/2015/12/Final-Taiwan_NHRI_Assessment_Report_2017). Latest update 7 May 2021.

The paper proceeds from comparative legal research that has been conducted during my postdoctoral fellowship at the Taiwan Foundation for Democracy. The research analyzes five ombudsman institutions<sup>9</sup> that have been designated as the NHRI and the NPM, hence the same model for the Control Yuan. The aim is to identify potential gaps and deficiencies that should be avoided in the establishing process of the NHRI and NPM within the Control Yuan.

In July 2020, a seminar was held at the Taiwan Foundation for Democracy,<sup>10</sup> where the research study<sup>11</sup> with several practical recommendations was presented to scholars, legal practitioners and public. The aim of this paper is to introduce research findings and provoke further discussion in the establishing process of NHRI and NPM in Taiwan.

## 1. A General-Purpose Institution: An Advantage or a Trap?

The pivotal question in the constitution process of human rights monitoring body has often been raised whether to create an entirely new body or rather to identify an existing institution and to delegate it with a new mandate in human rights. A number of countries believed that the designation of an actual institution (preferably one already with a human rights mandate) will overcome some initial difficulties<sup>12</sup> and will also be beneficial to the mechanisms themselves.

They argued, for example, that an existing institution could provide the NPM and NHRI with a well-established organizational structure, procedures and sufficient guarantees of independence. These mechanisms could also enjoy a well-established reputation, respect and authority towards key stakeholders and civil society. Additionally, they could benefit from the

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9 Austrian Ombudsman Board, Public Defender of Rights of the Czech Republic, Parliamentary Ombudsman of Norway, Human Rights Ombudsman of Slovenia, and Public Defender of Georgia.

10 Taiwan Foundation for Democracy, Seminar by Dr. Pavel Doubek, Postdoctoral Research Fellow of TFD. in <http://tfd.org.tw/opencms/english/events/data/Event0829.html#>. Latest update 7 May 2021.

11 Doubek, P. 2020. "Building a National Human Rights Institution and a National Preventive Mechanism within the Control Yuan of Taiwan – Research Report." The Chang Fo-Chuan Center for the Study of Human Rights at Soochow University. in <http://www.hrp.scu.edu.tw/center/links/%E5%87%BA%E7%89%88%E5%93%81>. Latest update 7 May 2021.

12 For example, creating a completely new legislative framework, ensuring the funding or building up visibility and credibility of a new institution.

flow of information within the institution<sup>13</sup>, as it usually has several specific departments and a large number of experienced staff.<sup>14</sup>

These are valid arguments. A general-purpose institution truly provides a number of advantages to the NPM and NHRI, especially in the establishing phase when the new mechanisms have neither proper organizational structure, nor experience and public trust. However, it has been shown in a number of ombudsman institutions that this arrangement does not in itself solve the problems of insufficient resources, lack of visibility, independence, expertise or trust.<sup>15</sup> Moreover, the shared-competence model creates new problems arising from the traditional mandate of the existing institution on the one hand and the new human rights functions of the NHRI and NPM on the other. When these different functions are confused or mixed, it can jeopardize the effective functioning of the two human rights mechanisms.<sup>16</sup>

## 2. Three Mechanisms “Under One Roof”

The Control Yuan is recognized as the general-purpose institution of ombudsman type<sup>17</sup>, which means that it traditionally relies on different working strategies other than those of NHRIs and NPMs. In this part, the differences between these three monitoring mechanisms are analyzed to identify challenges when they are brought together “under one roof” of a general-purpose institution.

The ombudsman institution originated in Sweden (1809) as a quasi-judicial authority that investigates complaints of maladministration, issues non-binding recommendations and reports to relevant authorities.<sup>18</sup> It is mostly monocratic, i.e. represented by a single-headed ombudsman, although

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13 APT. National Human Rights Commissions and Ombudspersons’ Offices/Ombudsmen as National Preventive Mechanisms, 11.

14 These advantages have been repeatedly emphasized by ombudsmen and NPM members in selected countries.

15 SPT. “Visit to Armenia Undertaken from 3 to 6 September 2013: Observations and Recommendations Addressed to the National Preventive Mechanism.” (CAT/OP/ARM/2 (2017)).

16 Doubek, P. 2019. “The National Preventive Mechanism A Key Human Rights Component of Well-Functioning Democracy.” *Taiwan Journal of Democracy* 15, 2: 165-194.

17 The Control Yuan became a member of the International Ombudsman Institute in 1994.

18 OECD & European Ombudsman. 2018. “The Role of Ombudsman Institutions in Open Government OECD Working Paper on Public Governance No. 29.” in <http://www.oecd.org/gov/the-role-of-ombudsman-institutions-in-open-government.pdf>. Latest update 7 May 2021.

it is often supported by one or more deputies. The person of the ombudsman is the sole representative of the ombudsman's entire mandate and holder of its independence. Given the global democratization process, the traditional ombudsman role has been modified to become a human rights institution that covers a wide spectrum of human rights issues.<sup>19</sup>

Transforming the ombudsman institution into a human rights body (NHRI, NPM or both) is not an easy task and always requires additional financial, human and logistical resources as well as considerable institutional changes.<sup>20</sup> It is important to keep in mind that despite a certain overlap, the ombudsman, the NHRI and the NPM are three distinctive mechanisms with different mandates, objectives, composition and working strategies.<sup>21</sup> Therefore, putting these different functions together under one "roof" is very challenging and requires thorough consideration to ensure their operational independence and effective functioning. These are the particularly challenging areas (see also Table 1):

1. The traditional ombudsman institution commonly focuses on cases of mal-administration and investigation of individual complaints (reactive approach). In contrast, the NPM relies on regular and systematic monitoring of places of detention to prevent torture and other ill-treatment<sup>22</sup> (preventive approach). In addition, the NHRI is in charge of overall human rights development in a country (protection and promotion of all human rights, human rights education, etc.).
2. The work of the NPM is based on planning, a systematic approach, making non-binding recommendations and maintaining a long-term constructive dialogue with state authorities.<sup>23</sup> On the other hand, the traditional ombudsman institution generally addresses a specific

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19 It became charged, for example, with a) the protection and promotion of human rights, b) conducting regular visits to places where people are deprived of their liberty, c) observing rights of people with disabilities, d) combating discrimination and e) supervising forced returns of migrants.

