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THE CHINESE OMBUDSMAN AND CONTROL SYSTEM †

PAI-CHUAN TAO *

IN 1958, Mr. Stephan Hurwitz, the Danish Parliamentary Commissioner, wrote an article entitled *The Danish Parliamentary Commissioner for Civil and Military Government Administration*.¹ It described the Danish Parliamentary Commission as a watchdog against abuse of administrative power. For the first time, the Danish term "Ombudsman," which stands for "Commissioner," was introduced to the general body of students of political science in England and the United States. In 1960 there was a proposal for a similar control system in Britain.² In the United States this system has also been seriously suggested for adoption.³

The Danish Ombudsman has broad investigatory power and can publicly criticize governmental agencies. His position is that of a counterweight in behalf of Parliament and private individuals against administrative and other governmental bodies to expose publicly any of their unfair practices. Beyond this power to publicize he has little or no real power. Conversely, he protects public officials against unfounded accusations by only pursuing those with merit.⁴

Compared with the control system of the Chinese government, however, the Danish Ombudsman is rather young, simple, and ineffective. It is young because it was not

† This article is based on an address delivered at the Center of Asian Studies, St. John's University, New York, in January 1965.

* The author has been a member of the Control Yuan of the Republic of China for seventeen years.

¹ Hurwitz, *The Danish Parliamentary Commissioner for Civil and Military Government Administration*, 1958 PUB. L. 236.

² Blom-Cooper, *An Ombudsman in Britain?*, 1960 PUB. L. 145.

³ Davis, *Ombudsmen in America: Officers to Criticize Administrative Action*, 109 U. PA. L. REV. 1057, 1058 (1961).

⁴ Christensen, *The Danish Ombudsman*, 109 U. PA. L. REV. 1100, 1101 (1961). See also Gellhorn, *The Swedish Justitieombudsman*, 75 YALE L.J. 1 (1965); Gellhorn, *The Ombudsman in New Zealand*, 53 CALIF. L. REV. 1155 (1965); Jagerskiold, *The Swedish Ombudsman*, 109 U. PA. L. REV. 1077 (1961).

until June 11, 1954, that the Danish king gave his assent to the Parliamentary Ombudsman Act. It is simple because the Ombudsman, appointed by the Parliament, may be dismissed at any time, and has only a small staff of a dozen people. It is ineffective because "the range of sanction available to the Ombudsman is remarkably small."⁵

The Chinese control system has a long history dating back to 221 B.C. The existing Republic of China Constitution proclaimed in 1947 maintains this traditional system which is called the Control Yuan and of which I have been a member for seventeen years. As a branch of the Parliament of the Republic of China, the Control Yuan is composed of representatives elected by Provincial and Municipal Councils, local Councils of Mongolia and Tibet, and Chinese citizens residing abroad. The members of the Control Yuan, totalling one hundred and eighty, exercise such powers as consent, impeachment, censure, auditing and correction.

This uniquely Chinese institution is an essential part of a political tradition; and like so many other things which the Chinese have seen fit to carry down through the ages, it has been termed 'formidable and significant,' and may contain some contributions for Western politics.⁶

However, this valuable Chinese institution is virtually unknown to the rest of the world. As Professor Walker put it,

as a result of . . . language difficulties and the refusal of Western scholars to pay much attention to political practices other than their own, this important Chinese control institution has suffered almost complete neglect.⁷

The Control System Historically Inheres in Chinese Government

In China's long history, the titles and organizations of the officials who exercised the control power changed from one dynasty to another. However, the nature and function

⁵ Christensen, *supra* note 4, at 1114.

⁶ Walker, *The Control System of the Chinese Government*, FAR EASTERN QUARTERLY 3-4 (1947).

⁷ *Id.* at 4.

of the control system have been maintained up to the present time. In an edict issued by Emperor Tai-tsung of the Ching Dynasty on the establishment of the Court of Control in 1637, the function of the control system was described as follows:

The Censors are to criticize straightforwardly my extravagance, mistreatment of the loyal and the able, being indulged in hunting, negligence of duty, demotion of the meritorious, appointment of the unfit, or promotion of the unserviceable. If the princes neglect their work, take property from the people without due compensation, or indulge in wine, women, or any sensual pleasure, the Censorate shall investigate and impeach them. If the six departments or their Ministers decide things wrongly, or delay review or trial of criminal cases, the Censors shall make them known to me. The Censorate shall check its own members from receiving bribery. A Censor, who takes revenge on someone by impeachment, thus abusing his power, shall be prosecuted. But he will not be blamed, even if what he says is not right. And what he says is right will be adopted.⁸

The office of the Censorate designated as the Yu-shih-ta-fu, or the Imperial Censor-General, was first created in the Chin Dynasty (221-206 B.C.) by Shih Huang Ti who built the Great Wall. To him, both the Great Wall and the Censorate were preventive measures to protect his kingdom. The Great Wall was to prevent enemies from crossing the northern border, and the Censorate was to prevent officials from neglecting their duties.

