More Discretion, Less Law: Exploring the Dilemmas in the Recent Anticorruption Reform in China

By *Su Bian**

Abstract: In 2018, the promulgation of the Supervision Law in China professed the central government's determination to combat 'corruption' at a new level. By putting 'all public officials exerting public powers' under supervision, these newly-established supervisory commissions have unified the dual-track and dual-leadership supervision system that came into force since 1954. In this respect, some have argued that the supervision reform is a step forward toward promoting the Rule of Law in China. However, this paper argues that there are some key ambiguities to be clarified in this law, especially with regard to non-typical corruptions – the vaguely-defined supervised object of 'duty-related violations'. By comparing this notion with similar concepts in other countries, particularly the 'maladministration' under the jurisdiction of an ombudsman, this paper suggests that the supervisory power for anticorruption needs to be checked by other state powers so as not to degenerate into a new discretionary power.

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A. Introduction

'Anticorruption efforts have become global phenomena because no country … is free from corruption'.[1] In contemporary society, corruption is a major source of regime mistrust among ordinary citizens.[2] To deal with corruption, the Chinese government and the Communist Party of China (CPC) have made great efforts ever since the founding of the People's Republic of China (PRC): there have been at least six anticorruption campaigns since 1982, among which the promulgation of the *Supervision Law* (*SL*) effective from 2018 constitutes the newest wave and 'the most thoroughgoing' one in history.[3] As President Xi Jinping emphasized, the fight against corruption should be carried out through three

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1 *Li Li, Donald Lien, Yiping Wu and Yang Zhao*, Enforcement and Political Power in Anticorruption – Evidence from China, World Development 98 (2017), p. 133.

2 *Melanie Manion*, Taking China's Anticorruption Campaign Seriously, Economic and Political Studies 4(1) (2016), p. 4.

3 *Manion*, note 2, p. 5.

steps: (1) making officials afraid to be corrupt; (2) making officials unable to be corrupt; and (3) making officials unwilling to be corrupt.[4] This shows that the Chinese central government not only aimed to punish corrupt behaviors but also to focus on the 'root problem' of corruption during China's economic transformation.[5] Such a determination to combat corruption is unprecedented.

If the anticorruption efforts throughout the past three decades in China are typically responses of the top party leaders to 'major corruption scandals that alerted them to a serious lack of control over party and government officials in the localities – and a possible legitimation crisis among a mass public mostly lulled by rapid economic growth but increasingly sensitive to conspicuous (also, rapidly growing) inequality',[6] the newest one is taken by many scholars not as a campaign at all but as 'the new normal' in China.[7] This is because, unlike the anticorruption campaign which involves 'short periods of intensified enforcement', the most distinct feature of the new wave is the institutionalization of the anticorruption efforts through law. Apart from the *SL*, there were also a series of supervisory regulations that have been promulgated and a new 'Section Seven' inserted into the 1982 Constitution as part of the 2018 Constitutional Amendment.

Toward this, Melanie Manion suggested that, over time, 'by affirming the rules through public pronouncements, impartial enforcement and personal example, Xi and colleagues can create an institution with its own stickiness: a norm that rules matter, which is a norm of rule of law'.[8] Jinting Deng agreed partially that the establishment of the SCs is conducive to channeling the extralegal power of the DICs (Discipline Inspection Committee) of the Party into legal means, such as lifting the standards of evidence requirements.[9] However, this paper contends that rationalization of the anticorruption procedures is yet to be qualified as consistent with the Rule of Law (RoL) requirements because the effects of the supervision reform on the judicial system are underestimated. Instead, this paper is meant to evaluate the supervision reform against the constitutional context of China: it takes the SCs' participation in cases of non-typical 'corruptions', namely, those of 'duty-related violations', as the focus to examine their relationship with the remedies of administrative litigation, and thereby suggests that in the Chinese context, the redress for 'duty-related violations' through the supervisory means risks displacing the judicial means. Consequently, we should be aware of the danger implied in the empowerment of the SCs, which, instead of promoting the RoL in China, leaves adverse impacts on it.

4 President Xi's talk, http://news.china.com/zh_cn/domestic/945/20170106/30147766_all.html (last accessed on 26 August 2020).

5 *Macabe Keliher and Hsinchao Wu*, Corruption, Anticorruption and the Transformation of Political Culture in Contemporary China, The Journal of Asian Studies 75(1) 2016, p. 16.

6 *Manion*, note 2, p. 6.

7 *Manion*, note 2, p. 7.

8 *Manion*, note 2, p. 11.

9 See *Jinting Deng*, The National Supervision Commission: A New Anti-corruption Model in China, International Journal of Law, Crime and Justice 52 (2018), p. 70.

