
**THE PUBLIC SECTOR OMBUDSMAN IN GREATER CHINA:
FOUR "CHINESE" MODELS OF ADMINISTRATIVE
SUPERVISION**

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ABSTRACT

Among the challenges facing Greater China, the ombudsman is rarely, if ever, considered one of them. Yet this relatively innocuous institution can, under the right conditions, contribute much that is beneficial to standards in public administration. This is the first Article to contrast the models of public sector ombudsman in Mainland China, Hong Kong, Macau, and Taiwan, drawing comparisons on such features as institutional function, constitutional and legal status, relationship with the executive branch, process, substantive powers, effectiveness and transparency. Even in a region as politically, constitutionally and economically associated as Greater China, four diverse models of ombudsman coexist. They display sharp differences from systemic function to institutional culture, and as the region is now on a path of convergence, these are differences which may soon have to be reconciled. That reconciliation would, as this Article shows, require a major reconceptualization and reconfiguration of administrative supervision in at least three of the jurisdictions under review.

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TABLE OF CONTENTS

1.	Introduction.....	437
2.	Outline of Public Sector Ombudsmen in Greater China	440
	2.1. <i>Mainland China</i>	440
	2.2. <i>Hong Kong</i>	443
	2.3. <i>Macau</i>	444
	2.4. <i>Taiwan</i>	444
3.	Institutional Function	446
4.	Consolidated Versus Dispersed Institutional Models	451
5.	Constitutional and Legal Status.....	455
6.	Relationship with Executive Branch.....	456
7.	Process and Substantive Powers.....	461
8.	Effectiveness and Transparency	475
9.	Concluding Remarks	483
10.	Table 1.....	485

1. INTRODUCTION

Public sector ombudsmen can serve as an important mechanism for complaints redress against public bodies and for promoting accountability and transparency within the public sector. They can play a useful role in improving standards within public administration, from reducing corruption and malpractice, to improving efficiency and consistency in decision-making. However, there is no universally agreed model of public sector ombudsman, from the level of constitutional status and institutional design, to process and practice. This is sharply illustrated by contrasting the models of public sector ombudsman in the Greater China region, namely in Mainland China,¹ Hong Kong, Macau and Taiwan²—a region in which there has been significant political, constitutional and economic convergence, yet in which there has previously been no dedicated comparative assessment of these institutions.

Historical fragmentation of political power in the region, including the colonization of Hong Kong and Macau, and the Chinese Communist Revolution, resulted in divergent legal and political traditions. The effect of the region’s diverse public law traditions on their models of ombudsman, and a specific assessment of their institutional, conceptual and practical contrasts, has hitherto been little explored in the literature. This is a pertinent area of focus given the legal and political challenges faced by and between the region’s constituent jurisdictions, with particular challenges faced with the finite provision for the autonomy of Hong Kong³ and Macau⁴ as Special Administrative Regions, and the uncertain potential for reunification between the PRC and Taiwan. These future developments will require assessments to be made on the future relationship between the jurisdictions, and whether and to what extent an agenda of centralization, harmonization, pluralization or the status quo should be

¹ “Mainland China” will be used to mean the Mainland of the People’s Republic of China in order to distinguish it from other jurisdictions in Greater China. “PRC” is used for the People’s Republic of China as a whole, which includes the Hong Kong and Macau Special Administrative Regions.

² “Taiwan” and its official name, the “Republic of China” (“ROC”), are used without implying a view on the constitutional status of Taiwan.

³ Basic Law of the Hong Kong Special Administrative Region art. 5 [hereinafter Basic Law of Hong Kong].

⁴ Basic Law of the Macau Special Administrative Region art. 5 [hereinafter Basic Law of Macau] [<https://perma.cc/VV4A-3QF4>].

pursued: the greater the challenge if either centralization or harmonization is pursued.

Furthermore, this study has broader appeal as a relevant comparison as “Asia has been underrepresented in comparative legal and constitutional studies” and “there has been a tendency in comparative law, with implications for comparative constitutional law, to treat Asian legal systems as homogenous.”⁵ Any presumption of homogenous models of law and legal institutions will be tested and challenged in relation to the ombudsman institutions in just one area of Asia: the economic and political powerhouse of Greater China.

It is worth emphasizing at the outset the constitutional significance of ombudsman institutions. They typically share common ideas of monitoring administrative activity for malpractice and deficiency, with aims including the promotion of transparency, accountability and public confidence in administration. They strive in various ways to align administrative practice with particular ethical conceptions of public administration. Importantly, it can be argued that the ombudsman function plays a part in upholding constitutional values.⁶ For example, in the Basic Law of Hong Kong, residents have the right to social welfare in accordance with law.⁷ Whilst this is justiciable as a constitutional right, the work of the Ombudsman can promote the right to social welfare by checking for maladministration in the conduct of, for example, the Social Welfare Department or the Housing Department in their provision of social welfare – maladministration which might not necessarily be unlawful and would therefore not be susceptible to judicial review. Moreover, residents have a constitutional guarantee to equality before the law,⁸ and this value is also promoted when the Ombudsman checks for selective enforcement of rules by public bodies; again, something that is not, in itself, unlawful. Similarly, existing common law values of constitutionalism and the rule of law continue to have a formal legal basis after the handover of Hong Kong from the United

⁵ Cheryl Saunders, *Towards a Global Constitutional Gene Pool*, 4(3) NAT'L TAIWAN U. L. REV. 1, 3–4 (2009).

⁶ See TREVOR BUCK, RICHARD KIRKHAM & BRIAN THOMPSON, *THE OMBUDSMAN ENTERPRISE AND ADMINISTRATIVE JUSTICE* 18–19 (2011) (stressing the importance of ombudsmen, and the role they play in the separation of powers).

⁷ Basic Law of Hong Kong art. 36.

⁸ *Id.* art. 25.

Kingdom to the PRC.⁹ Common law values such as certainty, predictability and non-retroactivity in decision-making can be promoted by an effective ombudsman institution reporting on administrative practice which contravenes these values. In fostering good administrative practice, the values inherent in these constitutional provisions are promoted by the ombudsman, perhaps in addition to ideas of constitutionalism itself.¹⁰

There has been discussion on where the ombudsman fits in a tripartite conception of the constitution as a separation of legislative, executive and judicial power.¹¹ Taiwan had to some extent preempted that question by erecting its ombudsman institution, the Control Yuan, as part of a “five point power” conception of the constitution, though certain of its powers are more extensive than those of ombudsmen in other systems. Bruce Ackerman has written on the need to reject Montesquieu’s trinity of state power, citing independent electoral commissions and central banks as examples of institutions placing strain on the traditional tripartite conception of the state bureaucracy.¹² Similarly, ombudsmen play such a role in the constitution, even if in a less direct way than in Taiwan. In short, the significance of the ombudsman is not only in relation to administrative practice, but also to the constitutional implications of the ways in which public administration is constrained and influenced by ombudsman institutions.

This Article explores four diverse models of public sector ombudsman in the four constituent jurisdictions of Greater China. It begins with an outline of the ombudsmen in the region, then ex-

⁹ *Id.* art. 8.

¹⁰ See, e.g., Albert H. Y. Chen, *A Tale of Two Islands: Comparative Reflections on Constitutionalism in Hong Kong and Taiwan*, 37 HONG KONG L.J. 647 (2007) (discussing constitutional experimentation in the last two decades in Asia, arguing for Hong Kong’s Basic Law success and international recognition as well as Taiwan’s peaceful transition from authoritarianism to democracy).

¹¹ BUCK, KIRKHAM & THOMPSON, *supra* note 6, at 15–19.

¹² See Bruce Ackerman, *Good-bye, Montesquieu*, in COMPARATIVE ADMINISTRATIVE LAW 128–33 (Susan Rose-Ackerman and Peter L. Lindseth eds., 2010) (arguing for reconceptualization of the comparative law analysis framework that would move beyond Montesquieu’s orthodox reflections on the separation of powers); see also Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000) (arguing that there is no reason to assume the classical writers have exhausted all possible models and interpretations of the separation of powers doctrine; calling to seek new constitutional forms, transcending long-standing trinitarian principles).

plores particular aspects of the institutions, their powers and processes. First, the institutional function of the ombudsman will be considered, before examining whether and to what extent each jurisdiction adopts a more consolidated or more dispersed institutional model. The constitutional and legal status of each ombudsman will then be set out, followed by a discussion of their respective relationships with the executive branch. Finally, the procedural and substantive powers of each ombudsman will be explained, before an evaluation of their effectiveness and transparency.

2. OUTLINE OF PUBLIC SECTOR OMBUDSMEN IN GREATER CHINA

A preliminary outline of each public sector ombudsman is necessary before discussing the specific characteristics of each institution. This is also useful for establishing an initial context within which to set each institution, as a purely functional comparison may overstate the comparability of the institutions under review.¹³ The respective public sector ombudsmen of the four constituent jurisdictions of Greater China are: (i) the Ministry of Supervision (Mainland China); (ii) the Ombudsman (Hong Kong); (iii) the Commission Against Corruption (Macau); and (iv) the Control Yuan (Taiwan).

2.1. Mainland China

Formally, the Ministry of Supervision (監察部) (“MOS”) performs the state ombudsman function in Mainland China.¹⁴ Defined

¹³ See also Saunders, *supra* note 5, at 6; Vicki C. Jackson, *Methodological Challenges in Comparative Constitutional Law*, 28 PENN ST. INT'L L. REV. 319, 325-326 (2009) (noting that conducting a comparative analysis of constitutions at the functional level is essential for developing a better understanding of other systems).

¹⁴ There are particular challenges in determining practice within the Ministry of Supervision and its subsidiaries due to a lack of publicly available information, as another author has acknowledged. See Thomas Stephan Eder, “China”, in *ASIAN OMBUDSMAN INSTITUTIONS: A COMPARATIVE LEGAL ANALYSIS* 92 (Ursula Kriebaum & Gabriele Kucsko-Stadlmayer eds., 2016) (stating that “no information could be obtained” in relation to MOS practice). The same author made this observation with regard to practice within the State Bureau of Letters and Visits (“SBLV”), which also performs ombudswork. See *id.*, at 98. While the SBLV has been increasingly criticized in media and policy outlets for lack of effectiveness (and noting also that the SBLV is not presented by Mainland China as the state ombudsman), the MOS has received less scrutiny in this regard.

by law to be in charge of supervision throughout the jurisdiction,¹⁵ this is a government institution under the State Council with a number of subsidiary supervisory authorities at the provincial and local levels. The MOS was established in 1949 as the People’s Supervisory Commission, reconstituted with its present title in 1954, abolished in 1959 and re-established in 1987. It is a member of the Asian Ombudsman Association, but not the International Ombudsman Institute.¹⁶

Prior to the re-establishment of the MOS, the Central Commission for Discipline Inspection (“CCDI”) exercised disciplinary jurisdiction over members of the Communist Party of China (the “Party”) holding public office. The MOS was given jurisdiction over cases involving public officeholders, whether or not they were members of the Party. As most public officeholders were (and are) Party members, both organizations were often involved in the investigation process. The MOS was operationally merged with the CCDI in 1993, though the two retain separate organizational identities. The MOS and the CCDI have a shared website.¹⁷ The MOS, which has around 800 employees,¹⁸ has been described as a “nominal component” of the State Council, which is directly under the leadership of the CCDI and “may be regarded as part of it.”¹⁹ This would suggest that the Party is the principal agency of supervision, rather than the state as such. However, Andrew Wedeman has argued that annual reports show that discipline inspection committees under the CCDI largely supervise individuals, whilst the MOS largely supervises institutions.²⁰ This potentially differentiates the work of the MOS and

¹⁵ Law of the People’s Republic of China on Administrative Supervision (adopted at the 25th Meeting of the Standing Committee of the Eighth National People’s Congress, May 9, 1997; amended by Decision of the Standing Committee of the Eleventh National People’s Congress Revising the Law of the People’s Republic of China on Administrative Supervision, June 25, 2010) art. 7 [hereafter Law on Administrative Supervision (Mainland China)], <http://en.pkulaw.cn/Display.aspx?lib=law&Cgid=134401> [<https://perma.cc/B2JJ-ERJH>].

¹⁶ The Mainland Chinese and Taiwanese institutions do not share membership of the same organizations, perhaps for political reasons.

¹⁷ CCDI & MOS, <http://www.ccdi.gov.cn/> [<https://perma.cc/WWA4-FTPS>] (LAST VISITED Nov. 28, 2017) (in Chinese).

¹⁸ Eder, *supra* note 14, at 88.

¹⁹ Guo Yong, *The Evolvement of the Chinese Communist Party Discipline Inspection Commission in the Reform Era*, 12 THE CHINA REV. 1, 2 (2012).