In the Han Dynasty (206 B.C.-A.D. 221), the office of the Yu-shih-ta-fu was raised to the same rank as that of the prime minister, but the former's salary was only one-fifth of that of the latter. This high-rank-and-low-salary system was interpreted as encouraging the censor to watch, investigate and impeach the prime minister. It was understood that the censor would take over the position of the prime minister should the latter be removed as a result of impeachment. This old system reminds us of the two party system in Britain, under which the duty of the loyal opposition is to criticize the administration and take over the government after it is defeated.

⁸ GORSKI, HISTORY OF THE CHING DYNASTY (Russian ed. 1909).

In the following dynasties, there were various changes in the names and organizations of the Censorate. In the Tang Dynasty (A.D. 618-916), the Censorate was composed of three yuans or departments. The first yuan, Tai-yuan, exercised the power of supervision and impeachment of all public functionaries. The second, Tien-yuan, supervised the court functions and remonstrated with the emperor. The third, Cha-yuan, kept close watch over provincial affairs.

In the Ching Dynasty (A.D. 1644-1911), the office of the Censorate was named Tu-cha-yuan, Court of Control. The duties performed by the censors expanded in scope, and the power of the Censorate was at its peak. Its tasks were to supervise all governmental institutions with respect to the performance of duties as well as personal conduct; to impeach all officials not only for their unlawful activities or conduct on the basis of irrefutable proof, but also on suspicion; to sit at the trial of serious or state crimes; to carry out legislative functions by advising the emperor what should be done; to file dissenting opinions to the edicts of the emperor; to supervise ceremonies; to audit accounts of the Departments of Revenue and the Provinces; to keep a close check on all government property; to superintend all public works; and to supervise examinations.

In view of the achievements and importance demonstrated by the Censorate in its long history, it is no wonder that this control system has been carried on to the present time.

However, the control system of the past periods was not without weakness or defect, the most formidable of which was its dependence. The Censorate should have been independent of the emperor and other officials, so that it could have freely criticized them. But contrary to the views of many historians, I find that it was not independent, for the censors were appointed and removed by the emperor. Although one emperor did warn his heirs against killing censors, and although many censors managed to maintain their important position as the critics of the dynasty, many other censors were beheaded for offending the emperors, and they were always at the mercy of the despots who appeared from time to time. Yet, this control system has

survived to a surprising degree in China, and this for several reasons. First, there was a tradition of courage, dedication, integrity and honesty on the part of the censors. Second, there was a tradition of popular support for a courageous censor. Finally, there was the emperor's fear of being accused of absolutism or unworthiness to exercise the right of the "Heavenly decree," should a censor be killed by him without justifiable reasons.

All these things are found in Confucius' teachings. In Chapter XV of the *Hsiao Ching*, written between 350 and 200 B.C., Tseng Tsu spoke: "As regards this kind affection, this loving respect, this comforting of one's parents and making their name great—all this I have learned well. Dare I ask if a son, by obeying all of his father's commands, can be called filial?" The Master answered: "What kind of talk is this? What kind of talk is this? Anciently, if the Son of Heaven had seven ministers to advise him, he would not lose his empire, even though he were imperfect. If a prince had five good men to counsel him, he would not lose his country, even though he were imperfect. If a minister had three men to remonstrate with him, he would not lose his home, even though he were imperfect. If an officer had one friend to correct him, he would not lose his good name. If a father had one son to reason with him, he would not be engulfed in moral wrong. Thus, in case of contemplated moral wrong, a son must never fail to warn his father against it; nor must a minister fail to perform a like service for his prince. In short, when there is question of moral wrong, there should be correction. How can you say that filiality consists in simply obeying a father?"⁹

It was Dr. Sun Yat-sen who first advocated the complete independence of the Censorate by vesting the control power in a high, separate and elective organ of the state. In his lecture on "The Three Principles of my People," Dr. Sun said,

The three governmental powers in the West have been imperfectly applied and the three coordinate powers of ancient China led to many abuses. If we now want to combine the best from China

⁹ THE HSIAO CHING 33 (Makra tr. 1961).

and the best from the other countries and guard against all kinds of abuse in the future, we must take the three Western governmental powers, add to them the old Chinese powers of examination and censorship and make a finished wall. . . . Such a government will be the most complete and the finest in the world, and a state with such a government will indeed be of the people, by the people, and for the people.¹⁰

The Nature of the Control System in Modern China

According to the 1947 Constitution of the Republic of China, which is based on Dr. Sun's teachings, the National Government is composed of the National Assembly, the President and the five Yuans, namely, the Executive, the Legislative, the Judicial, the Examination and the Control Yuan. This unique government system stands somewhere between the cabinet system and the presidential system of government in the Western countries.