This paper will be arranged in the following structure: in the first part, the institutional changes of the supervision reform will be introduced so as to clarify the constitutional implications of establishing the SCs. While some researches compare the SCs to the Hong Kong Independent Commission Against Corruption (ICAC) from a functional perspective, they neglect that the power and constitutional status of the SCs differ significantly from those of the ICAC. Opposed to that, this paper suggests, it is more appropriate to make a comparison between the SCs and the Western ombudsman institutions, which have equivalent constitutional status. Such a comparison will be much conducive to tracing and examining whether the SCs have been organically integrated into the Chinese constitutional structure or not. This paper suggests that they have not, and due to the vague prescription of the SC's jurisdiction over 'duty-related violations', the supervision reform is prone to be 'politicized' by punishing certain behaviors *selectively* and in an *ad hoc* way that is contradictory to the essential requirements of 'certainty' and 'generality' of the RoL project (Part 2). In the last part, this paper argues that, the discretionary factors implied in the supervisory power should be contained by balancing with other state powers, especially the judicial power, so as to keep its functional integrity (part 3).

B. Transformation of the supervision system in China's constitutional structure

In China, recognition of the supervisory power as a distinct power has a long tradition which could date back to the Qin Dynasty. In ancient China, a 'secret royal inspector' 监察御史 was appointed by the emperor and dispatched to local places to monitor government officials and look after the populace.[10] On behalf of the emperor, these inspectors were essentially an extension of the sovereign power to the local society rather than a limitation laid on the emperor himself and his administrative power. However, at the end of the Qing Dynasty, along with the introduction of parliamentary democracy into China, a modern conception of the supervisory power emerged and was further included in the Nanjing National Government. According to the leader of the Chinese Nationalist Party 国民党 Sun Yat-sen's innovative idea, a 'five-power' government 五权政府 was designed to both integrate the principle of 'separation of powers' between the legislative, the executive and the judiciary as in Western countries and the less commonly recognized powers of 'control' and 'censorship' derived from the historical legacy. Sun argued that, while the former three powers are essential to managing state affairs, the latter two are targeted at issues of 'personnel' and the governance of officials.[11] Notably, Sun did not put the

10 *Changdong Wei*, 国家监察委员会改革方案之辩正：属性、职能与职责定位 [Analysis on the Reform Plan of the State Supervisory Commission: Nature, Function and Responsibility], 法学 [Law Science] 3 (2017), pp. 4-5.

11 *Fuhui Zhu*, 国家监察体制之宪法史观察—兼论监察委员会制度的时代特征 [An Observation of the System of Supervision from a Perspective of Constitutional History: On Contemporary Characteristics of Supervisory Commission], 武汉大学学报（哲学社会科学版）[Wuhan University Journal (Social Science)] 3 (2017), p. 27.

supervisory power in the hand of the Legislative Yuan 立法院 but insisted that it should be exerted independently by the Supervisory Yuan 监察院; otherwise, he contended that the Legislative Yuan would obtain too many powers which would prevent the Executive Yuan 行政院 from properly functioning.[12]

Along with the establishment of the PRC, the supervision system was further combined with new characteristics. The Ministry of Supervision of the State Council co-existed with the supervision system of the Communist Party of China (CPC), which was well-known as the Chinese dual-track and dual-leadership supervision system.[13] Besides that, the procuratorates also exert their power of 'legal supervision' over typical cases of 'corruption' prescribed by Criminal Law. However, prior to the 2018 Reform, the division of tasks between them was not clear-cut but complicated and entangled.[14] This in the past decades has resulted in several major problems, among which the most significant ones are repetitive investigations, local protectionism and the application of extralegal measures of *Shuanggui* 双规 in anticorruption investigations by the DICs.

Against this background, it is clear that founding the SCs in 2018 meant combining three different sources of supervision into one and entrenching an independent state organ. First, the administrative supervision system led by the Ministry of Supervision was wholly incorporated into the state supervision system, and consequently, the *Administrative Supervision Law* ceased to be effective (Article 69 of the *SL*). Second, part of the supervision power concerning duty-related crimes that was previously exerted by the procuratorates, *as per* the socialist legal tradition, was transferred to the SCs. Third, the DIC was required to cooperate closely with the SCs in cases when the supervisees are public officials as well as Party members. In order to close gaps between Party disciplines and legal norms, disparate Party rules have been increasingly collected in a quasi-legal body called 'Inner-party Laws and Regulations' 党内法规 to enhance the consistency of their application. In short, merging with the party's DICs, 'the SCs have absorbed the anticorruption force of the procuratorates and have become the only anticorruption agency'.[15] These foregoing changes make it clear that what is critical concerning the legalization of this supervisory power is whether the three sources of supervision can be arranged in a consistent way that conforms to the general direction of building the RoL in China.

Nevertheless, concerning whether the supervisory power can be seen as organically integrated into the Chinese constitutional structure, standards based on a functional perspective or a structural perspective diverge. Those who hold positive attitudes toward the SC's effectiveness in combating corruption-related crimes and toward rationalization of the anticorruption procedures after the promulgation of the *SL*, base their judgments largely on

12 *Xin Nie*, 中西之间的民国监察院 [On the Supervision Yuan of the Republic of China between the East and the West], 清华法学 [Tsinghua Law Review] 5 (2009), pp. 139-140.