²⁰ Andrew Wedeman, *The Intensification of Corruption in China*, 180 THE CHINA Q. 895, 900–01 (2004) (arguing that corruption intensified after the advent of reforms).

the CCDI to the extent that there may remain distinctiveness between their respective jurisdictions and scope of work. In that vein, it has elsewhere been stated that the MOS is the administrative equivalent of the CCDI,²¹ but that the CCDI may be regarded as the more powerful of the two agencies.²²

Nevertheless, whilst the Mainland presents the MOS to the region as its public sector ombudsman—the MOS, rather than the CCDI, being a member of the Asian Ombudsman Association—it will be seen that in practical terms the MOS is subordinate to the Party, which retains the upper hand in matters of administrative supervision. However, it is still the MOS that is designated as Mainland China's public sector ombudsman.

It is important to note that Mainland-wide reforms are on the horizon with regard to the mechanism for administrative supervision, with a Pilot Program being run in Beijing Municipality, Shanxi Province and Zhejiang Province.²³ Nevertheless, this Article describes the existing system for four main reasons. First, nationwide

²¹ Yasheng Huang, *Administrative Monitoring in China*, 143 THE CHINA Q. 828, 836 (1995).

²² *Id.*, at 837.

²³ See Decision Carrying out the Pilot Program of Reforming the National Supervision Mechanism in Beijing Municipality, Shanxi Province and Zhejiang Province (adopted at the 25th Session of the Standing Committee of the Twelfth National People's Congress on Dec. 25, 2016; effective Dec. 26, 2016) [hereinafter Pilot Program Decision (Mainland China)], <http://en.pkulaw.cn/display.aspx?cgid=287285&lib=law> [<https://perma.cc/EFZ3-G5RV>]. It is provided that supervision committees shall also be established at county, city, and municipal level within those regions. Introduced in the context of anti-corruption reforms, one of the main objectives appears to be centralization of the administrative supervision function. This is seen in the investment of powers in the new supervision committees to supervise "all civil servants," which would include members and non-members of the Party. At present, the CCDI supervises Party members, whereas the MOS has jurisdiction over public officeholders whether or not they are Party members. Whilst this is a significant legal change, it is unclear to what extent it represents a significant practical change, as the CCDI and MOS already work closely. Centralization is also seen in the absorption by the supervision committees of the relevant functions of the MOS subsidiaries and the NCPB subsidiaries in Beijing, Shanxi, and Zhejiang. The relevant existing legal provisions on administrative supervision "shall be temporarily adjusted or ceased" in Beijing, Shanxi, and Zhejiang to enable the new supervision committees to be established. It appears, nevertheless, that CCDI, MOS, SPP and NCPB subsidiaries will continue to exist with their own functions. See e.g., The State Council Information Office of the People's Republic of China, *China's New Supervision System to Cover All Public Authorities* (Nov. 9, 2016), <http://www.scio.gov.cn/32618/Document/1518891/1518891.htm> [<https://perma.cc/WK4K-WMGP>] (citing the objective of such reforms as making the existing supervision system more efficient,

reform has not yet been formally announced. Second, a sufficient level of detail on the Pilot Program is not yet available. Third, to the extent that the Pilot Program may serve as a blueprint for nationwide reform, there may be modifications applied when nationwide reforms are introduced. Finally, though the Pilot Program implements structural changes, it does not at this stage appear to be significantly different from the current system in terms of substance, powers and context.

2.2. *Hong Kong*

The Ombudsman (申訴專員公署) of Hong Kong was first established in 1989 as the Commissioner for Administrative Complaints, becoming known as the Ombudsman from 1996, and essentially constructed on the New Zealand and UK models of the ombudsman. It absorbed part of the work of the Redress System of the Office of Members of the Executive and Legislative Councils (“OMELCO”), previously known as the Office of the Unofficial Members of the Executive and Legislative Councils (“UMELCO”).²⁴ Whilst the Ombudsman is an individual, she is supported by an office of around 120 regular staff (including a Deputy Ombudsman and two Assistant Ombudsmen) and a panel of advisers, and is now established as a corporation sole. Her powers are statutory in nature, derived from the Ombudsman Ordinance (cap. 397). As will be explained, her jurisdiction is over instances of maladministration committed by specified public bodies in their exercise of administrative functions. She is not directly engaged in performing anti-corruption work. The Ombudsman is a member of both the Asian

and pointing out that the aim for deepened reform of the current supervision system is to build a national anti-graft organ under the leadership of the Party). It also suggests that the Pilot Program is intended to be a forerunner to nationwide reform. It would be unlikely that the Pilot Program would be declared a failure or having failed to have achieved its objectives in Beijing, Shanxi, and Zhejiang, so the Pilot Program is likely intended to resolve practical issues in the implementation of the reforms with the intention of pressing ahead with nationwide reform. There will, of course, be further developments to come.

²⁴ The Legislative Council Redress System now embodies the Redress System previously operated by UMELCO and OMELCO. Whilst the Legislative Council Redress System appears still to be capable of dealing with complaints about maladministration, the Ombudsman is the principal institution with jurisdiction over maladministration.

Ombudsman Association and the International Ombudsman Institute.

2.3. *Macau*

The Commission Against Corruption (澳門廉政公署, *Comissariado contra a Corrupção*) ("CCAC") performs the public sector ombudsman function in Macau. It was preceded by the High Commission Against Corruption and Administrative Illegality set up in 1992, with reasonable continuity in terms of its structure and staffing arrangements. The CCAC was established under Article 59 of the Basic Law of Macau, effective on the establishment of the Macau Special Administrative Region on 20 December 1999 on the transfer of sovereignty from Portugal to the PRC. It combines the dual function of anti-corruption work and ombudswork. The CCAC is headed by the Commissioner Against Corruption, who holds the status of a public authority.²⁵ He may nominate two deputy commissioners to be appointed and dismissed by the Chief Executive,²⁶ and appoint support staff and advisers.²⁷ The CCAC is a member of both the Asian Ombudsman Association and the International Ombudsman Institute.

2.4. *Taiwan*

The ombudsman function in Taiwan is performed by the Control Yuan (監察院).²⁸ It is one of five branches of the state, three of which (the Legislative Yuan, the Executive Yuan and the Judicial Yuan) broadly align with their western counterparts, and two of which (the

²⁵ Law No 10/2000, Organic Law of the Commission Against Corruption (as amended by Law No 4/2012) art. 19 [hereinafter Organic Law of CCAC (Macau)], <http://images.io.gov.mo/bo/i/2000/33/lei-10-2000.pdf> [<https://perma.cc/AAJ6-NXB8>].

²⁶ *Id.* art. 24, § 1.

²⁷ *Id.* arts. 29–30.

²⁸ See Yeong-kuang Ger, *Institutional Design and Development in the ROC (Taiwan): A Critical Review of the Thoughts of Sun Yat-sen and the Global Development of the Ombudsman System*, 4 MD. SERIES IN CONTEMP. ASIAN STUD. 1 (2011) (discussing the origins of the Control Yuan and its functions).

Control Yuan and the Examination Yuan) have their origins in traditional concepts of Chinese government and constitutional theory.²⁹ Created in 1931, and then officially established under the ROC Constitution in 1948, it has been traced to ancient supervisory functions performed in China.³⁰ The Control Yuan has its constitutional foundation in Article 90 and Additional Article 7 of the ROC Constitution, where it is designated as the highest supervisory body of the state with the powers of impeachment, censure and audit.³¹

The role played by the Control Yuan has substantially changed over time.³² For example, its members used to be elected by provincial and municipal councils, and in that context the Judicial Yuan issued a constitutional interpretation whereby the Control Yuan, along with the – now suspended – National Assembly and the Legislative Yuan, “from the perspective of the nature of their statuses and functions in the Constitution, should be considered as equivalent to the parliaments of democratic nations.”³³ However, when members came to be nominated by the President of the ROC and confirmed by the National Assembly, the Control Yuan was no

²⁹ See Herbert Han-Pao Ma, *The Chinese Control Yuan: An Independent Supervisory Organ of the State*, 4 WASH. U.L.Q. 401, 401–03 (1963) (explaining the historical origins of the Control Yuan).

³⁰ See Ger, *supra* note 28, at 4–14 (detailing historical, political traditions in China with emphasis on ancient supervisory functions).

³¹ See Const. of the Republic of China (Additional Articles) art. 7, § 1 (1947), https://www.ey.gov.tw/pda_en/Upload/WebArchive/4697/Constitution.pdf [<https://perma.cc/5YBX-PBG7>]. Impeachment and censure powers are exercised under the Control Act of the Republic of China (promulgated by Presidential decree, July 17, 1948, amended 1949–1992) [hereinafter Control Act (Taiwan)], <http://www.cy.gov.tw/ct.asp?xItem=3158&mp=21&CtNode=1734&returnctNode=1734&returnxItem=3139> [<https://perma.cc/YW42-A8GX>], whereas audit powers are exercised under the Audit Act (promulgated by Presidential decree, Nov. 11, 1998). The audit function is carried out by the Ministry of Audit (National Audit Office), which is a subordinate part of the Control Yuan. Previously there was an Audit Yuan, established in 1928, but this was brought under the Control Yuan in 1931. Today asset declarations by public officials and political donations are required to be reported to the Control Yuan. See Ger, *supra* note 28, at 38–39 (describing the Political Donations Act and the power it provides to the Control Yuan to control and supervise political candidates).

³² See Jiunn-Rong Yeh & Wen-Cheng Chang, *Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805, 822 (2011) (noting that the Control Yuan in 2011 played a “very different role” than in 1948).

³³ JUDICIAL YUAN INTERPRETATION NO. 76 (1957), http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=76 [<https://perma.cc/CJ8D-T3JZ>]; see also Ma, *supra* note 29, at 425 (stating the Control Yuan’s functions and powers were “similar to those important powers exercised by the parliaments of democratic nations”).

longer a central representative authority, and that interpretation was deemed no longer applicable.³⁴ The Control Yuan is not considered a quasi-judicial organization, but rather an ombudsman.³⁵ Whereas an ombudsman is often a defined person acting with the corporate support of an office or bureaucracy, the Control Yuan is a collegiate entity comprising twenty-nine members as mandated by the ROC Constitution.³⁶ This includes a president and a vice president. The Control Yuan is a member of the International Ombudsman Institute, but not the Asian Ombudsman Association.³⁷

3. INSTITUTIONAL FUNCTION

The institutions under review perform distinguishable functions, suggesting variance in the conception of the state ombudsman function, even in an area as politically, economically and (particularly in relation to Mainland China, Hong Kong and Macau) constitutionally associated as Greater China.

The Law on Administrative Supervision is the main piece of legislation regulating the supervisory work of the MOS. It was enacted to "guarantee the smooth implementation of government decrees, maintain administrative discipline, facilitate the building of an honest and clean government, improve administration and raise administrative efficiency."³⁸ The MOS has jurisdiction over departments under the State Council, public servants working in such departments, other persons appointed by the State Council and the departments under it, and the governments of provinces, autonomous regions and municipalities directly under the Central People's Government and the leading members of such governments.³⁹ It

³⁴ JUDICIAL YUAN INTERPRETATION NO. 325 (1993), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=325 [<https://perma.cc/R6JH-53JQ>].

³⁵ See Ger, *supra* note 28, at 15-16 (explaining why it is improper to refer to the Control Yuan as a quasi-judicial body).

³⁶ See Const. of the Republic of China (Additional Articles) art. 7, § 2.

³⁷ See *supra* note 16.

³⁸ Law on Administrative Supervision (Mainland China) art. 1.

³⁹ *Id.* art. 15.

also has the power to handle matters of supervision within the jurisdiction of subsidiary supervisory organs.⁴⁰ The MOS and its subsidiaries have jurisdiction over complaints about the police, together with the Supreme People's Procuratorate ("SPP"), its subsidiaries and internal police review agencies.⁴¹ The standard complaints mechanism against the police is through the Complaint Redress Department of the Ministry of Public Security.

The work of the MOS ranges from fighting corruption to promoting efficiency in public administration. It shall "organize, coordinate, examine, and guide the work related to promoting political affairs transparency and rectification of malpractice that damage[s] the interest of the general public."⁴² Its jurisdiction is over political, economic and administrative discipline. Political offences include insubordination, spreading lies and falsehoods, and revealing state or Party secrets. Economic offences include bribery, fraud and wasting public resources. Finally, administrative offences include bureaucracy, error in policy-making, dereliction of duty, negligence, abdication of authority, unsatisfactory management, indiscriminate use of authority for private gain, use of public funds for banquets, entertainment, gifts and holidays, and "degeneracy."⁴³

The focus of the Ombudsman of Hong Kong's work is maladministration, though this is defined only in general terms:

inefficient, bad or improper administration and, without derogation from the generality of the foregoing, includes –

(a) unreasonable conduct, including delay, discourtesy and lack of consideration for a person affected by any action;

(b) abuse of any power (including any discretionary power) or authority including any action which –

(i) is unreasonable, unjust, oppressive or improperly discriminatory or which is in accordance with a prac-

⁴⁰ *Id.* art. 17.