20 The UN Subcommittee on Prevention of Torture (SPT), "Analytical Assessment Tool for National Preventive Mechanisms" (2016); GANHRI, "General Observations of the Sub-Committee on Accreditation" (2018).

21 Supra 16.

22 Article 19 (a) of the OPCAT.

23 Caruana. 2017. "Enhancing Best Practice Inspection Methodologies for Oversight Bodies with an Optional Protocol to the Convention against Torture Focus - UK, Norway, Switzerland, Malta, Greece, New Zealand." The Winston Churchill Memorial Trust of Australia. 25.

(individualized) problem<sup>24</sup> and strives for a quick solution.<sup>25</sup> Contrary to a constructive dialogue, the ombudsman often employs more or less binding remedies to enforce its resolution.<sup>26</sup>

3. Both the NHRI and NPM are expected to implement human rights standards set out in international treaties and various soft-law documents.<sup>27</sup> The traditional ombudsman’s institution usually works in a different way and rather applies a legalistic approach and is guided by the regulations of national law.<sup>28</sup>
4. Both mechanisms provide protection regardless of human rights violations by public authorities or private entities. For example, the NPM has a right to monitor private places of detention (e.g. private retirement homes). On the other hand, the traditional ombudsman usually has a mandate only towards the public servants.<sup>29</sup>
5. While the ombudsman institution is usually composed of professionals from a legal or administrative background (legal clerks, officers), the NPM and NHRI must employ experts coming from various fields such as medical,<sup>30</sup> psychiatric, legal and psychosocial,<sup>31</sup> academia or civil society organizations.<sup>32</sup>

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24 APT. 2006. “Establishment and Designation of National Preventive Mechanisms Published by the Association for the Prevention of Torture.”

25 OHCHR. 2010. National Human Rights Institutions – History, Principles, Roles and Responsibilities. 16. United Nations, New York and Geneva.

26 While the traditional ombudsman institution does not usually have direct enforcement powers, it can, for example, turn to the higher authority or take disciplinary, administrative or criminal measures. These measures can be very effective in enforcing the will of the ombudsman, but they do not seem fully compatible with the NPM’s need for constructive dialogue.

27 Article 19 (b) of the OPCAT; GANHRI. 2018. “General Observations of the Sub-Committee on Accreditation.”

28 APT. 2006. Establishment and Designation of National Preventive Mechanisms. Association for the Prevention of Torture.

29 Wei, Chien-feng. 2020. “A Short Discussion on the Structure and Operation of the Control Yuan National Human Rights Commission.” *Taiwan Human Rights Journal* 5, 3: 117-129. Also: Kuo, Ming-li. 2020. “Some Thoughts Regarding the Control Yuan National Human Rights Commission.” *Taiwan Human Rights Journal* 5, 3: 131-136.

30 Article 18 (2) of the OPCAT; GANHRI. 2018. “General Observations of the Sub-Committee on Accreditation.”

31 CPT. 2018. Report to the Portuguese Government on the visit to Portugal. item 38.

32 APT. 2008. “Visiting Places of Detention: What Role for Physicians and Other Health Professionals?” in [https://www.files.ethz.ch/isn/55777/08\\_Visiting%20Places%20of%20detention\\_RoleForPhysicians.pdf](https://www.files.ethz.ch/isn/55777/08_Visiting%20Places%20of%20detention_RoleForPhysicians.pdf).

	<b>Ombudsman</b>	<b>NHRI</b>	<b>NPM</b>
<b>Mandate</b>	Investigation of individual complaints in public administration	Protection and promotion of all human rights	Prevention of torture and ill-treatment in places of detention.
<b>Monitoring strategy</b>	Reactive approach	Combination of a reactive and preventive approach	Preventive approach
<b>Composition</b>	Professionals from legal and administrative backgrounds	Human rights experts and experts in related disciplines	Human rights experts and experts in related disciplines
<b>Cooperation with NGOs</b>	Non-formalized cooperation	Formalized cooperation	Formalized cooperation

Table 1

### 3. Case Studies from Selected Jurisdictions

While choosing foreign models of NHRI and NPM that might be helpful for the Control Yuan in its ongoing reform, we should bear in mind that the Control Yuan is a unique institution seen anywhere in the world. It is regarded as an ombudsman institution and truly has certain powers that resemble traditional ombudsman that have been chosen as a model for the majority of NPMs. On the other hand, the collective composition of 29 members rather resembles a multi-headed human rights commission.<sup>33</sup>

This dichotomy leads to a necessary methodological choice between the comparative analysis of foreign multi-headed human rights commissions or the comparison of several ombudsman-type institutions. The first approach seems logical as it best corresponds to the collective composition of the Control Yuan. However, it does not explain how to set up a human rights organization within an institution that is not entirely entrusted with the NHRI's mandate and that had not initially been considered as a human rights body. In other words, comparison of different national human rights commissions will certainly be useful for the operation of the NHRC (10 members of the Control Yuan), but has a limited benefit for the Control Yuan

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33 It should be better labelled as a “hybrid model” (see chapter 4).

as a whole.

On the contrary, examining the traditional ombudsman institutions that have gradually developed into NHRI and NPM and that had to find a way to distinguish the new functions from their traditional mandate appears to be more appropriate for the current debate in the Control Yuan. The apparent limitation, however, is that these bodies are generally one-headed institutions and are therefore not confronted with the struggle of how to establish a collective will. Nevertheless, given their broad mandate, they too have designated several ombudsmen or their deputies to be in charge of a specific issues of the NHRI or NPM.