13 *Manion*, note 2, p. 5.

14 *Li, Lien, Wu and Zhao*, note 1, p. 135.

15 *Deng*, note 9, p. 58.

functional reasoning. But on the other hand, they risk losing sight of the SC's unique status within the Chinese constitutional structure. As Geoffrey Samuel once commented:

> *[The functional] approach is particularly appealing to comparatists undertaking a micro comparison in that it allows for the bringing together of two quite different objects by reference to their practical uses and purposes. In comparative legal studies, a functional approach 'focuses not on rules but on their effects, not on doctrinal structures and arguments, but on events'.*[16]

The idea of 'functional equivalence' emerges therein. However, Samuel also criticized that, the functional approach 'requires that an institution be broken down into its separate parts or independent legal institutions be seen as a single unit'[17], which on the other hand, 'cannot tell the comparatist much about the actual internal structure of a legal system or how such a structure came into being'.[18] It 'fails to indicate how a legal system is put together in terms of its structure and (or) classification'.[19] For example, making a comparison between the ICAC of Hong Kong and the SCs is dependent upon that the two institutions are both specialized organs for combating corruption; however, the two organs are never equivalent in the constitutional structure: the ICAC is part of the executive branch while the SCs are independent of the administrative power. The comprehensive powers of the SCs include, but are not limited to, supervising duty-related crimes; they can also supervise duty-related violations or maladministration, which are usually the responsibility of the ombudsman in other countries. Moreover, in a decision issued by the Standing Committee of the National People's Congress (NPCSC),[20] the National SC is further endowed with the power to legislate supervisory regulations, while this power is not conferred on the ICAC. In this respect, without putting the SCs within the constitutional system and structure of China, it is impossible to get a full picture of the supervision reform, nor to evaluate whether it extends beyond the proper boundary of a supervisory organ. In this respect, the structural approach to studying the supervision reform is more appropriate to comprehend its implications for the general legal reform package, and this paper will pick up particularly the supervision of 'duty-related violations' and its relationship with administrative litigation as a pathway to explore the power shifts in the Chinese constitutional structure induced by the most recent supervision reform.

16 *Geoffrey Samuel*, An Introduction to Comparative Law Theory and Method, Oxford and Portland, Oregon 2014, p. 65.

17 *Samuel*, note 16, p. 66.

18 *Samuel*, note 16, p. 80.

19 *Samuel*, note 16, p. 96.

20 The National People's Congress, Decision of the Standing Committee of the National People's Congress on Developing Supervisory Regulations by the National Supervisory Commission 全国人民代表大会常务委员会关于国家监察委员会制定监察法规的决定 (2019), http://www.npc.gov.cn/npc/c30834/201910/911aed040a7948a3b2679568d6216140.shtml (last accessed on 26 August 2020).

C. The uncertainty implied in combating non-typical corruptions

Although the supervision reform intended to harmonize the disparate mechanisms of supervision and unify diverse categories of legal and political responsibilities, there are some normative gaps that must be noted. As the *SL* prescribes, the SCs 'shall conduct investigations of duty-related violations and crimes such as suspected corruption, bribery, abuse of power, neglect of duty, power rent-seeking, tunneling, practice of favouritism and falsification, as well as the waste of state assets' (Article 11(2)). This provision makes it clear that the SCs' jurisdiction embodies, not only those behaviors directly connected to material gains and prescribed by criminal laws, but also non-typical corruptions that can be defined as 'unhealthy tendencies'.[21] For example, the *SL* provisions refer explicitly to Article 53 of the *Law on Civil Servants*, according to which, public officials have to observe sixteen categories of disciplines, such as neglecting duties or practising disobedience; suppressing criticism; engaging in fraud; practising corruption, taking bribes and carrying out other activities that violate the financial and economic disciplines; or abusing powers to infringe on the legitimate rights of any citizen, legal person or any other organization, etc. In this sense, 'corruption' that fall into the scope of supervision by the SCs is not only linked with financial crimes of public officials, but can also be more properly and broadly defined as 'an abuse of public power, such that the office holder blurs the line between formal power of office and personal power'.[22] Apparently, there is a greater extent of vagueness and uncertainty implied in this term than recognized by current researches.