⁴¹ See People's Police Law of the People's Republic of China (adopted by the 12th Meeting of the Standing Committee of the Eighth National People's Congress on Feb. 28, 1995; revised Oct. 26, 2012), arts. 42, 46 [hereinafter Police Law (Mainland China)], <http://en.pkulaw.cn/display.aspx?id=13221&lib=law> [https://perma.cc/8FU9-XQP5].

⁴² Law on Administrative Supervision (Mainland China) art. 18.

⁴³ Wedeman, *supra* note 20, at 901-02.

tice which is or may be unreasonable, unjust, oppressive or improperly discriminatory; or

(ii) was based wholly or partly on a mistake of law or fact; or

(c) unreasonable, unjust, oppressive or improperly discriminatory procedures.⁴⁴

This is clearly not an exhaustive definition, and the Ombudsman takes maladministration to include – but not be limited to – abuse of power, delay, inaction, disparity in treatment, unfairness, error, wrong advice or decision, failure to follow procedures, faulty procedures, ineffective control, lack of response or reply to complainant or enquirer, negligence, omissions, selective enforcement, and poor staff attitude.⁴⁵ Notably, maladministration includes lawful and unlawful conduct and the Ombudsman has jurisdiction over both. Since unlawful conduct is susceptible to judicial review in the courts, there is potential for overlap between the jurisdiction of the Ombudsman and the courts.

The Ombudsman can investigate the administrative functions of an array of public bodies which are included in Schedule 1 of the Ombudsman Ordinance. These range from government departments and the Equal Opportunities Commission to the public broadcaster. It should be noted that the Ombudsman has the power to investigate the administrative functions of such bodies, which would appear to exclude judicial functions. Excluded from the ordinary jurisdiction of the Ombudsman are the Independent Commission Against Corruption (“ICAC”),⁴⁶ Hong Kong Police Force, Hong Kong Auxiliary Police Force, and Secretariat of the Public Service Commission. These bodies are subject to the scrutiny of the Ombudsman only in relation to the Code on Access to Information, a non-binding set of guidelines on freedom of information.⁴⁷

There are various restrictions on the Ombudsman’s power to investigate allegations of maladministration, including a prohibition

⁴⁴ Ombudsman Ordinance, Cap. 397, § 2(1) (Hong Kong) (1996) [hereinafter Ombudsman Ordinance (Hong Kong)], <https://www.elegislation.gov.hk/hk/cap397?p0=1&p1=1> [<https://perma.cc/5ZWP-UYUH>].

⁴⁵ See OFFICE OF THE OMBUDSMAN, THE OMBUDSMAN’S ROLE AND JURISDICTION: WHAT IS MALADMINISTRATION (2013), http://www.ombudsman.hk/en-us/about_this_office/role_and_jurisdiction.html [<https://perma.cc/TG6A-PF67>].

⁴⁶ See generally *infra* Sections 4, 5, and 6.

⁴⁷ Ombudsman Ordinance (Hong Kong), § 7(1)(b).

on the investigation of: matters affecting security, defense or international relations; the commencement or conduct of court or tribunal proceedings; contractual and commercial transactions (excluding tendering procedures); personnel matters; and government land decisions.⁴⁸

The CCAC of Macau is tasked with examining both legality and "administrative correctness."⁴⁹ Its main operational divisions are the Cabinet of the Commissioner, the Anti-Corruption Bureau, and the Ombudsman Bureau. The Ombudsman Bureau, which is comprised of an investigation arm and a research arm, is responsible for: receiving complaints and investigating allegations of administrative wrongdoing; protecting individual rights, freedoms, safeguards, and legitimate interests; contributing to fairness, transparency, justice and efficiency in public administration; making recommendations to correct unlawful and unfair acts; and recommending improvements to administrative procedures and systems.⁵⁰

The Anti-Corruption Bureau is principally focused on criminal activity, though cases involving both criminal and administrative offenses are coordinated with the Ombudsman Bureau.⁵¹ In addition to jurisdiction over public bodies, the CCAC's ombudsman oversight extends to companies which are under full or majority public ownership.⁵² Its specific anti-bribery oversight, however, extends to the private sector.⁵³ There is provision for limited ombudsman oversight of "relationships between private individuals involving a special relation of dominance, within the scope of the protection of rights, freedoms and safeguards."⁵⁴ Notably, the CCAC performs both an ombudsman and an anti-corruption func-

⁴⁸ *Id.* § 8 and sched. 2.

⁴⁹ Organic Law of CCAC (Macau) art. 4(5).

⁵⁰ *Id.* art. 3(1)(5); Admin. Reg. No. 3/2013, Amend. to Admin. Reg. No. 3/2009: Organization and Operation of the Commission Against Corruption (promulgated by Macau Special Admin. Region, Mar. 18, 2013), art. 23 [hereinafter Admin. Reg. No. 3/2013 (Macau)], http://bo.io.gov.mo/bo/i/2013/12/regadm03_cn.asp [<https://perma.cc/EK64-NAS7>].

⁵¹ Admin. Reg. No. 3/2013 (Macau) arts. 17(3), 22(3).

⁵² Organic Law of CCAC (Macau) art. 2-A(2).

⁵³ *Id.* arts. 2-A, 3(1)(1), 3(1)(3), 4(1); Law No. 19/2009, Prevention and Suppression of Bribery in the Private Sector (enacted by the Legis. Assembly), art. 7(1) (Macau), <http://www.ccac.org.mo/PrivSec/en/law/01.htm> [<https://perma.cc/7MWL-Q4U4>].

⁵⁴ Organic Law of CCAC (Macau) art. 2-A(2).

tion, whereas the Ombudsman of Hong Kong performs only the former.

The scope of the Taiwanese Control Yuan's jurisdiction is extensive. It has the power to investigate cases involving other Yuans, and its power of impeachment also extends over personnel of the Control Yuan.⁵⁵ The Control Yuan even has the power of impeachment over judges,⁵⁶ which might be taboo in other systems in the name of judicial independence. It does not, however, have the power of impeachment over the President, Vice President, and legislators. The President and Vice President are impeached on the initiative of the Legislative Yuan and adjudicated upon by the Grand Justices of the Judicial Yuan,⁵⁷ whereas legislators are accountable through democratic channels. Nevertheless, it seems that the Control Yuan may apply a lower intensity of review when investigating an elected official for impeachment, to avoid trespassing on the power of electors to recall that official from office through democratic mechanisms.⁵⁸

The Control Yuan was required to establish a Department of Supervisory Operations, Department of Supervisory Investigation, Department of Asset Declaration by Public Functionaries, Secretariat, General Planning Office and Information Management Office,⁵⁹ in addition to the National Audit Office.⁶⁰ It has a Special Committee on Anti-Corruption, though whilst this would primarily operate in the context of impeachment, censure and proposal of corrective measures; criminal investigation and prosecution of corruption is the responsibility of the Agency Against Corruption, which is part of the Ministry of Justice.

The Control Yuan has a Human Rights Protection Committee and can investigate alleged human rights violations. However, it

⁵⁵ *Id.* art. 7(4).

⁵⁶ *See, e.g., Ger, supra* note 28, at 22–23 (providing statistics and examples of judges who were impeached by the Control Yuan).

⁵⁷ *See* Const. of the Republic of China (Additional Articles) arts. 2(9)–(10). The Control Yuan formerly had the power to impeach the President and Vice President under Article 100 of the ROC Constitution.

⁵⁸ *See Ger, supra* note 28, at 24–26. A relatively recent example of an elected official being impeached is William Lai, Mayor of Tainan. Tsai Wen-Chu, *Control Yuan to Impeach Tainan Mayor Lai*, TAIPEI TIMES (Aug. 5, 2015), <http://www.taipeitimes.com/News/front/archives/2015/08/05/2003624642> [<https://perma.cc/C9SK-27ET>].

⁵⁹ Organic Law of the Control Yuan (amended May 19, 2010) art. 10.

⁶⁰ *Id.* art. 4.

has been proposed that a national human rights commission be established as it has been doubted whether the Control Yuan has the necessary capacity and focus to monitor human rights.⁶¹ Nevertheless, in 2015, the most recent year for which figures are available, over 82% of all complaints handled by the Control Yuan raised human rights issues.⁶²

The institutional functions of the public sector ombudsmen therefore exhibit different areas of emphasis. In Mainland China, the focus of the MOS is on administrative discipline and, perhaps increasingly, anti-corruption. The work of the Ombudsman of Hong Kong is concerned with addressing maladministration but not corruption,⁶³ whilst Macau’s CCAC is engaged in tackling both corruption and administrative malpractice. The Control Yuan of Taiwan, meanwhile, is primarily an institution of impeachment, censure, audit, and – to some extent – human rights protection. While there are areas of overlap between the work of these institutions, there are clear differences in emphasis.

4. CONSOLIDATED VERSUS DISPERSED INSTITUTIONAL MODELS

The Greater Chinese jurisdictions exhibit different approaches to whether ombudsman functions are consolidated in one or more closely associated institutions or distributed among a more dispersed array of bodies.

It might have been expected that Mainland China would display strong characteristics of a consolidated model of public sector ombudsman, given its tendency to centralized power and decision-making. However, it adopts a blend of consolidated and dispersed approaches. Ombudswork is undertaken by a range of institutions, with the MOS being one of four anti-corruption agencies in Mainland China, the others being the CCDI, the SPP (in which there is an Anti-Corruption Bureau), and the National Corruption Prevention

⁶¹ See Yu-jie Chen, *Human Rights in China-Taiwan Relations: How Taiwan Can Engage China*, 45 H.K.L.J. 565, 588 (2015) (discussing how “some experts have questioned whether the Control Yuan has the capacity and the focus that an institution dedicated to human rights matters should have”).

⁶² TAIWAN, REPUBLIC OF CHINA: ANNUAL REPORT OF THE CONTROL YUAN, 27 (2015), <http://www.cy.gov.tw/dl.asp?file-Name=671513451471.pdf> [<https://perma.cc/9L9K-DERT>].

⁶³ See *infra* Sections 4 and 6.

Bureau ("NCPB").⁶⁴ The Xinhua News Agency plays a role in gathering information related to corruption.⁶⁵ The system of complaint letters and visits affords a further opportunity for persons to express grievances with public officers and the conduct of public administration.⁶⁶ Complaints about judicial cases can be made to the Complaint Redress Department of the Supreme People's Court, whilst jurisdiction over police complaints is shared between the MOS, the SPP and its subsidiaries, internal police review agencies and the Complaint Redress Department of the Ministry of Public Security. This points to a dispersed institutional model in Mainland China, with a range of institutions involved in the performance of ombudswork.

However, there are also signs of consolidation in the current system. There is overlap in key personnel of the MOS, CCDI and NCPB.⁶⁷ The current practice is for the Minister of Supervision to simultaneously hold the position of Deputy Secretary of the CCDI and the position of Director of the NCPB.⁶⁸ Importantly, as the Minister of Supervision is the Deputy Secretary of the CCDI, he is in that

⁶⁴ See generally Jon S.T. Quah, *Hunting the Corrupt "Tigers" and "Flies" in China: An Evaluation of Xi Jinping's Anti-Corruption Campaign (November 2012 to March 2015)*, MD. SERIES IN CONTEMP. ASIAN STUD. 1, 4 (2015) ("After becoming the General Secretary of the CCP and Chairman of the Central Military Commission (CMC) at the 18th Party Congress in November 2012, Xi launched an anti-corruption campaign to eliminate the 'tigers and flies' who had become rich through bribery and patronage.").

⁶⁵ See John L. Thornton, *Long Time Coming: The Prospects for Democracy in China*, 87 FOREIGN AFF. 2, 7 (2008) (providing that one of the functions of the Xinhua News Agency "is to gather information on corruption nationwide and produce internal reports for the central leadership").

⁶⁶ See Regulation on Complaint Letters and Visits (promulgated by Decree No. 431 of the State Council of the People's Republic of China, Jan. 5, 2005, effective May 1, 2005) [hereinafter Regulation on Complaint Letters and Visits (Mainland China)], <http://www.china.org.cn/e-news/news050428-3.htm> [<https://perma.cc/2AUH-AVKS>]; see also *infra* Section 8.