The aim of this comparison is to describe how several general-purpose institutions of ombudsman type have reformed their internal structures to respond to the new human rights mandate of both, the NHRI and NPM. Taking into account all pros and cons of the latter method in mind, five different ombudsman institutions have been selected for this comparison (Georgia, Austria, Czech Republic, Slovenia and Norway).

### 3.1. Case Study 1: Public Defender of Georgia<sup>34</sup>

The Public Defender of Georgia is a single head ombudsman institution. Since 2009, the ombudsman has acted as an NPM and in 2013 was accredited as NHRI (A status). Besides that, it has other functions (e.g. the CRPD monitoring body<sup>35</sup>). The ombudsman institution has no specific unit exclusively for exercising the mandate of the NHRI. Conversely, the entire ombudsman institution has been adapted to comply with the Paris Principles (i.e. the whole ombudsman is the NHRI).

The organizational structure of the ombudsman’s office is composed of 13 departments and 8 divisions. Each specific human rights agenda has its department, for example, a Department of NPM, Department of Protection of the Rights of Persons with Disabilities, Department of Anti-discrimination Mechanism, and so forth. Each department is composed of the head and the number of staff. Besides, some of the departments are supported by additional units (for example, the NPM Advisory Council, the Children’s Rights Protection and Monitoring Advisory Body). This arrangement provides for higher involvement of experts and a more systematic approach.

<sup>34</sup> Public Defender (Ombudsman) of Georgia (<http://www.ombudsman.ge/eng>. Latest update 7 May 2021.)

<sup>35</sup> According to the United Nations Convention on the Rights of Persons with Disabilities.

The person of ombudsman has three deputies; each of them is responsible for the management, coordination and supervision of various activities of the ombudsman.

The mandate of the NPM is carried out by seven ombudsman employees from the NPM department and members of the so-called Special Preventive Group.<sup>36</sup> This group is multidisciplinary and includes 40 experts such as medical doctors, psychiatrists, psychologists, lawyers, addictologists, NGO representatives and also people with disabilities and former users of mental health services. These experts become members of the SPG on the basis of a contract with the Defender and they act under special authority granted by him/her and are accountable only to him/her.<sup>37</sup> The structure, rule of operation, competencies and other issues of the SPG are stipulated in the Statute of the Special Preventive Group.<sup>38</sup>

The work of the NPM is strengthened by the Advisory Council, which provides the ombudsman with recommendations on NPM plan of activities, methodology, training, thematic research, and so forth. It is made up of academics, members of national and international NGOs and members of international organizations working in the field of torture prevention.

The NPM has a certain level of autonomy within the ombudsman office as it has a right to manage its monitoring activities. However, strategic decisions require the approval of the Public Defender.

### 3.2. Case Study 2: Austrian Ombudsman Board<sup>39</sup>

The Austrian Ombudsman Board (AOB) consists of three ombudsmen and serves as “Human rights house of the Republic of Austria”.<sup>40</sup> In 2012 it became functioning as both an NPM and an NHRI. It also functions as the CRPD monitoring body and monitoring mechanism for the use of coercive measures exercised by state authorities (in the course of deportations, demonstrations and police operations). Like the Georgian ombudsman

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36 Article 19/4 of the Organic Law of Georgia on the Public Defender of Georgia.

37 Articles 3 and 19 of the Organic Law of Georgia on the Public Defender of Georgia.

38 Public Defender of Georgia. 2015. “*Statute of the Special Preventive Group.*” in <https://www.ombudsman.ge/res/docs/2019102216340322759.pdf>. Latest update 7 May 2021.

39 Austrian Ombudsman Board (<https://volksanwaltschaft.gv.at/en>). Latest update 7 May 2021.)

40 Austrian Ombudsman Board, Preventive Human Rights Monitoring (<https://volksanwaltschaft.gv.at/en/preventive-human-rights-monitoring>). Latest update 7 May 2021.)

institution, the Austrian Ombudsman Board has no internal structure labelled as “the NHRI” and the whole institution is compliant with the Paris Principles.

The three ombudsmen work in a collegial way. At the beginning of their term of office, AOB members agree on the division of the business. The legal regulation determines the complaint handling area of each member and stipulates which administrative sectors will be within each member’s remit.<sup>41</sup> For example ombudsman A is charged with taxes and fees, the penal system; ombudsman B focused on social issues, correctional institutions and ombudsman C deals with police matters, aliens and asylum law. Each ombudsman is provided with employees who work within his or her mandate and are specialized in a particular field of work.

The AOB is supported by the Human Rights Advisory Council (“*Menschenrechtsbeirat*”). It assists the AOB in defining the focal points for monitoring procedures, issuing maladministration statements, developing recommendations and ensuring consistent procedures and inspection standards.

The mandate of the NPM is carried out by six regional monitoring expert commissions (“*kommission*”) with a total of 57 part-time members. Each commission consists of the head of the commission, a coordinator and eight part-time experts with a variety of expertise. The law provides these commissions are equipped with a certain level of autonomy on the ombudsmen. The coordination of the NPM activities is carried out by the OPCAT Secretariat (2 employees).<sup>42</sup>

### 3.3. Case Study 3: Human Rights Ombudsman of Slovenia<sup>43</sup>

The Slovenian ombudsman institution was accredited as an NHRI (B status) in 2002 and in 2007 was established as an NPM. The Slovenian model is a single-head institution represented by a Public Defender. Nevertheless, the ombudsman is equipped with four deputies which are assigned with a particular part of his mandate. For example, deputy A is focused on the rights

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41 Austrian Ombudsman Board, Organisation (<https://volksanwaltschaft.gv.at/en/about-us>. Latest update 7 May 2021.)