Article 90 stipulates: "The Control Yuan shall be the highest control organ of the State and shall exercise the powers of consent, impeachment, censure, and auditing." Article 97 provides: "The Control Yuan may, on the basis of the investigations and resolutions of its committees, propose corrective measures and forward them to the Executive Yuan and the Ministers and Commissioners concerned, directing their attention to effecting improvements."

Except for the power of consent, the dynastic Censorates had all the powers of impeachment, censure, auditing, and correction now vested in the Control Yuan. And the Control Yuan also has such powers as exercised by the dynastic Censorates mentioned above except for the sitting at court trials. What is unique and important is the independence on the part of the Control Yuan of the other government branches, including the President. The members of the Control Yuan serve a term of six years and are eligible for re-election. They are not to be removed during their term unless recalled by their own constituencies. No member of the Control Yuan is to be held responsible outside the Yuan for opinions expressed or votes cast in

¹⁰ SUN YAT-SEN, *SAN MIN CHU I* 357-58 Frank W. Price (1927).

the Yuan. No member of the Control Yuan is to be arrested or detained without the permission of the Control Yuan except in case of *flagrante delicto*.

Only with these privileges can the members of the Control Yuan enjoy complete independence and freedom. The dynastic censors under the control of the emperors apparently did not have any of these protections. Therefore, the Chinese control system had not been complete and effective until the Constitution was promulgated and became effective in 1947.

The Chinese Constitution adopts some features from the United States. The United States Senate has adopted the principle of equal representation of the states, that is, two senators from each state; so has the Chinese Control Yuan, with five representatives from each province. As for the election method, though senators are now elected directly by the people of the individual states, yet, prior to the seventeenth amendment, they were elected by state legislatures. Many students of political science expressed doubt as to the merit of this change.¹¹ Both the United States Senators and the members of the Chinese Control Yuan serve six years. The Control Yuan, like the Senate, sets up a certain number of committees corresponding to the departments and commissions of the executive branch.

Consent, one of the powers exercised by the Chinese Control Yuan, is of American origin. The Control Yuan controls the appointment of four categories of officials, the Presidents and Vice Presidents of both the Judicial Yuan and the Examination Yuan, the Grand Justices, and the members of the Examination Yuan. (The President of the Executive Yuan or the Premier is nominated and appointed by the President of the Republic of China with the consent of the Legislative Yuan. The Legislative Yuan also exercises the consent power over the appointment of the Auditor General of the Control Yuan.)

The United States Senate, however, controls more appointments, that is, from the appointment of the Chief Justice of the Supreme Court to that of postmasters. The

¹¹ 1 HAYNES, THE SENATE OF THE UNITED STATES 10 (1938).

President of the United States nominates and, by and with the consent of the Senate, appoints federal officials.¹² With this great power comes an inevitable evil, "the courtesy of the Senate." That is, nominations from a given state are not to be confirmed unless they have received the approval of the senators of the party in power from that state. Other senators, as a courtesy, just follow their lead in the attitude they take toward such nominations. The most selfish phase of the senatorial courtesy is that a senator may base his opposition solely on a few words: "The nominee is personally obnoxious to me."¹³

Now let us discuss the power and practice of impeachment. The Chinese Control Yuan may impeach the President of the Republic of China and all public functionaries in the Central Government or local governments. The reason for impeachment can be based on neglect of duty or violation of law. An impeachment may be instituted upon the proposal of one or more than one member of the Control Yuan and the decision of not less than nine other members selected by turns. But an impeachment of the President of the Republic of China shall not be instituted without the proposal of not less than one-fourth of the whole body of the members of the Control Yuan and the resolution by the majority of the whole body of the members of that Yuan. The impeachment of the President is presented to the National Assembly for trial. The impeachment of a public functionary is referred for trial to the Committee on the Discipline of Public Functionaries in the Judicial Yuan. The most severe punishment within the jurisdiction of the Committee is dismissal or removal, while criminal charges, if any, are subject to the jurisdiction of courts.

In the Congress of the United States, an impeachment is instituted by the House with the concurrence of two-thirds of the members present. The Senate is the court of trial of the impeachment. The concurrence of two-thirds

¹² According to HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 399 (1953), there are 26,474 civilian positions and 98,000 military ones, totalling 124,474, subject to confirmation by the Senate.