⁶⁷ See 3 THE CHINA LEGAL DEVELOPMENT YEARBOOK: ON THE DEVELOPMENT OF RULE OF LAW IN CHINA 13, n.18 (Li Lin ed., 2009) (describing overlap of key personnel).

⁶⁸ The recent career experience of the current Minister of Supervision, Yang Xiaodu, appears largely to have been in the CCDI and other Party roles, perhaps indicating the tenor of his work and experience. This is in contrast to that of the Ombudsman of Hong Kong, Connie Lau Yin Hing, who previously served as Chairman of the UN Consumer Protection Rights Advisory Group and as the Chief Executive Officer of the Consumer Council in Hong Kong, her recent background generally being in public service. The Commissioner Against Corruption in Macau, Cheong Weng Chon, was previously Director of the Legal Affairs Bureau for 14

capacity subordinate to the Secretary of the CCDI, who is typically a member of the Politburo Standing Committee of the Party. This indicates the relationship between the state and Party machinery, including their actual or perceived order of precedence. Whilst the MOS and its subsidiaries are deemed to be subject to no interference from administrative departments, public organizations or individuals,⁶⁹ the degree of control, de facto or otherwise, the Party is capable of exerting over the MOS and its subsidiaries, means that the MOS must in practice be strongly influenced by the Party, whether or not this constitutes "interference." The Mainland Chinese picture is therefore a mixed approach of consolidated and dispersed models—a range of actors and institutions participating in the execution of ombudsman functions, but ultimately unified under the control of the Party. Further consolidation may be in store with the Pilot Program in Beijing Municipality, Shanxi Province, and Zhejiang Province, combining the functions of MOS subsidiaries and NCPB subsidiaries in the new supervision committees in those regions,⁷⁰ stated to "effectively strengthen the leadership of the Party."⁷¹

The two Special Administrative Regions display a strong degree of consolidation. The ombudsman function in Hong Kong is vested primarily in the Ombudsman, with anti-corruption functions vested in the ICAC, a separate institution. As ombudswork can be functionally distinguished from anti-corruption work, this represents a strong degree of consolidated power in the two institutions. The work of the Ombudsman (and ICAC) is complemented by parallel redress systems, such as the Legislative Council Redress System,⁷² and the Complaints Against Police Office with oversight by the Independent Police Complaints Council. However, primary oversight for maladministration in the public sector is vested in the Ombudsman.

In Macau, there is a greater degree of consolidation. Whilst there are parallel complaint redress systems in operation, including the

years. The President of the Control Yuan of Taiwan, Chang Po-ya, has a background primarily in public service, whilst the Vice President of the Control Yuan, Sun Ta-chuan, has a background in academia and public service.

⁶⁹ Law on Admin. Supervision (Mainland China) art. 3.

⁷⁰ See Pilot Program Decision (Mainland China), *supra* note 23.

⁷¹ *Id.*

⁷² Formerly known as the Redress System of UMELCO and OMELCO. See *supra* Section 2.2.

Public Information Centre and the Macau Security Forces Disciplinary Committee,⁷³ the CCAC is vested with both ombudsman and anti-corruption functions, unlike its Hong Kong counterpart where these have been separated into different institutions. In addition, whereas the Ombudsman of Hong Kong is a statutory creation, the CCAC enjoys a constitutional foothold and therefore has greater formal and structural entrenchment than the Ombudsman of Hong Kong.⁷⁴

Institutional consolidation is also high in Taiwan, all the more so considering the Control Yuan has a comparatively strong degree of institutional independence and constitutional equality with other branches of the state.⁷⁵ The Control Yuan is not the sole performer of ombudsman and anti-corruption functions in Taiwan. When members have made a determination of impeachment, the case is turned over to a competent disciplinary organ for action, typically a commission of the Judicial Yuan.⁷⁶ Importantly, however, the Control Yuan is vested with the power of impeachment – usually found in legislatures – which, apart from formal consequences for the impeached official, also carries significant reputational indictment. It therefore represents the investment of considerable constitutional and political authority in an ombudsman institution. Furthermore, the Control Yuan is the only institution under review that is also vested with an active role in the protection of human rights.

There is a broad pattern of consolidated power across the Greater Chinese jurisdictions, but this takes different forms. In Taiwan, consolidation occurs through the medium of a hierarchically equal constitutional footing for the Control Yuan, while in Macau it is seen through the unification of the ombudsman and anti-corruption functions in the CCAC, which is given a specific constitutional foothold. In Hong Kong, the ombudsman and anti-corruption functions are separated, and then vested in two dedicated institutions, namely the Ombudsman and the ICAC, respectively. Meanwhile, Mainland China opts for an ostensibly dispersed model, with a range of different actors and institutions participating in ombudswork and anti-corruption work, but operating within a system of de

⁷³ Asian Ombudsman Association, *Fact Sheet: Commission Against Corruption, Macau*, 6 (2010) [hereinafter Asian Ombudsman Association (Macau)].

⁷⁴ See *infra* Sections 5 and 6.

⁷⁵ *Id.*

⁷⁶ For a further discussion on process and substantive powers of the Control Yuan, see *infra* Section 7.

facto consolidation under the overarching authority of the Party. Whereas consolidation is formally institutionalized through constitutional or legislative instruments in Hong Kong, Macau, and Taiwan, it is discerned in Mainland China through the underlying political authority of the ruling party.

5. CONSTITUTIONAL AND LEGAL STATUS

The ombudsman institutions enjoy different constitutional and legal statuses. The most firmly established is the Control Yuan of Taiwan, which is entrenched by Additional Article 7 of the ROC Constitution. While this does not spell complete autonomy from the other branches,⁷⁷ its erection as a formally equal institutional pillar of the state gives it a solid constitutional and legal foundation. The only other institution to enjoy an express constitutional foothold is the CCAC of Macau, for which there is specific provision in the Basic Law of Macau.⁷⁸ This, again, does not mean that it functions with complete autonomy from other state institutions,⁷⁹ but it does provide for a formal constitutional guarantee of independence and means that it could not be abolished by ordinary legislation of the Macanese legislature.

By contrast, the Ombudsman of Hong Kong enjoys no such constitutional entrenchment, as it is founded on ordinary legislation. Whilst there is no obvious reason why there should be political appetite to do so, this means that the Ombudsman can be modified or abolished by ordinary legislation of the Legislative Council in Hong Kong. The ICAC is constitutionally entrenched in the Basic Law of Hong Kong,⁸⁰ just as is the CCAC of Macau; however, the ICAC is tasked solely with an anti-corruption function, rather than the performance of broader ombudswork. It is nevertheless worth acknowledging that there are questions as to whether entrenchment in the Basic Law of either Hong Kong or Macau is "real" constitutional entrenchment, given the contested nature of the constitutional status of the Basic Law of each Special Administrative Region.

⁷⁷ For a further discussion on the Control Yuan's relationship with the executive branch, see *infra* Section 6.

⁷⁸ Basic Law of Macau art. 59.

⁷⁹ For a further discussion on the CCAC's relationship with the executive branch, see *infra* Section 6.

⁸⁰ Basic Law of Hong Kong art. 57.

No specific constitutional provision is made in Mainland China for the MOS. Accordingly, the MOS can be reorganized, redefined, or abolished by the NPC. The Mainland Chinese and Hong Kong ombudsman institutions therefore enjoy no constitutional entrenchment, unlike their Macanese and Taiwanese counterparts.

6. RELATIONSHIP WITH EXECUTIVE BRANCH

One of the structural features that can assist the effectiveness of an ombudsman and public confidence that the ombudsman is an independent monitor of public administration, is the extent to which it is appropriately distanced from the executive.⁸¹ There are essentially three ways in which the ombudsman can be related to the executive: (i) as part of the executive, (ii) reliant on, but not part of, the executive, and (iii) neither reliant on, nor part of, the executive.

Of the four jurisdictions under review, only in Mainland China is the ombudsman function fulfilled by a government ministry with little or no attempt made to distance the performance of that function from the executive. This system is not exclusive to Mainland China – in Japan, for example, the state ombudsman function is also performed by a branch of the executive, namely the Administrative Evaluation Bureau of the Ministry of Internal Affairs and Communications. Membership of the executive does not automatically erode the basis on which the ombudsman acts nor its effectiveness in monitoring public administration. What matters are the implications of the ombudsman being part of the executive in the context of a specific system.

In the context of Mainland China, a particular structural concern is the sharing or blurring of the ombudsman function between the MOS and the CCDI. It is unclear whether the supervisory function is performed by a state institution proper or by the Party. As noted, the practice is for the Minister of Supervision to also serve as Deputy Secretary of the CCDI and as Director of the NCPB. The overlap of state and Party function and personnel is unsurprising considering the effective monopoly of the Party over state machinery, and the phenomenon of parallel state and Party competence is seen else-

⁸¹ For a further discussion on effectiveness and transparency, see *infra* Section 8.

where such as in the Central Military Commission and in local government.⁸² It could even be argued that, given the political realities of Mainland China, involvement of the Party machinery in administrative supervision might strengthen the ombudsman function.

However, the effective merger of the MOS and CCDI subsidiaries has been asymmetric across different local areas.⁸³ In addition, structurally, the investment of the ombudsman function in a government ministry, the functions of which are not clearly distinguishable from those of a parallel Party body, does not inspire confidence that monitoring would be conducted independently of executive and political constraints. It may well be designed in that way precisely to avoid the possibility of independent monitoring. In reality, the CCDI may be the dominant supervisor, as has been suggested by other commentators,⁸⁴ in which case the foundation of the MOS as the state ombudsman institution is eroded—yet the MOS is still designated by Mainland China as the national ombudsman. There also seems to be a lack of clarity between the investigation channels of each body, which muddies the waters between administrative and political supervision.⁸⁵

The Ombudsman of Hong Kong and the CCAC of Macau fall into the second category: they are reliant on, but not (formally) part of, the executive. The Ombudsman is generally regarded as distinct from the legislature, executive, and judiciary; though, if one had to functionally align the institution with one of the branches of state, it would be the executive. While she is appointed and removed by the Chief Executive for a renewable period of five years,⁸⁶ it is provided

⁸² See, e.g., Susan V. Lawrence, *China's Political Institutions and Leaders in Charts*, CONG. R. SERV. (Nov. 12, 2013) <https://www.fas.org/sgp/crs/row/R43303.pdf> [<https://perma.cc/4857-KVZC>] (report intended to assist in identifying “where political institutions and individuals fit within the broader Chinese political system and to identify which Chinese officials are responsible for specific portfolios”); see also WEN-CHEN CHANG ET AL., *CONSTITUTIONALISM IN ASIA: CASES AND MATERIALS* 121–24, 173–77 (2014) (outlining the organization of the Chinese Communist Party).

⁸³ See Randall Peerenboom, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 417 (2002) (noting that some cities merged both personnel and workload, while others attempted to maintain some degree of separation). This may be less of an issue if the Pilot Program resolves structural inconsistencies.

⁸⁴ See *supra* Section 2.1.

⁸⁵ See Larry C. Backer & Keren Wang, *The Emerging Structures of Socialist Constitutionalism with Chinese Characteristics: Extra-Judicial Detention and the Chinese Constitutional Order*, 23(2) *PAC. RIM L. & POL'Y J.* 251, 281–84, 336–37 (2014) (pointing out that, in practice, the MOS and the CCDI are administered essentially by the same personnel).

⁸⁶ Ombudsman Ordinance (Hong Kong), §§ 3(3), (3A).

that the Ombudsman is not to be regarded as a servant or agent of the Government, or as enjoying any status, immunity, or privilege of the Government.⁸⁷ In addition, the Ombudsman is prohibited from holding any other office of profit, or from engaging in any other occupation for reward, without the specific approval of the Chief Executive.⁸⁸ She may resign from office at any time, or can be removed by the Chief Executive with the approval by resolution of the Legislative Council in the event of an inability to discharge the functions of her office or misbehavior.⁸⁹

Nevertheless, the Ombudsman is financially reliant on the executive, and must submit an annual report to the Chief Executive for tabling in the Legislative Council.⁹⁰ This includes a statement of accounts and an auditor's report, which is made freely available on the internet for public scrutiny. In practice, the Ombudsman is regarded as operating quite independently of the executive, and the anecdotal evidence is that she is not subject to political pressure. However, the institution remains reliant on the executive thus maintaining a degree of structural proximity.