42 Austrian Ombudsman Board, Expert Commissions (<http://volksanwaltschaft.gv.at/en/preventive-human-rights/expert-commissions>. Latest update 7 May 2021.)

43 Human Rights Ombudsman (<http://www.varuh-rs.si/en/>. Latest update 7 May 2021.)

of the child; deputy B is charged with the environmental issues; deputy C is responsible for rights of persons deprived of their liberty and deputy D observes constitutional rights and non-discrimination.

The organizational structure of the ombudsman institution is composed of four divisions. First, the NPM (represented by deputy C) is responsible for the implementation of the OPCAT. Second, the Human Rights Centre (represented by deputy D), carries out broad tasks in overall human rights protection and promotion, information, education, training and cooperation with civil society. Third, the Child Advocacy (represented by deputy A) is in charge of providing professional assistance to a child when expressing its opinion in all proceedings and matters involving the child in compliance with the Convention on the Rights of the Child. Besides these units, the ombudsman has established the Human Rights Council, which is an advisory body (represented by deputy B) composed of members of civil society, representatives of science and public authorities.

The Slovenian NPM unit is composed of 4 ombudsman's employees with diverse areas of expertise (law, criminal investigation, special education, etc.) and the head of the NPM unit who is the deputy ombudsman. The deputy ombudsman coordinates all activities of the NPM, signs visits reports and issues the NPM recommendations. The NPM unit is not composed of experts (such as medical doctors), but necessary experts cooperate with the NPM on a contractual basis.

What is particularly interesting is that Slovenian NPM is labelled as “ombuds plus” model, because it has established a formal way of cooperation with civil society organizations.<sup>44</sup> Each year several NGOs are selected to take part in visiting the places of detention and carry out additional activities according to instructions of the NPM (for example, 7 NGOs were directly involved in NPM monitoring in 2018).

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44 Human Rights Ombudsman-Republic of Slovenia. 2018. “Report of the Human Rights Ombudsman of the Republic of Slovenia on the Implementation of Duties and Powers of the National Preventive Mechanism in 2017.”

### 3.4. Case Study 4: Public Defender of Rights of the Czech Republic<sup>45</sup>

To date, the Czech ombudsman institution has not been accredited as the NHRI according to a Paris Principles. Nevertheless, it already partially performs the tasks of the NHRI (protection and promotion of human rights, human rights education, investigation of individual complaints, research). The broad human rights mandate is divided between specialized departments (NPM department; department of equal treatment; department of family, health and employment; CRPD department, etc.). The particular areas of ombudsman’s competence are divided between the ombudsman and his deputy.

In 2006, the Czech ombudsman institution was designated with the NPM mandate and specialized department (*Department of Supervision over Restriction of Personal Freedom*) was established. This unit is composed of 16 lawyers of which eight focus exclusively on the NPM agenda<sup>46</sup> and the rest are charged with the traditional ombudsman mandate (e.g. mostly dealing with individual complaints). However, the NPM agenda is not strictly separated within the department and thus some of the lawyers are charged with preventive monitoring as well as dealing with ombudsman complaints, which is contrary to the OPCAT’s obligations.<sup>47</sup> There is no advisory body established by the ombudsman to support the NPM tasks; nevertheless, the department cooperates with ad hoc experts from the non-legal field such as physicians, nurses, interpreters, psychiatrists or social workers.<sup>48</sup> These experts are selected on the basis of a public call for proposals and are put on the ombudsman list from which they are selected for the purpose of a particular visit according to a visit plan and actual need. The legal basis for cooperation is based on a short-term employment contract (they carry out their duties as employees of the ombudsman).

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45 Public Defender of Rights of the Czech Republic (<https://www.ochrance.cz/en/>. Latest update 7 May 2021.)

46 Public Defender of Rights. 2019. “Protection against Ill-treatment 2018 – Report of the Public Defender of Rights as the National Preventive Mechanism.” at 9.

47 Supra 16.

48 In 2017, 12 experts took part in NPM visits (4 psychiatrists, 1 geriatrician, 3 general nurses, 3 psychiatric nurses, 1 specialist in education of children with behavioural disorders, 2 psychologists, 3 social services experts).

The staff of the NPM department is subordinate to the head of this department, the superior managers of the ombudsman office and ombudsman himself. At all levels of management, the superiors (even those who are formally outside the NPM department) can instruct NPM staff, allocate individual complaint files, monitor their work, impose disciplinary action, and assess their work.

### 3.5. Case Study 5: Parliamentary Ombudsman of Norway<sup>49</sup>

The Norwegian ombudsman institution carries out the mandate of the NPM, but it is not the NHRI, as this mandate was dedicated to specialized stand-alone Norwegian National Human Rights Institution.<sup>50</sup>

Like the Czech Republic, Norway has implemented OPCAT by establishing specialized NPM organizational unit within the ombudsman institution (2013). It consists of eight ombudsman employees and cooperates with external experts with experience in fields such as mental health, cognitive and physical disabilities, elderly care and child welfare.<sup>51</sup>

Similarly to Georgian, Slovenian and Austrian NPMs, the Norwegian NPM does not deal with individual complaints. The NPM unit is supported by the Advisory Committee. This committee contributes to the NPM with expertise, information, advice and other support in prevention work. It comprises 15 organisations and professional groups that work with persons deprived of their liberty.<sup>52</sup> The committee members are in close contact with the NPM and ensure mutual cooperation and exchange of information as well as participation in awareness-raising activities.<sup>53</sup>

The staff of the NPM unit is directly subordinated to the ombudsman whose role is limited to approving all final visit reports, annual reports and annual work plan. NPM unit makes autonomous decisions on the methodology, annual visit plan, follow-up with places of detention after visits, concluding visits, etc.