While most researches have duly noticed the effects of establishing the SCs on the power of the procuratorates with regard to typical 'corruption', namely, those 'duty-related crimes', there is little discussion on the relationship between the judiciary and the SCs in cases of 'duty-related violations'. This can be attributed to the fact that before the Reform, the procuratorates were entrusted with an obligation of 'legal supervision' according to Article 129 of the 1982 Constitution, whose supervision power might be directly influenced by setting up the SCs as the sole supervisory organ. However, this paper argues that the power transference from the procuratorates to the SCs is in fact not the core of the supervision reform. Since the end of the Cultural Revolution, the power of the procuratorates to carry out 'legal supervision' has already gone through a transformation from being comprehensive to being limited. Initially legislated according to the model of the Soviet Prokuratura, who was invested with 'supreme supervisory power over the strict execution of the laws by all ministries and institutions subordinated to them, as well as public officials and citizens of the USSR', the 1979 *Organic Law of the Procuratorate* (Article 5) explicitly removed the article on 'general supervision' but preserved the procuratorate's supervisory power over the administration of justice. In other words, the power of 'legal supervision' of the procuratorates is no more 'general' but confined to specific ones, which included public

21 *Li, Lien, Wu and Zhao*, note 1, p. 134.

22 *Manion*, note 2, p. 4.

prosecution, investigation of criminal cases directly handled by the procuratorate, approval of arrest, and supervision over the investigatory activities of public security organs, the judicial activities of the people's courts and the activities of prisons and detention houses, etc.

Among these powers, strictly speaking, only the investigation of duty-related crimes could be categorized as supervision over public officials and hence was officially transferred to the SCs since 2018. And this transference was relatively guaranteed since prior to the supervision reform, there had already been independent offices (e.g. the Anticorruption bureau 反贪, the Anti-dereliction of Duty Department 反渎, and the Corruption Prevention Department of anticorruption 预防职务犯罪) within the procuratorates that were responsible for investigating duty-related crimes. These departments, including the people and the equipment thereof, can be transferred entirely to the SC system.[23] Last but not least, with regard to duty-related crimes, which are rigidly prescribed by the Criminal Law, there is less room to manoeuvre or to abuse the power of investigation. In the *Provisional Regulation on the Jurisdiction of the National Supervisory Commission* 国家监察委员会管辖规定（试行）effective since April 16, 2018, Chapter 4 clearly and explicitly makes an exhaustive list of 88 duty-related crimes under the jurisdiction of the SCs, while in contrast, Chapter 3 on 'duty-related violations' only mentions the principles, policies and organizations. In this respect, it is clear that there are relatively few attempts to nail down the meaning and categories of 'duty-related violations', which defect remains largely underevaluated in academic researches.

Taking the 'uncertainty' and 'arbitrariness' implied in 'duty-related violations' into account, this paper intends to suggest that legalization of anticorruption efforts in China can probably pose an implicit risk to continuing its project of building the RoL. This is because, after unifying the 'troika' supervisory organs, the SCs are set up to include diverse kinds of corruptions and all public officials into their jurisdiction, without proper consideration for the different nature and categories of the supervised objects. It thus leaves much room for the discretion of the SCs in interpreting these provisions. However, Friedrich Hayek has reminded us that, 'generality' and 'certainty' are essential requirements for RoL. 'What must not enter into the decision are the momentary ends of government, the particular values which it attaches to different concrete purposes, or its preferences between the effects of its actions on different people'.[24] He fiercely criticized practices of delegating the law-making power to the administrative organs, since it will result in 'whatever the authority decides, within the sphere in which it is given such power, shall have the force of law'.[25] Such a warning can cast light on the supervisory power as well. With the SCs

23 See *Deng*, note 9, p. 61.

24 *Friedrich. A. Hayek*, Lecture . The Safeguards of Individual Liberty, in: Bruce Caldwell (ed.), The Market and Other Orders, vol. 15 of The Collected Works of F. A. Hayek, London; Chicago 2014, p. 172.

25 *Hayek*, note 24, p. 170.

being conferred on the power to legislate supervisory regulations, to carry out supervisory activities, the normative ambiguities implied in 'duty-related violations' will further endow them with a power to interpret the supervisory regulations, which apparently contradicts the principle of 'division of powers'. Therefore, to constrain the discretionary power of the SCs, this paper suggests that it is necessary to explore delicate mechanisms of checks and balances that are imposed on the supervisory powers in other countries, especially how the worldwide ombudsman offices have been integrated into a constitutional structure, which can provide comparative insights and invaluable lessons for improving the supervisory legislation in China.

D. A comparative study with the ombudsman system

With regard to supervising public officials in carrying out their duties, the SCs can be compared to the ombudsman system. First introduced in Sweden, the ombudsman position was designed to listen to citizens' complaints against public officials and redress 'injustice induced by maladministration'. Cases where there is some space for administrative discretion but it would be too expensive or inefficient for citizens to resort to administrative litigations are particularly targeted by this office. In other words, the ombudsman aims to address a grey zone in administrative law: since modern society has become increasingly complex due to urbanization and technological developments, administrative organs have been conferred on comprehensive discretionary powers in the distribution of public goods, while on the other hand, there are fewer remedies than expected that could keep up with the expanding administrative powers.[26] Thus the ombudsman is set up to deal with the flaws implied in the historical separation of powers and plays a significant role in maintaining a healthy relationship between the government and the people: on the one hand, it hears citizens' complaints against the government, while on the other hand, it protects the government from unnecessary suspicion.[27]