The position is similar in Macau, where the Commissioner Against Corruption is appointed by the Central People's Government on the nomination of the Chief Executive,⁹¹ and is removed in the same way.⁹² Unlike for the Ombudsman of Hong Kong, there is no provision that the Commissioner must be unable to fulfil his duties or have misbehaved prior to being removed from post. However, he is suspended of his functions if he is served with a decision of indictment or a decision specifying a date for a trial hearing for the intentional commitment of a crime.⁹³ He may resign from post by providing written notice to the Chief Executive.⁹⁴ The Commissioner may not engage in any other public or private activity, whether remunerated or not, nor may he hold any position in a trade union or political organization, without the authority of the Chief Executive where this would involve exercising a public function

⁸⁷ *Id.* § 6B(1).

⁸⁸ *Id.* § 4.

⁸⁹ *Id.* § 3(4).

⁹⁰ *Id.* Sch. 1A, § 3(4). Funding is appropriated by the Legislative Council, *id.* §§ 3(6), 6(3); Sch. 1A, § 1.

⁹¹ Organic Law of CCAC (Macau) art. 17.

⁹² *Id.* art. 23(2).

⁹³ *Id.* art. 23(1).

⁹⁴ *Id.* art. 23(3).

contributing to the pursuit of the public interest.⁹⁵

A notable difference between the two Special Administrative Regions is that the Macau Commissioner is formally appointed by the Central People’s Government of the PRC, whereas the Ombudsman of Hong Kong is formally appointed by the Chief Executive of Hong Kong. However, it should be borne in mind that, in Macau, the ombudsman and anti-corruption functions are vested in a single agency, whereas in Hong Kong the anti-corruption body is the separate ICAC (i.e., the Commissioner Against Corruption in Hong Kong). Indeed, the head of the ICAC is, like his counterpart in Macau, appointed by the Central People’s Government on the nomination of the Chief Executive⁹⁶—though he does not exercise the ombudsman function.

Another notable difference that supports the independence of the CCAC from the executive—at least formally—is that it is provided for in the Basic Law of Macau. In particular, Article 59 of the Basic Law of Macau states that the CCAC “shall function independently.”⁹⁷ However, Article 59 also provides that the Commissioner “shall be accountable to the Chief Executive.”⁹⁸ Accordingly, despite its constitutional entrenchment, the CCAC is accountable to the Chief Executive in Macau even though executive agencies are essentially accountable to the CCAC in terms of their administrative standards and practices. The CCAC must submit an annual report to the Chief Executive to be published in the Official Gazette of Macau⁹⁹ and the report is also made available on the CCAC website. The CCAC’s income comes from the Government budget.¹⁰⁰

The Control Yuan is the most structurally independent from the executive of the four jurisdictions under review. It is clearly not part of the executive, but an arm of the state in its own right under the quinqupartite structure of the Taiwanese constitution.¹⁰¹ It is also

⁹⁵ *Id.* art. 18.

⁹⁶ Basic Law of Hong Kong art. 48(5).

⁹⁷ Basic Law of Macau art. 59; Organic Law of CCAC (Macau) art. 2.

⁹⁸ Basic Law of Macau art. 59.

⁹⁹ Organic Law of CCAC (Macau) art. 15(1).

¹⁰⁰ Administrative Bylaw No. 3/2009, Organization and Operation of the Service of the Commission against Corruption (Macau) art. 27, <http://www.ccac.org.mo/index.php/en/about/related-laws?id=1247> [<https://perma.cc/Q4S7-K3MR>]; Organic Law of CCAC (Macau) art. 40.

¹⁰¹ See Const. of the Republic of China, (Additional Articles) art. 7 (establishing the Control Yuan as an arm of the state with the power to impeach, censure, and audit other institutions); see also *supra* Section 2.4.

the most firmly entrenched in constitutional terms by Additional Article 7 of the ROC Constitution. Members are nominated and appointed by the President of the ROC with the consent of the Legislative Yuan, each member serving for a period of six years.¹⁰² They must have a demonstrated period of service in designated professions or areas of service.¹⁰³ The move away from the previous system, in which members were elected, at least signaled a move toward a system where members could not be openly partisan. Indeed, members are required to be without party affiliation and to independently exercise their powers and discharge their responsibilities in accordance with law.¹⁰⁴ Nevertheless, appointments to the Control Yuan are not without political controversy.¹⁰⁵

Notwithstanding its structural independence, the Control Yuan budget still comes from the Government and is approved by the Legislative Yuan, thus it is not a completely autonomous institution. As noted, members of the Control Yuan are appointed by the President of the ROC (part of the executive, and not subject to the jurisdiction of the Control Yuan) with the consent of the Legislative Yuan, and unlawful acts of the Control Yuan are justiciable in the Judicial Yuan. Therefore, taken as a whole, the Control Yuan is subject to the usual system of checks and balances.¹⁰⁶

It can therefore be seen that the ombudsman is part of the executive—and accountable to the ruling party—in Mainland China, but is to varying degrees separate from the executive, though not entirely independent of it, in Hong Kong, Macau, and Taiwan. The most structurally independent of the institutions is the Control Yuan of Taiwan.

¹⁰² *Id.* art. 7(2).

¹⁰³ Organic Law of the Control Yuan art. 3.1.

¹⁰⁴ Additional Articles art. 7(5).

¹⁰⁵ See e.g., Jiunn-Rong Yeh, *Presidential Politics and the Judicial Facilitation of Dialogue Between Political Actors in New Asian Democracies: Comparing the South Korean and Taiwanese Experiences*, 8(4) INT'L J. CONST. L. 911, 936 (2010) (recounting a significant legislative boycott in 2004 wherein President Chen's nominations for Control Yuan commissioners were blocked by the KMT legislative majority for a year until the Constitutional Court ruled that the legislature must exercise its consent power in a timely manner).

¹⁰⁶ See CHANG ET AL., *supra* note 82, at 181–84.

7. PROCESS AND SUBSTANTIVE POWERS

There are similarities among the main aspects of institutional procedure. Each of the ombudsmen under review can, for example, receive complaints from members of the public, private companies, and government bodies. None of the institutions is first required to have complaints filtered by legislators (though a legislative filter was in place in Hong Kong until 1994), and all have broadly comparable powers to obtain evidence and summon witnesses in the process of their investigations. Importantly, all are under a formal duty of secrecy or confidentiality in relation to the complainant. All four institutions have the power to make their reports public, and all have internal procedures to review their own decisions.

There are, however, some procedural differences between the institutions. For instance, the Ombudsman of Hong Kong is the only institution that does not have the power to process anonymous complaints. In addition, whereas there is a specific provision that enacts a penalty for failure to cooperate with the investigations of the Ombudsman or CCAC, there is no such provision for failure to cooperate with the investigations of the MOS or the Control Yuan. None of the four institutions' decisions is subject to external review – unless there are grounds for alleging that the institutions themselves have acted unlawfully – though, in Mainland China, the decisions of lower supervisory organs are subject to external review by hierarchically superior organs. This does not, however, extend to the MOS itself, as it is the highest organ of supervision in the state.

The substantive powers of the bodies under review bear significant similarity based primarily on a power to make recommendations. The Ombudsman, CCAC, and Control Yuan each have no power to award remedies and no power to impose penalties on investigated bodies or persons. Both the Ombudsman and CCAC have no power to compel an investigated body to implement their respective recommendations, whilst the Control Yuan has an indirect power to do so. Though the MOS is not radically different in terms of its substantive powers, it has an indirect power to award remedies. It also has the power to impose a penalty on an investigated person and a partial power to impose a penalty on an investigated body in the form of a notice of criticism.

Dealing first with Mainland China, members of the public can submit a complaint to the MOS. The Law on Administrative Supervision requires supervisory organs to institute a reporting system,

whereby citizens shall have the right to make accusations or expositions against any administrative organ or public servant, or any persons appointed by state administrative organs, who are alleged to have violated rules of administrative discipline.¹⁰⁷ In addition, complaints can be made by legal persons (including companies) and "other organizations," which would apparently include other government and public bodies.¹⁰⁸ Following the 2010 amendment to the Law on Administrative Supervision, there is now express provision for the submission of anonymous complaints, and a duty of confidentiality is placed on supervisory organs with regard to the rights, interests, and information relating to informants.¹⁰⁹ Complaints can be submitted to the MOS by telephone, fax, e-mail, or the MOS website.

The MOS also conducts its own monitoring and inspection, and can perform investigations on that basis. It even has staff working in other government departments to monitor their administration.¹¹⁰ The MOS has been said to require approval from the Premier or Vice Premiers to investigate ministerial or provincial level officials, but is capable of initiating investigations of officials at the division or county level without such approval.¹¹¹

A case undergoes preliminary investigation, and can then be accepted for further investigation.¹¹² The MOS has the power to obtain documents, accounts and other evidence, and to require departments and individuals under supervision to explain or clarify questions relevant to the supervision.¹¹³ It also has the power to order

¹⁰⁷ Law on Administrative Supervision (Mainland China) art. 6.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* art. 6, 46; Regulations for the Implementation of the Law of the People's Republic of China on Administrative Supervision, Adopted at the 63rd Executive Meeting of the State Council (Sept. 6, 2004) art. 3 [hereinafter Implementation Regulations of Law on Administrative Supervision (Mainland China)], <http://en.pkulaw.cn/display.aspx?cgid=55462&lib=law> [<https://perma.cc/J346-3XHL>].

¹¹⁰ See Huang, *supra* note 21, at 836.

¹¹¹ *Id.*, at 837.

¹¹² Law on Administrative Supervision (Mainland China) arts. 30-32; Implementation Regulations of Law on Administrative Supervision (Mainland China) art. 29.

¹¹³ Law on Administrative Supervision (Mainland China) arts. 19-20; Implementation Regulations of Law on Administrative Supervision (Mainland China) art. 10.

departments and individuals under investigation not to sell or transfer property relevant to the case.¹¹⁴ Administrative departments and authorities can be required to render assistance in the course of handling cases involving violation of laws and rules of administrative discipline.¹¹⁵ Organizations and individuals within the jurisdiction of the supervisory organ have no power to refuse to undergo supervision nor to obstruct supervisors in the performance of their official duties.¹¹⁶ Nevertheless, departments and persons under supervision have a right to make representations in the course of an investigation.¹¹⁷ Cases found not to be within the jurisdiction of the supervisory organ are transferred to the body with authority to handle them, and criminal cases are transferred to the relevant judicial body.¹¹⁸

The MOS may decide that the allegations in a complaint are not adequately supported by facts or that the offence is minor, and either close the case or subject the investigated party to “criticism” and “education.”¹¹⁹ If the MOS determines that there has been wrongdoing meriting punishment,¹²⁰ disciplinary proceedings begin. There can be a public hearing where the case is deemed sufficiently important, difficult, or complicated.¹²¹ In the case of public officials who are also Party members, there can also be a recommendation that a discipline inspection committee under the CCDI impose Party

¹¹⁴ Law on Administrative Supervision (Mainland China) art. 20(2); Implementation Regulations of Law on Administrative Supervision (Mainland China) arts. 12–13.

¹¹⁵ Law on Administrative Supervision (Mainland China) art. 22; Implementation Regulations of Law on Administrative Supervision (Mainland China) arts. 17–20.

¹¹⁶ Law on Administrative Supervision (Mainland China) art. 13.

¹¹⁷ *Id.* art. 34.

¹¹⁸ *Id.* art. 44.

¹¹⁹ Wedeman, *supra* note 20, at 904.

¹²⁰ See Law on Administrative Supervision (Mainland China) art. 5 (“In supervision, education shall be combined with punishment, and supervision and inspection shall be combined with system construction.”). Prior to the 2010 amendment, there was no reference to “system construction.” Cf. Law of the People’s Republic of China on Administrative Supervision (adopted at the 25th Meeting of the Standing Committee of the Eighth National People’s Congress, May 9, 1997), <http://en.pkulaw.cn/display.aspx?id=2b401469c8ac7f44&lib=law> [<https://perma.cc/QK9U-VB2B>].

¹²¹ Asian Ombudsman Association, *Fact Sheet: Ministry of Supervision, People’s Republic of China*, 6 (2010) [hereinafter Asian Ombudsman Association (Mainland China)].

disciplinary sanctions, either in addition to, or instead of, administrative sanctions imposed under the MOS.¹²²

Supervisory decisions and recommendations must be conveyed in writing to the units or persons concerned.¹²³ Administrative sanctions include a warning, recording of demerit, recording of serious demerit, demotion, dismissal, or discharge.¹²⁴ Major supervisory decisions and recommendations of subsidiary organs must be submitted to the level of government to which the supervisory organ belongs, and to the supervisory organ at the next highest level, for consent. Major supervisory decisions and recommendations of the MOS must be submitted to the State Council for consent.¹²⁵

The MOS has the power to order departments and individuals to cease violating laws, rules, regulations, and rules of administrative discipline,¹²⁶ and to recommend suspension of duty to competent authorities for persons suspected of seriously violating rules of administrative discipline.¹²⁷ A supervisory decision must be implemented by the relevant departments and persons, whilst supervisory recommendations must be adopted unless there are justifiable reasons not to do so.¹²⁸ Corrective recommendations can be made

¹²² See Wedeman, *supra* note 20, at 904.