¹³ 2 HAYNES, *THE SENATE OF THE UNITED STATES* 741 (1938).

is also required for conviction by the Senate. As a result of this overcautious and overburdensome procedure, there have been only twelve impeachments during the history of Congress, and only four officials convicted. It is a sharp contrast to the condition in the Chinese Control Yuan, by which twenty impeachments were instituted and six officials convicted in 1964. According to Professor Haynes, great dissatisfaction was felt with the impeachment procedure, and unsuccessful efforts were made to remedy the difficulty by amending the Constitution. "What is the outlook for the future?" Mr. Haynes wrote: "Although thousands of civil officers may seem to be amenable to impeachment, in fact the precedents indicate a much narrower applicability."¹⁴

Besides consent and impeachment, the Control Yuan exercises the power of censure. When a public functionary violates the law or neglects duty, the Control Yuan may impeach or censure him. A censure differs from an impeachment in two respects. First, the former may be confirmed by not less than three members of the Control Yuan, instead of nine members. Second, the former is forwarded to the superior of the public functionary for suspension of his duty or other immediate necessary measures, instead of forwarding it to the Committee on the Discipline of Public Functionaries for punishment action.

In such a case, if the superior does not take any action or does take some action which the Control Yuan considers inadequate, it may impeach the public functionary in question, and then the said superior will be held responsible if the impeached public functionary is punished by the Discipline Committee.

The fourth power exercised by the Control Yuan is auditing. When funds are appropriated by the Legislative Yuan, it is the auditing process which accounts for the way they are spent. There are two kinds of auditing: the preaudit and the postaudit. The preaudit reviews the expenditures of the various departments or agencies to determine whether such expenditures have been authorized

¹⁴ *Id.* at 874.

by law and the necessary money is available. The postaudit examines the budget statements of all government offices and investigates illegal or dishonest financial practices. The Control Yuan bears the responsibility for both types of audit.

The Control Yuan, however, delegates the auditing power to its Ministry of Audit, which attends to the following:

- (1) supervision over the execution of budgets by all government organs in the country;
- (2) ratification of orders or receipt and payment of all government organs;
- (3) examination of the preliminary and final budgetary statements of all government organs;
- (4) investigation of the violation of fiscal measure or dereliction of duty on the part of any government organ in the country.

The Ministry of Audit, however, does not have such powers as are exercised by the Government Accounting Office of the United States, *i.e.*, prescribing the accounting system followed by all departments and agencies, as well as settling of claims and vouchers, both of which are considered in China as executive responsibility.

The Ministry of Audit is directed by the Auditor General who is nominated and, with the consent of the Legislative Yuan, appointed by the President of the State. The Auditor General serves for a six-year term which is far shorter than the American Comptroller General's sixteen-year term. He should, within three months after the presentation of the annual budget statement by the Executive Yuan, complete his auditing in accordance with law and submit an auditing report to the Legislative Yuan. But it is the Control Yuan, not the Legislative Yuan, which takes action against instances of misuse or illegal use of funds.

A very important function performed by the Control Yuan is the so-called corrective measure. The Chinese Constitution (Article 97) provides that the Control Yuan must establish several committees corresponding to the various ministries and commissions of the Executive Yuan to watch

and investigate their activities. When the Control Yuan finds a public functionary guilty or his activity unlawful or inappropriate, it proposes a corrective measure in addition to instituting an impeachment or censure.

Corrective measures are the business of the Committee of the Control Yuan. After being formulated by a relevant committee, the corrective measure is forwarded to the Executive Yuan, directing its attention to effecting improvements. Although the corrective measure is not mandatory, the Control Yuan, backed by its power and prestige, always gets favorable replies from the executive branch.

As a result of the effectiveness and usefulness of the corrective measures, the Control Yuan receives every month hundreds of complaints from the people whose rights or interests have been allegedly injured by government administrative activities. Besides serving as a remedy, this function also helps to prevent the administration from abusing its power.

Conclusion

In his *An Ombudsman in Britain?*, Mr. L. F. Blom-Cooper argues: "Civil servants who have daily to make decisions would be conscious of something like the Chinese Control Yuan (born during the Han Dynasty, 206 B.C.-A.D. 220), which is a parallel branch of government, constantly looking over their shoulders."¹⁵ But since, as Mr. Blom-Cooper admits, "it is good that a civil servant should be aware of a public watchdog over his acts. . . ." ¹⁶ and since the Control Yuan only investigates the complaints by individual citizens and makes suggestions (which are not mandatory), the Control Yuan is not a bloodhound but a safety valve.

¹⁵ Blom-Cooper, *supra* note 2, at 148.

¹⁶ *Ibid.*