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49 Parliamentary Ombudsman of Norway (<https://www.sivilombudsmannen.no/en/>. Latest update 7 May 2021.)

50 Norwegian National Human Rights Institution (<https://www.nhri.no/en/>. Latest update 7 May 2021.)

51 Norwegian Parliamentary Ombudsman. 2015. Annual Report 2014. at 19.

52 The purpose and tasks of the Advisory Committee are well described in the Annual Report 2014.

53 Norwegian Parliamentary Ombudsman. 2016. Annual Report 2015. at 59.

#### 4. Lessons for the Control Yuan

On the basis of the comparative analysis, several common characteristics are identified for the institution of the ombudsman conceived as NHRI and NPM:

- (i) the NHRI is designated as the entire ombudsman institution, not as part of it (Georgia, Slovenia, Austria);
- (ii) in contrast, the NPM is constituted as a part of ombudsman institution, however, with more or less separate structure and certain level of autonomy (Georgia, Slovenia, Norway, Austria);
- (iii) the mandate and competences of ombudsmen (Austria), ombudsman–deputy (Czech Republic) or deputies (Georgia, Slovenia) are clearly defined;
- (iv) a number of specialized organizational units are created to address different human rights issues (Georgia, Slovenia, Norway, Czech Republic);
- (v) the preventive mandate of the NPM is separated from the reactive mandate of the ombudsman (Georgia, Slovenia, Norway, Austria) and
- (vi) advisory bodies and standardized forms of cooperation with experts and civil society are in place (Georgia, Slovenia, Norway, Austria).

Before examining the extent to which Control Yuan should learn from the experience in different ombudsman institutions, it must be emphasized that the Control Yuan is not a traditional ombudsman institution. Frankly speaking, it is a hybrid model with some qualities incomparable to any ombudsman institution in the world (significant number of Control Yuan’s ombudsmen, broad mandate including, for example, the observance of anti-corruption law, strong powers including power of impeachment).<sup>54</sup>

While some qualities (for example, independent position on the executive branch) can certainly be beneficial to NHRI and NPM, there are other characteristics that can lead to significant disadvantages. One may ask, for example, how the Control Yuan can engage in a constructive dialogue with state authorities on the basis of non-binding recommendations if it usually exercises strong enforcement powers? How can it ensure a systematic and

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<sup>54</sup> Supra 16 at 17-18.

coherent approach to human rights monitoring when the mandate is shared by 29 members? How to involve different experts and apply international human rights standards<sup>55</sup> in its day-to-day work processes if neither specialized advisory body nor formalized cooperation with experts and civil society is in place?

#### 4.1. Division of the Mandate of the Control Yuan

The Control Yuan's hybrid model has shaped the NHRI's founding process. Non-governmental organizations have emphasized that the NHRI should be governed by working methods other than the traditional mandate of the Control Yuan. They then called for the appointment of full-time specialized human rights commissioners distinct from the other Control Yuan members.<sup>56</sup> Organic Act of the Control Yuan National Human Rights Commission has partially responded to this request, as it separated the Control Yuan's mandate between "human rights part" (National Human Rights Commission composed of 10 commissioners) and the "ombudsman part" (remaining 19 ombudsmen).<sup>57</sup>

However, the legislative arrangement raises more questions than answers. In fact, the NHRC is not a completely independent body, as NHRC commissioners (10) remain members of the Control Yuan and have a right to exercise the powers and competences of the Control Yuan's traditional mandate. At the same time, the remaining members (19 ombudsmen) can receive complaints about human rights and thus in fact become involved in the process of protection and promotion of human rights. Additionally, the two NHRC commissioners alternate each year with two ombudsmen.<sup>58</sup>

The application of this law thus might be puzzling in practice. The question could be raised as to whether the responsibility for the protection and promotion of human rights rests with the NHRC in all circumstances, or whether Control Yuan members from "ombudsman part" may be too

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55 Kuo, Ming-li. 2020. "Some Thoughts Regarding the Control Yuan National Human Rights Commission." *Taiwan Human Rights Journal* 5, 3: 131-136.

56 Covenants Watch. 2019. "監察院「國家人權委員會組織法草案」錯失改革良機" in <https://covenantswatch.org.tw/2019/06/16/opinion-on-nhrc-law/>. Latest update 7 May 2021.

57 Organic Act of the Control Yuan National Human Rights Commission (監察院國家人權委員會組織法), Organic Law of the Control Yuan (監察院組織法) and Organic Act of the Control Yuan Committees (監察院各委員會組織法)

58 Article 3 of the Organic Act of the Control Yuan National Human Rights Commission.

involved on some occasion (for example, to investigate complaints concerning human rights, take part in human rights education, etc.). This raises further question as to which institution in practice perform the mandate of the NHRI under the Paris Principles and what is the relationship (mode of cooperation) between the NHRC and the “ombudsman part”.

While it is reasonable to opt for the unique arrangement for the hybrid-model of the Control Yuan, a clear line must be drawn between the NHRC and the rest of the ombudsman institution to ensure that the NHRC is truly an independent institution composed of full-time human rights commissioners. Otherwise, a blurry composition can lead to duplication of functions, undermining the NHRC’s independence and general confusion of the mandate.<sup>59</sup>

If the complete separation of the Control Yuan’s mandate would not be achievable, the question arises as to whether it would be preferable to reform the entire Control Yuan to the National Human Rights Commission and to create a clear organizational structure of various human rights departments.<sup>60</sup> However, in the light of existing legislation and the ongoing debate, it is unlikely that the reform of the Control Yuan will go in this direction.