In a broader context, ombudsman arrangements reflect the evolution of demands for administrative accountability from 'representative government' to 'responsive government'[28] and from 'input democracy' to 'output democracy'. After being accepted into other Scandinavian countries, the idea of ombudsman has gained worldwide recognition since the 1960s, particularly thanks to the excellent work of the Danish Ombudsman, Stephan Hurwitz. Nowadays various forms of ombudsman offices have been set up at national, regional and international levels. It is reported that there are 198 ombudsman institutions in almost

26 *Jesse M. Unruh*, The Ombudsman in the States, The ANNALS of The American Academy of Political and Social Science 377 (1968), pp.114-115.

27 *Sverre Thune*, The Norwegian Ombudsman for Civil and Military Affairs, The ANNALS of The American Academy of Political and Social Science 377 (1968), p. 46.

28 *Dalmas H. Nelson and Eugene C. Price*, Realignment, Readjustment, Reform: The Impact of the Ombudsman on American Constitutional and Political Institutions, The ANNALS of The American Academy of Political and Social Science 377 (1968), p. 129.

all continents (except the Arctic and the Antarctica) around the world,[29] which have already become 'an integral part of the public sector accountability mechanisms'.[30]

However, apart from this trend of convergence, it is notable that the core functions of ombudsmen have been transformed through time, varying from redressing 'maladministration' to promoting 'good governance', from the classical ombudsman whose chief obligation is to oversee public officials to the hybrid ombudsman that also aims to protect human rights. John Robertson, who is the former Chief Ombudsman of New Zealand, deems that this development is inevitable since 'the core business of an ombudsman can correctly be said to include basic human rights violations which arise from the daily interaction of a government and its people', despite that they may occur to different degrees of 'intensity'.[31] In accordance with the ombudsman's role in human rights protection, Benny Tai has put forward a typology of six ombudsman and human rights models (OHRMs) to map their diverse performances in the contemporary world, which includes the classical, implicit, explicit, co-existing, extended, and hybrid OHRMs.[32]

The Swedish ombudsman is typically the classical OHRM, while the other five types are variations of it. The main obligations of the classical ombudsman are to address citizens' complaints, carry out independent investigations and make recommendations to the parliament through annual reports. In support of this independent status, the ombudsman has the power to persuade and make recommendations to the concerned administrative organs but is deprived of the power to punish or make enforceable orders. In other words, the supervisory power of the ombudsman is characterized as comprehensive *procedural* powers as opposed to relatively weak substantive powers. For example, in cases of maladministration, the Danish ombudsman can 'instruct' that official's superiors to take appropriate disciplinary action; to submit a recommendation for action to the parliament if that official is 'a present or former minister'; or to 'instruct the public prosecutor to institute appropriate court action in the instance of a criminal offense by an official below the ministerial level'.[33] Nevertheless, he does not have the power to punish the public official by himself. In most cases, this weakness of his substantive powers has not prevented the ombudsman's suggestions from being respected and followed, since it can be 'ameliorated by executive desire to avoid adverse publicity'.[34]

29 The IOI Website, https://www.theioi.org/the-i-o-i (last accessed on 26 August 2020).

30 Quoted from *Mr PJ Justice Bokhary*, The Ombudsman in Hong Kong: Role and Challenges under the Transformation of Governance in the Post-1997 Era, Asia Pacific Law Review 17(1) (2009), p. 137.

31 *John Robertson*, The Ombudsman around the World, International Ombudsman Yearbook 2 (1998), p 112.

32 See *Benny YT Tai*, The Hong Kong Ombudsman and Human Rights Protection Revisited, Asia Pacific Law Review 17(1) (2009), pp. 96-102.

33 *Henry J. Abraham*, The Danish Ombudsman, The ANNALS of The American Academy of Political and Social Science 377 (1968), p. 57.

34 *Bokhary*, note 30, p. 135.

However, compared with the restrained powers of the classical ombudsman, the other five OHRMs are increasingly endowed with more capacity and responsibilities in dealing with human rights violations according to the requirements of the *Paris Principle*.[35] Among them, the hybrid OHRM has the most extensive powers on the other end. This model is more commonly observed in circumstances of transitional justice, where the ombudsman assumes more responsibilities than the other types, such as promoting human rights education, redressing environmental pollution, and enforcing leadership codes.[36] The hybrid mode initially took shape in Spain and Portugal and later spread to Eastern Europe, Africa and Latin America.[37] On the one hand, this stretching of the ombudsman's functions is necessary against the more complex social background and indeed helps in recognizing and realizing the people's 'right to good administration'.[38] However, on the other hand, this 'hybridity' could lead to failures or risks in maintaining the essential integrity of the ombudsman's functions. It is worth recalling the critical warnings of the leading authority on ombudsman institutions, Emeritus Rowat, who predicts 'that rapid growth and expansion of the ombudsman institution would make it "all too easy to lose sight of … essential features of the original ombudsman system"'.[39] This especially applies in cases where the over-empowerment of the ombudsman has disembedded him from a strictly delineated division of powers and brought about adverse effects on the legal reforms of these countries.