¹²³ Law on Administrative Supervision (Mainland China) art. 36.

¹²⁴ *Id.* art. 24(1); see also Law of the People's Republic of China on Public Servants (adopted at the 15th Meeting of the Standing Committee of the Tenth National People's Congress, Apr. 27, 2005) art. 56, http://english.gov.cn/archive/laws_regulations/2014/08/23/content_281474983042347.htm [<https://perma.cc/D6BT-2PS2>] (“[D]isciplinary actions include: warning, recording of a demerit, recording of a serious demerit, demotion, removal from office and discharge from public employment.”).

¹²⁵ Law on Administrative Supervision (Mainland China) art. 35. “Major” decisions and recommendations are purportedly defined in the Implementation Regulations of Law on Administrative Supervision (Mainland China) art. 37 as those dealing with “consequential matters for inspection and handling consequential or complicated cases.” Definitions of these terms could potentially be found in the Implementation Regulations of Law on Administrative Supervision (Mainland China) arts. 28, 30, though they refer to different sections of the Law on Administrative Supervision.

¹²⁶ Law on Administrative Supervision (Mainland China) art. 19(3); Implementation Regulations of Law on Administrative Supervision (Mainland China) art. 19(3).

¹²⁷ Law on Administrative Supervision (Mainland China) art. 20(4); Implementation Regulations of Law on Administrative Supervision (Mainland China) art. 20(4).

¹²⁸ Law on Administrative Supervision (Mainland China) arts. 25, 36; Implementation Regulations of Law on Administrative Supervision (Mainland China) art. 25.

in a wide variety of situations, including where a party refuses to enforce laws or rules; where decisions, decrees, or instructions should be modified or revoked; where the interests of the state, collective, or citizen are impaired and remedial measures need to be taken; where a party is ordered to make an open apology, cease to perform their duties to accept inspection, resign, or be dismissed; in “other situations wherein efforts shall be made to improve a diligent and clean government system”; and “other situations for which a supervisory recommendation is needed.”¹²⁹ A notice of criticism can also be circulated against departments or persons who violate provisions of the Law on Administrative Supervision.¹³⁰ The MOS does not appear to have the power to award remedies directly, but through its recommendations can stipulate “remedial measures” which include elimination of ill effects, rehabilitation of reputation, extension of apology, and compensation for loss.¹³¹

A person aggrieved by the decision of a supervisory organ may seek review by that organ, and then by the next highest supervisory organ.¹³² The reviewing organ may hold a hearing and may make its decision public.¹³³ A higher supervisory organ reviewing such a decision or recommendation may modify or revoke the decision, or recommend to the lower supervisory organ to modify or revoke it.¹³⁴ There is, however, no option for higher review of decisions and recommendations of the MOS, as it is the most senior supervisory organ in the state apparatus; nor does the MOS have the power to review decisions taken by supervisory organs at the county level, as these are subject to review at the provincial level (though decisions of supervisory organs at the provincial level are subject to review by the MOS).¹³⁵

In Hong Kong, there are two ways in which an investigation can be initiated by the Ombudsman. The first is upon the receipt of a complaint from a natural or legal person.¹³⁶ Complaints may be

¹²⁹ Law on Administrative Supervision (Mainland China) art. 23.

¹³⁰ *Id.* art. 45.

¹³¹ Implementation Regulations of Law on Administrative Supervision (Mainland China) art. 23.

¹³² Law on Administrative Supervision (Mainland China) arts. 38, 40; Implementation Regulations of Law on Administrative Supervision (Mainland China) art. 39.

¹³³ Asian Ombudsman Association (Mainland China), *supra* note 121, 6.

¹³⁴ Law on Administrative Supervision (Mainland China) arts. 39, 41.

¹³⁵ *Id.* art. 42.

¹³⁶ The Ombudsman Ordinance (Hong Kong), § 7(1).

made via an online complaint form, post, telephone, or in person. They cannot be made anonymously.¹³⁷ The Ombudsman has discretion on whether to fully investigate a complaint¹³⁸ and can continue or discontinue an investigation even if the complainant withdraws the complaint.¹³⁹ The second way in which an investigation can be initiated is on the Ombudsman's own motion by way of a "direct investigation."¹⁴⁰

The Ombudsman has the power to regulate procedure as she thinks fit, and has the power to obtain information and documents, and to make such inquiries, as she thinks fit.¹⁴¹ She also has the power to obtain evidence and summon witnesses.¹⁴² There is significant flexibility in terms of formal procedural requirements, but in practice investigations are conducted by a specific team, each with one or more areas of specialization and each headed by a Chief Investigation Officer. More senior staff, including the Deputy Ombudsman or Assistant Ombudsmen, may become involved in difficult or complex cases. Staff and advisers of the Ombudsman are under a duty of secrecy in relation to matters arising from any investigation or complaint, and coming to their actual knowledge in the exercise of their functions. However, this is qualified by permitting disclosure of relevant matters in the course of proceedings for an offense under the Ombudsman Ordinance, reporting evidence of any crime to such authority as they consider appropriate, and disclosing to a person any matter which is necessary to be disclosed for the purposes of investigating a complaint or deciding whether an investigation should be undertaken, continued, or discontinued.¹⁴³ It may be noted that a duty of secrecy potentially sets a higher standard than a duty of confidentiality. Proceedings are almost always conducted without a hearing, though the Ombudsman has the power to hold a hearing if she thinks fit to do so.¹⁴⁴

At the conclusion of an investigation, the Ombudsman may submit a report to the head of the affected organization. The report may recommend that a particular remedy be given to the complainant or

¹³⁷ *Id.* § 10(1)(b).

¹³⁸ *Id.* § 9.

¹³⁹ *Id.* § 11.

¹⁴⁰ *Id.* § 7(1).

¹⁴¹ *Id.* § 12(3).

¹⁴² *Id.* § 13.

¹⁴³ *Id.* § 15.

¹⁴⁴ *Id.* § 12(5).

may make other recommendations.¹⁴⁵ For example, it might be recommended that policies, procedures, or practices are modified to avoid maladministration in the future. It might be recommended that additional training is given to staff or that targets or objectives are set. In certain circumstances, the Ombudsman may submit the report and recommendations to the Chief Executive.¹⁴⁶ If the Ombudsman considers that a serious irregularity or injustice has occurred, she may make a report to the Chief Executive which must thereafter be laid before the Legislative Council.¹⁴⁷ This offers an avenue for political accountability in the event of serious irregularity or injustice related to maladministration.

Importantly, however, the Ombudsman has no power to grant a remedy or to compel an investigated body to implement any changes. In principle, the head of the investigated organization can ignore her recommendations. In addition to the possibility of political accountability outlined above, however, the Ombudsman can publish a report on an investigation (without disclosing the identity of individuals) which affords the public an opportunity to learn of instances of maladministration and consequent findings. As such, it may not always be easy for recommendations to be ignored by the head of the investigated organization as there is an avenue for both executive and public scrutiny.

In addition to the Ombudsman’s power of investigation, her office can address a complaint by way of mediation where the parties so agree and where the maladministration is not serious.¹⁴⁸ In practice, there is also the option of initiating an “internal complaint handling” mechanism whereby, with the complainant’s consent, the Ombudsman refers the complaint to an organization for investigation and direct reply to the complainant.¹⁴⁹

There is no power of external merits review of the Ombudsman’s determinations. A request for review can be submitted by a disappointed complainant, but this is processed internally and will

¹⁴⁵ *Id.* § 16(1).

¹⁴⁶ *Id.* § 16(1)–(3).

¹⁴⁷ *Id.* § 16(5)–(6).

¹⁴⁸ *Id.* § 11B; see also Asian Ombudsman Association, *Fact Sheet: Ombudsman of Hong Kong*, 3 (2010) [hereinafter Asian Ombudsman Association (Hong Kong)], http://ofomb.ombudsman.hk/doc/yr22/pdf/en/2010_E_Ombudsman%20Review.pdf [<https://perma.cc/Y2U3-MCKU>].

¹⁴⁹ Asian Ombudsman Association (Hong Kong), 3.

not necessarily result in modification of the original decision. Statistics show that the original decision is varied only in a small percentage of requests for review;¹⁵⁰ however, this is not necessarily indicative of deficiency in the review process of the Ombudsman. The same statistics disclose that only a very small percentage of complainants seek a request for review. There can be a range of reasons for this, including satisfaction with the original decision, insufficient confidence in the likelihood of successful review, and being unaware that review can be requested. If the Ombudsman acts unlawfully, her decision or conduct is of course susceptible to judicial review.

In Macau, members of the public can submit complaints to the CCAC by telephone, fax, e-mail, post, or in person.¹⁵¹ The CCAC also has the power to initiate its own investigations. When a complaint is received, it undergoes preliminary analysis. If categorized as showing signs of corruption, it is allocated for preliminary investigation by the Anti-Corruption Bureau and is thereafter subject to a full investigation or filed as not fit for investigation. At the conclusion of a full investigation, the case is referred to the Public Prosecutions Office or filed on the basis of insufficient evidence.

If showing signs of administrative deficiency, a case is allocated for preliminary investigation by the Ombudsman Bureau. Again, if not fit for investigation, it is filed. Otherwise, there are three ways in which the case can be handled. First, it can be formally investigated. Second, if there is no sign of any violation of law and it is deemed more appropriate for another body to handle the case, the CCAC will refer it to the body concerned and follow up on progress, provided that the complainant's consent is secured.¹⁵² Third, where the case is deemed properly to be subject to administrative or judicial remedies, the CCAC may refer the parties to the relevant bodies.¹⁵³ The CCAC has the discretion to close proceedings where the

¹⁵⁰ See THE OFFICE OF THE OMBUDSMAN, ADMINISTRATION WING, CHIEF SECRETARY FOR ADMINISTRATION'S OFFICE, LEGISLATIVE COUNCIL BRIEFING PAPER (LC PAPER NO. CB(4)513/12-13(01)): ESTABLISHING AN INDEPENDENT MECHANISM TO REVIEW THE DECISIONS OF THE OMBUDSMAN (Mar. 26, 2013), <http://www.legco.gov.hk/yr12-13/english/panels/ajls/papers/aj0326cb4-513-1-e.pdf> [<https://perma.cc/FE4H-KSCA>] (citing statistics for requests for review received, and reviews conducted, from 2009 through Feb. 28, 2013).

¹⁵¹ Asian Ombudsman Association (Macau), *supra* note 73, at 6.

¹⁵² *Id.*, at 5.

¹⁵³ Organic Law of CCAC (Macau) art. 13.

facts lie beyond its jurisdiction or where there is insufficient evidence to support the investigation.¹⁵⁴

The Commissioner Against Corruption, deputy commissioners, and certain other staff have free access to all places of work of the Administration of Macau.¹⁵⁵ The Commissioner and his deputy commissioners enjoy the status of a criminal police authority in relation to penal procedure acts within their powers,¹⁵⁶ and in criminal inquiries, CCAC staff may be authorized by the Commissioner to carry and use weapons of a type and caliber approved by decision of the Chief Executive of Macau.¹⁵⁷ The CCAC is empowered to examine documents, conduct inquiries, and obtain testimony, and bodies under investigation are required to comply with timeframes stipulated by the CCAC in this regard.¹⁵⁸ All natural and legal persons are required to cooperate with the CCAC,¹⁵⁹ and public entities within the scope of the CCAC’s jurisdiction are required to cooperate and to carry out such investigations, inquiries, and other measures as necessary.¹⁶⁰ A person who refuses to testify to the CCAC or who fails to do so without justification, or who intentionally and unjustifiably obstructs the performance of the CCAC’s duties, is liable to be subject to the criminal penalty for disobedience.¹⁶¹ There is a duty of confidentiality in relation to the CCAC’s handling of the facts of cases.¹⁶²

The CCAC is under a duty to communicate a final decision to the party requesting its intervention.¹⁶³ Upon the completion of an investigation, it may report any findings of illegal acts to the relevant authorities.¹⁶⁴ Recommendations can be made directly to the authorities where illegal or unfair administrative acts or procedures are identified.¹⁶⁵ The Commissioner Against Corruption is neither civilly nor criminally liable for a recommendation or preparatory

¹⁵⁴ *Id.* art. 12(3).