#### 4.2. Allocation of NHRI’s Mandate

From a comparative point of view, the scope of NHRI’s mandate is commonly proportionately divided among several ombudsmen (Austrian Ombudsman Board), ombudsman-deputy (Czech Republic) or ombudsman’s deputies (Slovenia, Georgia). This assignment allows the ombudsman or deputy ombudsman to pay close attention to a particular area of the NHRI’s mandate (specific human rights), which can strengthen effective oversight of all human rights.<sup>61</sup> The separation of NHRI mandate is common also to the traditional human rights commissions. For example, the Australian Human Rights Commission has seven specialized commissioners,<sup>62</sup> the

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59 OHCHR. 2010. National Human Rights Institutions – History, Principles, Roles and Responsibilities: 15. United Nations, New York and Geneva.

60 See above the NHRIs in Georgia, Slovenia and Austria that have been designated as the entire ombudsman institution, not as a part of it.

61 General Observations of the GANHRI Sub Committee on Accreditation. 2009.

62 Age Discrimination Commissioner, Children’s Commissioner, Disability Discrimination Commissioner, etc. See: Australian Human Rights Commission. Commissioners (<https://humanrights.gov.au/about/commissioners>). Latest update 7 May 2021.).

Human Rights Commission of New Zealand is composed of four focus-oriented commissioners<sup>63</sup> and also the commissioners of the Human Rights Commission of Sri Lanka are each responsible for overseeing particular thematic subcommittees.<sup>64</sup>

The Organic Act of the Control Yuan National Human Rights Commission does not prescribe any categorization of the mandate among particular members of the NHRC, so each of them has full discretion to focus on any matters that fall under Control Yuan's jurisdiction. I am convinced that, as it is common for the three-head or single-head ombudsman institutions to divide their monitoring focus, this is all the more true for the 10-head NHRC.

It seems appropriate that the mandate and responsibilities of each NHRC commissioner be clearly defined. When considering the criteria for the separation of NHRC's mandate between commissioners, the Control Yuan might proceed from the experience from the above NHRIs and assign each commissioner with a specific human rights area. Given the United Nations treaties that have been ratified in Taiwan, some commissioner(s) may focus on economic, social and cultural rights,<sup>65</sup> some may pay attention to the rights of the child,<sup>66</sup> another may be in charge of protection of civil and political rights,<sup>67</sup> another be responsible for observing the rights of persons with disabilities,<sup>68</sup> discrimination of women<sup>69</sup> and torture<sup>70</sup>.

Such an arrangement can (a) generate specialized commissioners (e.g., commissioner for children, commissioner for the protection of women, commissioner for equal treatment, etc.), (b) provide for a clear leadership and a consistent approach and (c) ensure a cohesive and complex approach

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63 Chief Commissioner, Race Relations Commissioner, Equal Employment Opportunities Commissioner and Disability Rights Commissioner. See: Human Rights Commission, Commissioners and Senior Leadership (<https://www.hrc.co.nz/about/commissioners-and-senior-leadership/>). Latest update 7 May 2021.)

64 Sub-Committee on Persons with Disabilities, Sub-Committee on Economic, Social, and Cultural rights, etc. See: Human Rights Commission of Sri Lanka, Annual Report 2017, p. 44. (<https://www.hrcsl.lk/wp-content/uploads/2020/01/English-2017.pdf>). Latest update 7 May 2021.)

65 According to International Covenant on Economic, Social and Cultural Rights.

66 According to the Convention on the Rights of the Child.

67 According to International Covenant on Civil and Political Rights.

68 According to the Convention on the Rights of Persons with Disabilities.

69 According to the Convention on the Elimination of All Forms of Discrimination Against Women.

70 According to the Convention against Torture that is currently discussed at the Executive Yuan.

encompassing all human rights. It also allows the Control Yuan to conduct more targeted research on human rights issues that are most concerned by the current Taiwanese society (for example human rights issues concerning the transitional justice, abolition of death penalty, labor rights, refugee and asylum issues, women’s rights, etc.).<sup>71</sup>

When drafting this structure, consideration should be given to possible difficulties and challenges. First, the biggest challenge appears to be the NHRC Organic Act that requires collective decision making.<sup>72</sup> Although this law provides a sub-committee meeting<sup>73</sup> that may to a certain extent provide some specialization among the commissioners, it does not guarantee a clear and constant allocation of commissioners’ mandate as seen from the examples above. To address this need, a possibility would be to revise the NHRC Organic Act or to adopt a new legislation that clarifies the mandate among the commissioners and lays down the organizational structure.

A further challenge of this composition could be that it places significant demands on each commissioner since he or she should bear all responsibilities in a particular field of competence. It also increases the risk that a single commissioner will not properly act on his or her duties and thus the overall protection of human rights in a respective segment may decrease. However, I believe that these difficulties can be overcome through adequate training, supervision by the NHRC Chair and by regular joint meetings of all commissioners.

#### 4.3. Organizational Structure

The Paris Principles stipulates that an institution shall have an infrastructure which is suited to the smooth conduct of its activities. All ombudsman institutions selected for research study have established an organizational structure that considers the mandate of both, an NHRI and an NPM.

For example, by learning from the experience of the Georgian ombudsman, the Control Yuan may create several specialized departments

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71 Wei, Chien-feng. 2020. “A Short Discussion on the Structure and Operation of the Control Yuan National Human Rights Commission.” *Taiwan Human Rights Journal* 5, 3: 117-129.

72 Articles 5 and 6 of the NHRC Organic Act.

73 Article 5 para 3 of the NHRC Organic Act. ([T]he NHRC may hold a sub-committee meeting upon passing a resolution.)

related to certain human rights areas (eg. Department for Children, Department for Civil and Political Rights, etc.). Each department may be headed by a specialized commissioner and be made up of several employees who are experts in a given field. Some departments requiring a different or more sophisticated approach (e.g. CRPD department) can be supported by additional units (advisory board, consultative council, etc.).