For example, some African countries have, on one hand, encountered significant obstacles in building up an ombudsman mechanism in their authoritarian contexts. Yet, on the other hand, there is a widespread illusion that the ombudsman may play a key role in transitional justice. Rather than confining his powers to procedural ones, the hybrid ombudsman is also permitted to bring constitutional cases to court, to submit bills of legislative reforms to the parliament, and to have some other substantive powers. However, it is doubtful whether this expectation is reasonable. If the hybrid ombudsman was found to take on more responsibilities because of an insufficient means for remedies during democratic transitions, it would be *paradoxical* to assume that once the ombudsman was set up, his recommendations could be effectively implemented by other state organs. The premature environment of transitional justice leads to a lack of support for the ombudsman to work well and coordinate with other state powers. Consequently, empowering the ombudsman can only

35 See Principles relating to the Status of National Institutions (The Paris Principles), https://www.ohchr.org/en/professionalinterest/pages/statusofnationalinstitutions.aspx (last accessed on 26 August 2020).

36 *Linda C. Reif*, The Ombudsman, Good Governance and the International Human Rights System, Dordrecht 2004, p. 215.

37 *Tai*, note 32, p. 101.

38 *Simone Cadeddu*, The Proceedings of the European Ombudsman, Law and Contemporary Problems 68 (2004), pp. 162-163.

39 *Najmul Abedin*, Conceptual and Functional Diversity of the Ombudsman Institution: A Classification, Administration & Society 43(8) (2011), p. 904.

result in him being mistakenly made a *superpower* to oversee or even substitute for the functions of other state organs. In fact, during the process of political transformations, a properly demarcated separation of powers is more urgently needed than the replacement of one unlimited power with another.

If we take into account the establishment of China's SC system against this background, we could find that it has a special affinity with the hybrid-type ombudsman, whose 'hybridity' is manifested not only in the several substantive powers possessed by the SCs, especially the one to directly make decisions on government sanctions against public officials, but also displayed in the shared goals to overcome various obstacles during democratic transitions, which include but are not limited to anticorruption work. In this respect, the SCs constitute a type of powerful ombudsman and its establishment shows particularly the determination of the Chinese central government to strengthen state capacity and improve the quality of governance. Despite this, all these good intentions should not blind us to several institutional pitfalls of 'disembedding' the SCs from the constitutional structure that I will examine in the following paragraphs.

I. Exclusionary relationship with administrative litigation

The first difference between the Chinese SCs and the classical ombudsman arrangements is that, in most countries that have ombudsman as their supervisory organ, issues complained to the ombudsman are not excluded from judicial review, as it is in the court that an enforceable decision could be obtained. In some of them, it is even required that 'the administrative right of appeal' be exercised 'before any complaint can be lodged with the ombudsman',[40] which clearly indicates that the supervision of ombudsmen is meant to 'supplement' judicial remedies rather than to replace them. While 'in the delivery of justice and the removal or at least diminution of a sense of injustice, the judiciary always welcomes the participation of others', the existence of other paths to justice does not 'reduce the judiciary's own duty and its keen appreciation of that duty which includes of course the exercise of judicial review over an ombudsman's function'.[41] In Hong Kong law, for example, 'if an ombudsman abstains from an investigation in the erroneous belief that such an investigation would be outside his or her remit, then that would be an error of law which a court can be expected to correct'.[42]

However, different from the 'overlapping' jurisdictions between the judiciary and the ombudsman in these countries, the basis for setting up supervisory commissions in China is the 'exclusionary' jurisdictions between the judiciary and the SC. As Chapter 2 of the *Administrative Litigation Law* prescribes, complaints concerning rewards or punishments of public officials of the administrative agencies are not accepted by the People's courts.

40 *Thune*, note 27, p. 43.

41 *Bokhary*, note 30, p. 143.

42 *Bokhary*, note 30, p. 137.