¹⁵⁵ *Id.* art. 35.

¹⁵⁶ *Id.* art. 11(3).

¹⁵⁷ *Id.* art. 36(1).

¹⁵⁸ *Id.* arts. 4(2)–(4), 6(2), 12(2).

¹⁵⁹ *Id.* art. 5.

¹⁶⁰ *Id.* art. 6(1).

¹⁶¹ *Id.* art. 14.

¹⁶² *Id.* arts. 20, 26.

¹⁶³ *Id.* art. 12(4).

¹⁶⁴ *Id.* art. 4(6).

¹⁶⁵ *Id.* art. 4(12).

acts leading toward a recommendation.¹⁶⁶ If the investigated entity does not fully accept recommendations made by the CCAC, it must give its reasoned reply within a specified period of time.¹⁶⁷ The CCAC must then decide whether the partial or non-acceptance of its recommendations is justified; if not, it may pass the case to the hierarchical superior or the supervisory entity of the investigated body and, once the hierarchical chain has been exhausted, it must inform the Chief Executive of Macau.¹⁶⁸ It may also inquire into the progress of any criminal or disciplinary proceedings filed with the relevant authorities.¹⁶⁹ In terms of review mechanisms for the disappointed complainant, the CCAC will not reexamine or give further response to a complaint on which a decision has been made, unless sufficiently substantial further evidence has been provided by the complainant.¹⁷⁰

The CCAC may report on the results of its investigations to the Chief Executive.¹⁷¹ It can also make recommendations on the interpretation, amendment, or repeal of legislation, or recommend new legislation where it considers that there are deficiencies in existing legal provisions with regard to the rights, freedoms, safeguards, or legitimate interests of individuals.¹⁷² Further, it can make recommendations to the Chief Executive for the introduction of new measures to combat corruption and illicit or unethical practices, and to improve public administration.¹⁷³ There is a Monitoring Committee on the Discipline of CCAC Personnel comprising a president and four members, appointed by the Chief Executive, which receives complaints about CCAC personnel.¹⁷⁴

Finally, in Taiwan, investigations are either assigned to members of the Control Yuan upon receipt of a complaint, initiated by such members, or commissioned by the Control Yuan and entrusted to a related organization for investigation.¹⁷⁵ The process for receiv-

¹⁶⁶ *Id.* art. 22.

¹⁶⁷ *Id.* art. 12(5).

¹⁶⁸ *Id.* art. 12(6).

¹⁶⁹ *Id.* art. 4(7).

¹⁷⁰ Asian Ombudsman Association (Macau), *supra* note 73, at 6.

¹⁷¹ Organic Law of CCAC (Macau) art. 4(8).

¹⁷² *Id.* art. 4(9).

¹⁷³ *Id.* art. 4(10), (11).

¹⁷⁴ *Id.* art. 38(3).

¹⁷⁵ See CONTROL YUAN, *Our Powers: Why and How Does the Control Yuan Exercise*

ing and handling written complaints is set out in regulations enacted by the Control Yuan. It has the power to receive complaints from the public and from agencies and organizations, in addition to the power of Control Yuan members to initiate investigations.¹⁷⁶ Complaints can be lodged by post, fax, via the Control Yuan website, in person at the Control Yuan, or in person to Control Yuan members when they are on a circuit supervision trip—members of the Control Yuan not only inspect the central authorities, but also local authorities through circuit supervision trips.¹⁷⁷ Each member of the Control Yuan is expected to visit a different location in Taiwan each quarter of the year.

Upon the receipt of a complaint in relation to which there are no existing cases, the complaint is dealt with by a member of the Control Yuan. If the member approves the request, the case is forwarded to a relevant committee.¹⁷⁸ Complaints are dismissed if they are beyond the powers and jurisdiction of the Control Yuan, require a lawsuit to be filed against a judicial agency or court martial, or require the issuing of a petition, appeal or administrative litigation.¹⁷⁹ A complaint will not be investigated where it has been submitted to administrative remedial procedures, judicial proceedings, or a higher or responsible agency for handling, unless the defendant is alleged to have committed malfeasance or serious misconduct.¹⁸⁰ The Control Yuan can, but usually does not, investigate a case pending in a court of law.¹⁸¹ It is possible for a complaint to be submitted

the Power of Investigation?,
<http://www.cy.gov.tw/ct.asp?xItem=7764&ctNode=1825&mp=21>
 [https://perma.cc/3MW4-3EDJ] (explaining the investigative structure of the Control Yuan).

¹⁷⁶ Control Act (Taiwan) art. 4; Regulations for Receiving and Handling People’s Written Complaints (Control Yuan) (enacted by the 22nd Control Yuan plenary meeting, 20 July 1948, amended 1955-1998) art. 3 [hereinafter Complaint Regulations (Taiwan)].

¹⁷⁷ Ger, *supra* note 28, at 36.

¹⁷⁸ See Complaint Regulations (Taiwan) art. 9 (establishing the system for processing people’s written complaints).

¹⁷⁹ *Id.* art. 11.

¹⁸⁰ *Id.* art. 12.

¹⁸¹ See CONTROL YUAN, *Our Powers: Can the Control Yuan Investigate Cases Pending in a Law Court?*,
<http://www.cy.gov.tw/ct.asp?xItem=7766&ctNode=1825&mp=21>
 [https://perma.cc/48TK-AB2Q] (last visited Nov. 28, 2017) (describing circumstances in which the Control Yuan can investigate cases pending in a court of law).

anonymously, but no investigation will be made on such a complaint unless the defendant is alleged to have committed malfeasance or serious misconduct.¹⁸² If an investigation is made on the basis of an anonymous complaint, no reply is issued by the Control Yuan following processing of the complaint.¹⁸³ No replies are issued where the complaint is similar to others lodged by the same complainant in a short period of time, or where the complaint includes empty, absurd, or insulting remarks.¹⁸⁴ The Control Yuan has the power to investigate and obtain files, records and documents, and may summon the complainant and the investigated person for questioning.¹⁸⁵

The powers of the Control Yuan comprise impeachment, censure, and the proposal of corrective measures—in addition to the power of audit which is beyond the scope of this Article. Impeachment proceedings are required to be initiated by two or more members of the Control Yuan, and investigated and voted upon by a committee of not less than nine members.¹⁸⁶ If nine or more members, excluding the initiators of the case, conclude for a determination of impeachment, the case is turned over to a competent disciplinary organ for action,¹⁸⁷ typically the Commission on the Disciplinary Sanctions of Functionaries (“CDSF”) of the Judicial Yuan. Proceedings of impeachment are not disclosed to the public if and until the case is turned over to the competent disciplinary organ.¹⁸⁸ At the same time as the case is transferred, the Control Yuan announces its motion of impeachment in a press release and publishes it in the Control Yuan bulletin.¹⁸⁹

Where the Control Yuan considers a violation of law or dereliction of duty in an impeachment case to be sufficiently serious as to require immediate remedy, it can require the offender’s superior to

¹⁸² Complaint Regulations (Taiwan) art. 12.

¹⁸³ *Id.* art. 13.

¹⁸⁴ *Id.*

¹⁸⁵ Control Act (Taiwan) arts. 26–27.

¹⁸⁶ Zhonghua Minguo Xianfa (Constitution of the Republic of China) Additional Articles art. 7(3) (1947).

¹⁸⁷ Control Act (Taiwan) art. 8; Enforcement Rules of the Control Act (amended 11 February 2009) art. 10.

¹⁸⁸ Control Act (Taiwan) art. 13.

¹⁸⁹ Enforcement Rules of the Control Act art. 10(2).

take immediate remedial action.¹⁹⁰ Where it considers that an impeached public functionary has violated criminal or military law, it is required to turn the case over to the relevant disciplinary organ and a competent court or court martial.¹⁹¹ A competent organ or court to which an impeachment case has been transferred is required to take immediate action.¹⁹²

The potential consequences of impeachment are discharge, suspension, degradation, salary cut, demerit and admonition.¹⁹³ Importantly, the Control Yuan does not have the power to impose disciplinary sanctions¹⁹⁴—it has the power of impeachment, but disciplinary power resides in the relevant disciplinary organ, namely the CDSF. This is in line with Article 77 of the ROC Constitution which states that the Judicial Yuan shall have jurisdiction over cases concerning disciplinary measures against public functionaries.

If a member of the Control Yuan considers a public functionary to be guilty of violation of law or dereliction of duty which requires suspension of duty or urgent remedy, he may submit a written censure to be examined and determined by three or more members. A censure is forwarded to the superior of the functionary or, if the case involves a violation of criminal or military law, to the competent court or court martial.¹⁹⁵ A censure which reaches the superior of the functionary may result in suspension of the functionary from duty.¹⁹⁶ If the superior considers that no action should be taken, he is required to submit his justifications to the Control Yuan,¹⁹⁷ though if found by two members of the Control Yuan to have taken inappropriate action, the superior himself may face impeachment.¹⁹⁸ As with impeachment, proceedings of censure are not disclosed to the public if and until the case is turned over to a competent disciplinary

¹⁹⁰ Control Act (Taiwan) art. 14.

¹⁹¹ *Id.* art. 15.

¹⁹² *Id.* art. 16.

¹⁹³ See CONTROL YUAN, *Our Powers: What are the Differences Among the Powers of Impeachment, Censure, and Corrective Measures?*, <http://www.cy.gov.tw/ct.asp?xItem=7785&ctNode=1825&mp=21> [<https://perma.cc/UH4B-ANDP>] (last visited Nov. 28, 2017) (differentiating the powers of impeachment, censure and corrective measures).

¹⁹⁴ Ma, *supra* note 29, at 426.

¹⁹⁵ Control Act (Taiwan) art. 19.

¹⁹⁶ *Id.* art. 21.

¹⁹⁷ *Id.* art. 22.

¹⁹⁸ *Id.*

organ.¹⁹⁹ Also as with impeachment, a competent organ or court to which a censure case has been transferred is required to take immediate action.²⁰⁰ A potential consequence of censure is suspension from duty or other immediate action.²⁰¹

The Control Yuan has the power to propose corrective measures to the Executive Yuan and its subordinate organs.²⁰² Other Yuans and the office of the President do not fall under the scope of this power, thus it to some extent embodies the Control Yuan's ombudsman functions proper. Upon receipt of corrective measures, the body in question is required to make improvements immediately or take other appropriate action, and inform the Control Yuan in writing on those improvements or actions. If no reply is received within two months, the Control Yuan may inquire of the organ in question.²⁰³ If the organ refuses to reply or gives an unsatisfactory explanation, the Control Yuan can initiate a case of impeachment or censure against the head of the organization in question.²⁰⁴ Whilst it therefore cannot directly compel the Executive Yuan or its subsidiary organs to implement recommendations, the possibility of impeachment or censure of the head of the organization under review incentivizes compliance.

Should a complainant disagree with the decision of a member of the Control Yuan, he may request, but is not entitled to, reinvestigation. There is provision for internal review of Control Yuan decisions insofar as an impeachment case that is not approved can be requested for review by the proposing members, in which case it is transferred to a new committee comprising 9-13 members for final decision.²⁰⁵

¹⁹⁹ *Id.* art. 23.

²⁰⁰ *Id.*

²⁰¹ CONTROL YUAN, *Our Powers: What are the Differences Among the Powers of Impeachment, Censure, and Corrective Measures?*, <http://www.cy.gov.tw/ct.asp?xItem=7785&ctNode=1825&mp=21> [<https://perma.cc/UH4B-ANDP>] (last visited Nov. 28, 2017).

²⁰² Control Act (Taiwan) arts. 1-2, 24.

²⁰³ *Id.* art. 25.

²⁰⁴ See CONTROL YUAN, *Our Powers: What Should an Organization do After Receiving a Case of Corrective Measures Proposed by the Control Yuan?*, <http://www.cy.gov.tw/ct.asp?xItem=7763&ctNode=1825&mp=21> [<https://perma.cc/4AH4-LMQB>] (last visited Nov. 28, 2017) (describing the consequences of failure to properly address a corrective measure).

²⁰⁵ Ger, *supra* note 28, at 24.

8. EFFECTIVENESS AND TRANSPARENCY

Institutional effectiveness is not easy to measure, less still when comparing jurisdictions where the institutions under evaluation serve varying purposes and operate within considerably different legal, constitutional, political, and social contexts. Public confidence in the institution may be an indicator that it is fulfilling its function with a degree of success. However, this is difficult to measure.²⁰⁶ Short of an extensive and wide-ranging empirical study across the four jurisdictions, beyond the scope of this research,²⁰⁷ the best indicators of effectiveness and transparency come with a contextual comparison of the extent to which formal legal frameworks create a suitable environment for promoting robust standards of public administration, and whether stated objectives appear to be met.