The Control Yuan can also learn from the Austrian model which has created regional expert commissions or Slovenian model that is based on the cooperation of internal organizational units, advisory body and non-governmental organizations. Chien-feng Wei (魏千峯) further refers to National Human Rights Commission of India where five different organizational units are established to cover various issues of NHRI's operation.<sup>74</sup> One may also find inspiration in Human Rights Commission of Sri Lanka that has created 9 sub-committees on specific thematic issues.<sup>75</sup>

Given that the current design of organizational units of the Control Yuan is not sufficient to fully employ the mandate of the NHRI,<sup>76</sup> it is necessary to set up a clear organizational structure that takes into account all the commitments emerging from the Paris Principles and that guarantees the highest possible protection and promotion of all human rights. It seems appropriate to establish specialized departments with clearly defined objective, methodology and staff, as well as to set up an advisory body composed of various experts and representatives of relevant NGOs (see Table 2).

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74 Wei, Chien-feng. 2020. "A Short Discussion on the Structure and Operation of the Control Yuan National Human Rights Commission." *Taiwan Human Rights Journal* 5, 3: 117-129.

75 Human Rights Commission of Sri Lanka. 2018. *Annual Report 2017*: 44.

76 Similarly also: Wei, Chien-feng. 2020. "A Short Discussion on the Structure and Operation of the Control Yuan National Human Rights Commission." *Taiwan Human Rights Journal* 5, 3: 117-129.

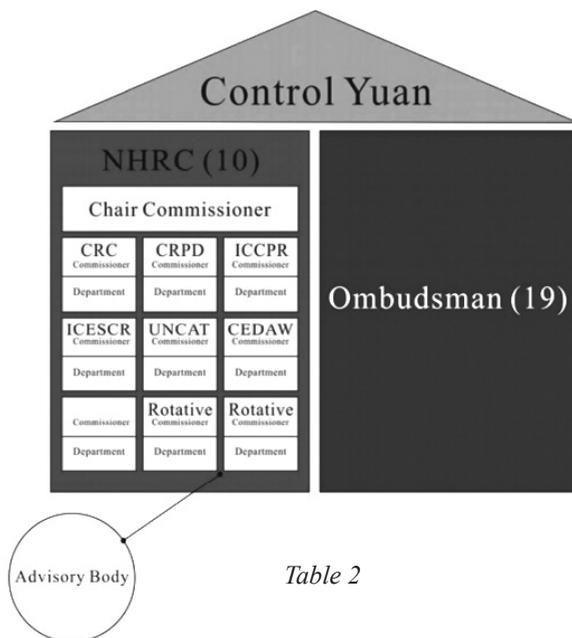


Table 2

#### 4.4. Separate Structure for the NPM

Considering the OPCAT requirements specified by the UN Subcommittee on the Prevention of Torture<sup>77</sup> and above-mentioned international experience, to create a fully-functioning NPM, a distinct NPM structure should be created. To achieve this goal, the NPM should not be regarded as a mere organizational unit of the Control Yuan but, on the contrary, as an entity *sui generis* that is endowed with considerable autonomy concerning its preventive mandate. It should *inter alia*: (i) highlight preventive operating; (ii) be composed of experts from various areas of expertise; (iii) employ a constructive approach towards state authorities; (iv) cooperate with civil society; (v) have the power to develop its own rules and methodologies, including the preparation of a visit plan, visit strategies and cooperation with experts; (vi) be composed of staff that designated to carry out the NPM mandate only and do not deal with the tasks of the mandate of ombudsman or NHRC (for example dealing with individual complaints or conducting reactive visits) and (vii) constantly increase its visibility as a specialized

<sup>77</sup> Subcommittee on Prevention of Torture (SPT). 2016. Analytical Assessment Tool for National Preventive Mechanisms.

torture monitoring body.

Compared to analyzed ombudsman institutions, the situation in Taiwan is more complicated given the hybrid model of Control Yuan, the questionable position of the NHRC and a significantly higher number of commissioners/ombudsmen. The fundamental question to be answered is where should the NPM be located and which members of the Control Yuan should be in charge of it?

The study discusses several models.<sup>78</sup>The first option is to designate the entire institution of the Control Yuan to be Taiwanese NPM (i.e., all 29 members of Control Yuan are NPM members). Second, only the NHRC part (10 members) or ombudsman part (19 members) is to be designated as the NPM. The third solution is to set up the NPM on an equal footing with the NHRC and the ombudsman. The latter will require the adoption of the new organic law on the NPM that defines a mandate of NPM members and establishes the relationships between the NPM, NHRC and ombudsman.

Despite significant challenges and legislative demands, I believe that having the NPM as the equal “partner” to the NHRC and the ombudsman better meets the OPCAT requirements (distinct structure, visibility, a certain level of autonomy). Such an arrangement also helps to build up specific work strategies and methodologies and to have professional staff experienced in the prevention of torture. Conversely, if the NPM is perceived as a purely organizational department structured within Control Yuan’s existing design, it risks being confused with the work of NHRC or ombudsman and losing its unique preventive nature (see Table 3).<sup>79</sup>

As for the internal structure of the NPM itself, the number of options is left for the Control Yuan. The NPM may be, for example, composed of NPM department, the Special Preventive Group<sup>80</sup> and the NPM Advisory Council (Georgian model); it can employ “ombuds plus” model (Slovenia); or to create regional monitoring committees (Austria).<sup>81</sup>

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78 Supra 11 at 41-43.

79 See the deficiencies of the Czech NPM department. In: Supra 16.

80 To formalize the cooperation, the Control Yuan may issue Statute of the Special Preventive Group on a similar basis as Georgian ombudsman. See Supra 38.