Therefore, those cases of 'duty-related violations', as disciplinary practices, will be excluded from being appealed in the court, both before and after the supervision reform. As a consequence, the establishment of the SCs in China, instead of facilitating access to administrative justice, can produce the side effects of discouraging administrative justice by means of litigation. For example, in the case filing system 'China Judgments Online', between 2018 and May 24, 2020, by searching the keyword 'supervisory commission' in the category of administrative cases, we found 610 administrative orders and judgments that are related to the SCs, amid which there are 215 for the year 2018, 347 for the year 2019 and 48 for the first 5 months of 2020.[43] Furthermore, in each year respectively, there are 56, 48 and 1 administrative cases that were sued directly against the SCs for their neglect of supervisory duties; yet in none of them did the court support that the SCs should be subject to administrative reconsideration or litigation. The reasoning varied from case to case, either recognizing the exercise of supervisory power as an internal administrative act or an independent supervisory act. Although personnel-related issues are never subject to administrative litigation before or after the supervision reform, shifting them into the exclusive jurisdiction of the SCs still indicates a turning point in administrative legislation: from making great efforts to improve administrative procedures till finally legislating a law on administrative procedures that can specify in detail different types of maladministration, to a new direction that relies on a superpower to supervise public officials. In this respect, strengthening the supervisory power can hinder the juridification process in achieving administrative justice. Without proper arrangements that can scrutinize the exertion of the supervisory power, such as the requirements to exhaust judicial remedies before turning to the SCs or the explicit prescription that submitting complaints to the SCs does not prevent them from facing judicial review, this sidelining of the judiciary is especially worthy of attention.

II. The 'unresponsive' complaint system

Besides this lack of judicial control, another gap in the current SC legislation is the underdeveloped democratic accountability of the SCs. Although the SCs are responsible to the people's congresses as the Constitution prescribes, unlike the well-developed ombudsman system, which 'opens the door' to any citizens' complaints,[44] there is less significant improvement on the 'accessibility' of the supervisory mechanism by ordinary citizens. This gap forms a stark contrast with the ombudsman system for which receiving citizens' complaints is an essential feature and in most cases there are few limits laid on the complaint system. Citizens do not have to be represented by lawyers or pay fees: in Danish law, the only limit imposed on the complaints is that they have to involve some degree of direct, personal 'interest', cannot be falsified and must usually be filed no more than

43 The number is obtained by the date 24 May 2020.

44 *Abraham*, note 33, p. 58.

one year after the maladministration happens.[45] In addition to this definitive feature of 'accessibility', in Norway, there are also requirements of 'publicity' regarding the results of the ombudsman's decisions; namely, since the issues dealt with by the ombudsman sometimes may influence the general public as well as the complainant, the ombudsman's annual report to the parliament must be forwarded to the Norwegian News Agency, and citizens can access it easily through newspapers or bookstores.[46]

Compared with these practices, the annual report of the National SC remains unpublished and there are only requirements for it to draft reports on specific issues to the NPCSC. Its working procedure thus lacks democratic features at both the input and output ends. Concerning the file categorization system that decides which department of the SCs will process citizens' complaints or decline them eventually, Fenfei Li and Jingting Deng acutely criticized that, '[n]o concrete standards or rules for such dismissals are established, no reasons are needed for the record, such decisions are neither available to the general public nor challengeable by the whistleblower'.[47] In many aspects, Article 15 of the *SL,* which prescribes the accessibility of the supervision of the SCs for ordinary citizens, resonates with Article 14 of the *Regulation on Complaint Letters and Visits (2005),* and there is little improvement on the procedures of dealing with citizens' complaints, nor any rules on whether and how the SCs can refuse to respond to complaints. These questions are subject to the discretion of the SCs which cannot be reviewed judicially. For sure, investigations can be initiated by the supervisory organ itself, but it is important to keep in mind that the democratic basis for setting up the supervision system, as shown in the ombudsman mechanism, is the reduced restraints on complaints rather than the selected though competent supervisors. Without sufficient accessibility for ordinary citizens, it is doubtful whether the SCs are set up to facilitate citizens' external supervision over administrative agencies or merely to put public officials under higher-level administrative controls.

III. Lack of consideration for the autonomy of semi-public supervisees

As the *SL* stipulates, all personnel managed, *mutatis mutandis*, by the *Law on Civil Servants* fall into the scope of the jurisdiction of the SCs (Article 15). While progressively places the personnel of organs of the CPC in the scope of civil servants, this provision also explicitly includes the personnel of judicial organs at all levels, as well as organizations defined as 'public' according to the 'socialist' ownership structure. Managers of those social organizations entrusted with public powers, such as public hospitals, public schools or mass organizations of self-government, have all been subject to the jurisdiction of the commissions.

45 *Abraham*, note 33, p. 58.

46 *Thune*, note 27, p. 52.

47 *Fenfei Li and Jinting Deng*, The Limits of the Arbitrariness in Anticorruption by China's Local Party Discipline Inspection Committees, Journal of Contemporary China 25(97) (2016), p. 86.

Although it is certainly true that these semi-public organizations should not be excluded from public scrutiny, it does not follow that the supervisees and the means of supervision should be uncategorized. For social institutions entrusted with duties regarding the distribution of public goods, maintaining their functional specialty and distinctiveness from government administration is nevertheless as important as maintaining their public ownership. To be more specific, if the inclusion of these social organizations into the supervisory scope is based on the public 'ownership' of the means of production, then it raises doubts about whether the supervision should be extended beyond *auditing* measures to guarantee the delivery of public goods and protect state assets from being wasted. However, a tendency to stretch the scope beyond this boundary can be constantly observed, such that the dispatched supervisors to public schools can also observe the contents of the textbook and the teachers' professional behaviors, which not only infringes on the supervised social organizations' 'autonomy' in managing their daily affairs, but also is questionable whether the dispatched supervisor is equipped with sufficient knowledge to deal with specific issues that require expertise.

On this matter, it is worth learning from the legislation on 'private' ombudsman in Britain and Australia, whose ombudsman scheme in the semi-public sector usually has a requirement that, 'before a complaint can be investigated by the ombudsman, the authority or organization concerned must have had an opportunity to deal with the complaint internally'.[48] For example, under section 24(1) of the Courts and Legal Services Act (1990), although the ombudsman can make a recommendation to a professional body about its arrangements for the investigation of complaints, he should not make *a priori* assumptions about how the profession should conduct itself.[49] That said, the distinction made between public and private ombudsman aims not only to take the required expertise into consideration but also respects the autonomy of concerned social groups in conducting preliminary self-regulation.

Seen from the above three aspects, the SC system contains a strong 'control' mentality in supervising 'duty-related violations' in comparison with the more 'accessible' mechanism of the ombudsman. Facing the overwhelming circumstances of corruption in China, the urge to build an effective anticorruption organ is understandable and irresistible, yet on the other hand, it is too hasty to entrench such a superpower which can greatly endanger the RoL project that China has been painstakingly building throughout the past four decades. With regard to the uncertainty embodied in supervising the 'duty-related violations', how the recent supervision reform continues to serve a 'politicized mission'[50] of controlling low-profile officials and semi-public social organizations is clearly revealed. In this sense, rationalization of the anticorruption efforts through law is not actually conducive to the

48 *Rhoda James and Mary Seneviratne*, The Legal Services Ombudsman: Form versus Function? Modern Law Review 58(2) (1995), p. 190.

49 *James and Seneviratne*, note 48, p. 199.

50 See *Deng*, note 9, p. 70.

RoL project of China; Rather, without external constraints placed on the supervisory power itself, it can adversely impact judicial autonomy, democracy and civil society.

E. Conclusion

This article has discerned an expansive tendency of the powers of the SCs due to the indefinable and uncategorized 'duty-related violations', which as a form of non-typical corruptions has been neglected by current researches. Through this lens, I suggest that there is a returning movement of the Chinese supervision system to the Soviet model of the General Procurator, who had non-specified powers to carry on supervision work. However, the Soviet experiences remind us that the integrity of the supervisory power lies in its embeddedness in a proper division of state powers and cannot do without other supporting mechanisms, such as an effective administrative litigation system and judicial autonomy. As Walter Gellhorn put it, it is 'not so much the character of the Prokuratura itself, but its virtual isolation that is responsible for its inadequacies'.[51]

Likewise, the Chinese supervision reform was initiated in a premature environment. The widespread corruption of public officials, the lack of means of complaints, the ineffective administrative litigations and the urgent need to improve human rights protection in an increasingly complex society, etc., all contributed to the establishment of SCs in China. Nevertheless, these multi-layered expectations have driven the commission to outgrow its original design as a special anticorruption organ and turn into an independent 'fourth' power. To some extent, it can be compared to the hybrid type of ombudsman born in the contexts of transitional justice. Not only are more powers conferred on the SC than on the classical ombudsman, but the high expectation for it to miraculously redress all problems associated with political transformations has turned it into a superpower over other state organs.

However, this paper suggests that an implicit dilemma exists in this 'over-empowerment'. If the integrity of the supervisory function has to be sustained with the support of other democratic mechanisms, such as judicial independence, enactment of the Administrative Procedure Law, and an effective complaint system, these solid bases for the proper functioning of the supervision system are nonetheless lacking in transitional justice. This shows that political transformations solely reliant on supervision reform are destined to be hard and risky and are likely to result in a deviation from the RoL project that has been built in China over the last forty years.

Almost three years have passed since the SCs were set up from the national level down to the county level, and it might be too early to predict the outcome. However, this article aims to cast light on the extremely vague meaning of 'duty-related violations' and the undifferentiated principle of 'full coverage' (of public officials) 全面覆盖, which, I argue,

51 See *Helmut Bader and Henry Brompton*, Remedies against Administrative Abuse in Central Europe, the Soviet Union, and the Communist East Europe (Ombudsman and Others), The ANNALS of the American Academy of Political and Social Science 377 (1968), p. 83.

will drive the supervision system to become increasingly ‘politicized’. In Hayek’s words, this is an upsurge of administrative discretion rather than the opposite, and it will lead to the replacement of ‘law’ with ‘policy’,[52] or more precisely speaking, the substitution of ‘control’ for ‘supervision’.

52 See *Hayek*, note 24, p. 171-174.