81 See Article 5 of the draft of the implementation law that anticipates creation of the NPM committee. See Supra 4.

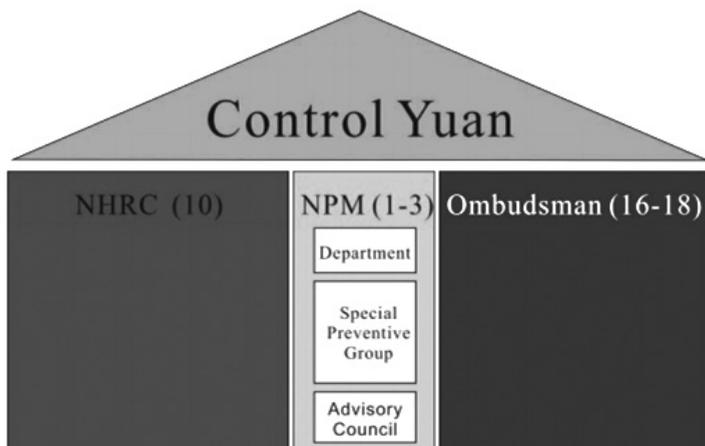


Table 3

#### 4.5. Cooperation with Civil Society

To conduct the NHRI and NPM mandate effectively, the Control Yuan should closely cooperate with civil society, represented by various NGOs, academics, scholars, scientists and other experts. GANHRI Sub-Committee on Accreditation recommends that such cooperation should be standardized and involve various actors such as statutory human rights institutions, thematic institutions, civil society and non-governmental organizations.<sup>82</sup>

By learning from analyzed ombudsman institutions, formal cooperation with civil society can be arranged as follows: (i) civil society organizations are involved in a specialized advisory or consultative body; (ii) civil society organizations are entitled to take part in conducting monitoring of human rights altogether with the ombudsman staff and (iii) civil society organizations are involved in other ombudsman activities such as joint research, human rights education and awareness-raising activities, etc.

There are, of course, several ways to cooperate with civil society. An interesting mode of partnership has been developed, for example, by the Georgian Ombudsman who authorizes NGOs engaged in human rights or the prevention of torture to submit a project application to the ombudsman in order to carry out joint projects under the mandate of the NPM.<sup>83</sup> This

<sup>82</sup> GANHRI. 2018. General Observations of the Sub-Committee on Accreditation.

<sup>83</sup> Based on the Rules of Cooperation Between the National Preventive Mechanism of the Public Defender and the NGOs.

includes, for example, thematic visits to places of detention, conducting sector surveys or carrying out educational and awareness-raising activities in order to rigorously study the situation in places of detention.<sup>84</sup>

## 5. Conclusion

Neither the Paris Principles nor the OPCAT prescribe a unified structure for NHRI and NPM. Therefore, each State can select a structure appropriate to its political and geographical context<sup>85</sup> and choose the framework that best suits its particular needs.<sup>86</sup> However, this wide discretion should not serve as an excuse not to implement a fully operational mechanism in accordance with the highest standards<sup>87</sup> and best practices established in other countries.

As a number of traditional single-head ombudsman institution with relatively clear-cut organizational structure struggle to set up a truly functioning NHRI and NPM, one can imagine how difficult this task would be for hybrid model of the Control Yuan with a complicated internal structure and pluralistic composition. In addition, as a non-member of the United Nations, Taiwan is not eligible for the regular or advisory visits by the UN Subcommittee on the Prevention of Torture. However, I am convinced that a number of soft-law documents as well as rich experience of the foreign ombudsman institution, are sufficient guide for the Control Yuan to manage the ongoing reform efficiently and in line with the international commitments.

The paper suggests that there are currently five important tasks before the members of the Control Yuan. First, there is a need to clarify the position of the NHRC and to guarantee its autonomy and independence. Second, members of the Control Yuan appointed as the NHRC commissioners shall clearly allocate the NHRC's mandate to ensure specialization in particular human rights issues. Third, the NHRC shall design specialized departments dealing with particular human rights issues. Fourth, a distinctive structure for the NPM shall be created including specialized NPM unit(s) and NPM-designated Control Yuan member(s). Fifth, a standardized cooperation shall

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84 Public Defender (Ombudsman) of Georgia – National Preventive Mechanism. 2017. Human Rights Situation in Closed Institutions.

85 APT. 2006. Establishment and Designation of National Preventive Mechanisms. 78.

86 OHCHR. 1993. Vienna Declaration and Programme of Action.

87 At least those developed by GANHRI Sub-Committee on Accreditation and United Nations Subcommittee on the Prevention of Torture, 2018.

be established with civil society.

I believe that by going in this direction, Taiwan is very likely to create a truly functioning and broadly respected human rights mechanism that could make a significant leap in human rights endeavour.

# 監察院「當中」的國家人權委員會 與國家防範機制

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## 摘要

近年來，台灣的民主與人權有了長足的發展。除了批准數個聯合國條約並建立獨特的條約審查機制外，台灣還決定進一步採取措施，建立自己的人權機構，積極監督其人權上的承諾。

究竟此一重責大任應交由哪個機構執行？在建立國家人權委員會的過程中，各方就這個問題有激烈的討論。最後，監察院「勝出」，成為安置國家人權委員會和國家酷刑預防機制的機構。

有趣的是，對於監察院設置國家人權委員會和國家預防機制一事，公民社會和學者的反應冷淡，非如預期般讚揚這項空前的人權承諾。如此遲疑的原因，在於監察院組織定位不明，其陳舊的組織結構和功能亦可能難以滿足當今有效監督人權的要求。批評的聲音反映出人民的擔憂，究竟這項改革只是門面上的裝扮，還是確實有可能為台灣建立有效的監督機構？

如果希望邁向後者，則監察院的現行架構是否能為國家人權委員會和國家預防機制提供足夠的空間，使他們完全獨立於外部力量和內部的糾葛？這些機構的結構、組成和工作策略的最佳選擇為何？這些新任務應該如何在監察院現任成員——或更確切地說在國家人權委員會委員——之間，加以區隔？

## 關鍵字

監察院、國家人權委員會、國家防範機制、巴黎原則、反酷刑公約任擇議定書、監察使

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