Structurally, the situation in Mainland China is a cause for concern. It has been pointed out that supervisory organs subsidiary to the MOS are part of the local governments which they monitor. In addition, the heads of the local branches of the MOS and CCDI are equivalent to or lower in rank than the heads of local governments or their subordinate bureaus.²⁰⁸ This means that, even though there is the possibility of seeking review from the supervisory organ immediately above that whose decision is being challenged, there might be insufficient incentives for the original supervisory organ to rigorously monitor departments and persons within their jurisdiction, or to properly process complaints received about such departments and persons. Deserving cases might therefore never have the possibility of reaching the more senior supervisory organ, including the MOS itself.

²⁰⁶ See e.g., Brenda Danet, *Toward A Method To Evaluate The Ombudsman Role*, 10 ADMINISTRATION & SOC'Y 335-70 (1978) (providing background literature on the assessment of ombudsman effectiveness); S. E. Aufrecht and M. Hertogh, *Evaluating Ombudsman Systems*, in RIGHTING WRONGS: THE OMBUDSMAN IN SIX CONTINENTS 389-402 (Roy Gregory and Philip Giddings eds., 2000) (background on the ombudsman); Anita Stuhmcke, *Evaluating Ombudsman: A Case Study in Developing a Quantitative Methodology to Measure the Performance of the Ombudsman*, 10 THE INT. OMBUDSMAN YEARBOOK 23-82 (2006) (discussing quantitative methodology for measuring ombudsman performance).

²⁰⁷ An empirical study of ombudsman institutions in Greater China would be useful, but particularly challenging in Mainland China given informational and transparency deficits.

²⁰⁸ Huang, *supra* note 21, at 842.

In addition, supervisory organs must submit reports on the results of inspections to the level of government to which they belong, or to the supervisory organ at a higher level.²⁰⁹ This has been cited as a factor negatively affecting the effectiveness of the Mainland Chinese supervisory organs in limiting maladministration, in addition to understaffing of supervisory organs, a lack of sufficient power to impose sanctions, dependence on government funding, and the incapability of dealing with high-level corruption.²¹⁰ Governmental consent can also be required for administrative sanctions to take effect,²¹¹ undermining the independence of supervisory organs.

These weaknesses in the structural design of the MOS and the broader supervisory system can translate into limited effectiveness. However, even where formal rules and institutions seem well designed, there remains the possibility for divergence between those rules and institutions, and actual practice. Mainland China's comparative lack of transparency accentuates this possibility. As an example, persons assisting the charging or provision of information against serious violations of laws or rules of administrative discipline can be rewarded by the MOS.²¹² In addition, administrative sanctions are due to be imposed on any person who retaliates against a complainant, accuser, exposé or supervisor, with the potential for criminal responsibility.²¹³ On the face of it, these rules incentivize formal reporting by complainants or persons assisting investigations, and disincentivize reprisal by the authorities.

Nevertheless, challenges remain in Mainland China in terms of complainants' fear of retaliation.²¹⁴ This has been documented in relation to another channel for persons to express grievances about public officers and the conduct of public administration, namely the

²⁰⁹ Law on Administrative Supervision (Mainland China) art. 30(3); Implementation Regulations of Law on Administrative Supervision (Mainland China) art. 28.

²¹⁰ PEERENBOOM, *supra* note 83, at 416-17.

²¹¹ Implementation Regulations of Law on Administrative Supervision (Mainland China) art. 24.

²¹² *Id.* art. 3; Regulation on Complaint Letters and Visits (Mainland China) art. 8.

²¹³ Law on Administrative Supervision (Mainland China) art. 47; Police Law (Mainland China) art. 46; Regulation on Complaint Letters and Visits (Mainland China).

²¹⁴ Yong, *supra* note 19, at 17-18.

system of complaint letters and visits.²¹⁵ The effectiveness of this system has been questioned by allegations of arbitrariness²¹⁶ and human rights violations.²¹⁷ Indeed, similar allegations have been made of the CCDI interrogation system, though it has been suggested that there may recently have been some improvement in that system, and that it may – notwithstanding the controversial techniques employed, and in utilitarian terms – be an effective anti-corruption mechanism.²¹⁸ However, since the 2010 amendment to the Law on Administrative Supervision, there is express provision for the submission of anonymous complaints,²¹⁹ though there is no data to attest to the practical effectiveness of this provision. A duty of confidentiality has also been imposed on supervisory organs with regard to the rights, interests, and information relating to informants,²²⁰ and provisions are in place to support the impartiality of supervisors.²²¹ It should also be noted that there have been formal steps taken in Mainland China to improve transparency and access to information in public administration, as with the introduction of regulations on the disclosure of government information in 2007.²²²

The potential for misalignment between formal rules and institutions on the one hand, and actual practice on the other, was recognized by Huang Yasheng. It was, however, argued that it is still

²¹⁵ See Regulation on Complaint Letters and Visits (Mainland China). See generally Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103 (2006) (arguing that the xinfang system is fundamentally a multipurpose tool of governance, rather than an institution of particularized justice based on legal norms).

²¹⁶ Thornton, *supra* note 65, at 14.

²¹⁷ Human Rights Watch (Sophie Richardson ed.), *An Alleyway in Hell: China's Abusive Black Jails* (Nov. 12, 2009), <https://www.hrw.org/report/2009/11/12/alleyway-hell/chinas-abusive-black-jails> [<https://perma.cc/KH8A-R8R2>].

²¹⁸ See Dui Hua Foundation, *Corruption, Shuanggui and Rule of Law* (June 27, 2013), <http://www.duihuahrjournal.org/2013/06/corruption-shuanggui-and-rule-of-law.html> [<https://perma.cc/6F8J-AYVM>] (describing shuanggui and signs of efforts to bring it under the rule of law); See also CCDI & MOS, *Notice on Several Questions Regarding the use of Liangzhi and Shuanggui Measures by Discipline Inspection and Supervision Organs* (June 5, 1998).

²¹⁹ Law on Administrative Supervision (Mainland China) art. 6.

²²⁰ *Id.* arts. 6, 46.

²²¹ *Id.* art. 14; Implementation Regulations of Law on Administrative Supervision (Mainland China) art. 33.

²²² Regulations of the People's Republic of China on the Disclosure of Government Information (promulgated by the State Council, May 1, 2008) The China Center, Yale Law School, February 2009, https://law.yale.edu/system/files/documents/pdf/Intellectual_Life/CL-OGI-Regs-English.pdf [<https://perma.cc/KN8L-8BBE>].

important to examine formal rules and institutions because, first, formal institutions often give rise to incentives and condition behavior, and second, the central administration appears to adjust institutional design to overcome problems or achieve political objectives.²²³ That justifies an examination of the formal machinery for administrative supervision even if there is the possibility for divergence from actual practice. In addition, as this Article aims to compare and contrast the ombudsman machinery in each of the Greater Chinese jurisdictions, a finding may well be that there is in Mainland China the greatest potential for misalignment between formal institutions and actual practice in administrative supervision. That would of course count as a weakness of the system relative to the other systems under review.

Some indication of institutional effectiveness can be drawn from published statistics, though this is dependent on the credibility and methodology of the body compiling the statistics and the selection of statistics made available. The MOS publishes limited statistics on its investigation activities, but without significant elaboration on the number and type of complaints received.²²⁴ Reports on individual cases are made available on the MOS website, but these tend to be short and appear to be selective.²²⁵ This is again an indictment on its transparency.

The most recently available Annual Report published by the Ombudsman of Hong Kong, spanning April 2016 to March 2017, reported that for the year under review 4,862 complaints were received, slightly lower than previous annual figures. Of those complaints, 2,556 were concluded by inquiry, 218 by investigation and 133 by mediation. 1,102 cases were closed on the basis of insufficient grounds, and 965 were closed on the basis that the Ombudsman was legally bound to do so, including absence of jurisdiction. The top five organizations complained against, where the Ombudsman pursued cases to conclusion, were the Food and Environmental Hygiene Department (476), Housing Department (456), Buildings Department (216), Lands Department (207) and Transport Department

²²³ Huang, *supra* note 21, at 840-41. The Pilot Program may also be considered in this context.

²²⁴ See Ministry of Supervision, *2016 Annual Report on Information Disclosure* (Apr. 11, 2017), http://www.ccdi.gov.cn/xxgk/xxgknb/201704/t20170411_97156.html [<https://perma.cc/4HMC-KJLP>] (describing activities of the MOS in 2016).

²²⁵ See *Disciplinary Review*, <http://www.ccdi.gov.cn/jlsc/> [<https://perma.cc/GSZ6-GLLY>].

(171). Of all cases concluded by way of full investigation, 60.5% were found unsubstantiated, 22.5% partly substantiated (an increase of over nine percentage points), 11.0% substantiated, 5.5% unsubstantiated but other inadequacies found, and 0.5% withdrawn or discontinued. The top five forms of maladministration substantiated by a full investigation were error, wrong advice or decision (27.4%), ineffective control (19.5%), delay or inaction (16.8%), faulty procedures (14.2%) and lack of response to complainant/enquirer (7.1%). Eleven direct investigations were completed, examining a range of issues including tree management, the Marine Department's follow-up mechanism on recommendations made in Marine Incident Investigation Reports, temporary closure of public swimming pools and beaches due to lifeguard shortages, and regulation of kindergarten application fees.²²⁶

Limited data is published by the Ombudsman on the compliance rate by public bodies with her recommendations. For the year under review, the Ombudsman made a total of 254 recommendations, of which 83.1% were accepted for implementation – almost identical to figures for the previous year – and 16.9% were still under consideration by the end of the audit period.²²⁷ This ostensibly means that no recommendations were rejected for implementation. In addition, 133 cases were settled through mediation, similar to the two previous years, though a sharp increase on three years previously.²²⁸ It should be emphasized that it is technically open to an investigated body to decline to implement the Ombudsman's recommendations. However, whether in the spirit of pursuing good administrative practice, for fear of political or reputational consequences (such as in reports forwarded by the Ombudsman to the Chief Executive, those laid before the Legislative Council, or those on which the media reports),²²⁹ the Ombudsman has secured a very high rate of compliance with her recommendations.

²²⁶ The Ombudsman, Hong Kong, ANNUAL REPORT: MAINTAINING IMPARTIALITY WITHOUT FEAR OR FAVOUR (2017), <http://ofomb.ombudsman.hk/doc/yr29/en/mobile/index.html> [<https://perma.cc/D2PN-CV33>].

²²⁷ *Id.* at 25.

²²⁸ *Id.* at 28.

²²⁹ It is conceivable that legal consequences could result in circumstances in which an investigated body ignored recommendations in relation to a particular case of maladministration, and the same form of maladministration arises again in a manner which is unlawful. There is a possibility of arguing in an application for judicial review that the body, in failing to take into account the Ombudsman's rec-

The available data would suggest that the Ombudsman is an effective form of administrative supervision in Hong Kong, though two caveats are worth noting. First, these figures are provided by the Ombudsman and their veracity and accuracy is dependent on honest and transparent reporting. Second, subsequent annual reports do not disclose whether and to what extent the recommendations still under consideration by the end of the preceding audit period were accepted for implementation. Accordingly, for the period from April 2016 to March 2017, the outstanding 16.9% of recommendations which had yet to be accepted for implementation could have been wholly or partly rejected (or accepted) following the conclusion of the relevant audit period.

The most recently published Annual Report of the CCAC of Macau is for 2016. Overall, 839 complaints were received from the public (almost a 10% increase on the previous year, and of which 411 were made anonymously or with a request for anonymity), 29 cases were initiated by the CCAC on its own motion (a 190% increase on the previous year), 19 were investigated at the request of overseas authorities (a 375% increase on the previous year), and 23 were referred to the CCAC by other public bodies (over 53% increase on the previous year). In terms of its ombudswork, 658 complaints were received. Of those, the top five areas to which complaints referred were systems relating to public service positions (186), meteorological analysis (80), traffic affairs (42), municipal affairs (40) and disciplined services management and their law enforcement (37). Thirty complaints were determined to be beyond the competency of the CCAC. The anti-corruption arm of the CCAC received 252 criminal cases qualifying for handling, and concluded 182 cases. The Annual Report also stated that twelve cases investigated by the CCAC had been adjudicated in court in 2016, mostly involving corruption, fraud, forgery, breach of confidentiality, or abuse of power. The cases resulted in a mixture of verdicts including imprisonment for periods ranging from six months to twelve years and six months, payment orders for between 6,000 and 420,000 MOP, and acquittals.²³⁰

ommendations, had failed to take into account a relevant consideration—a recognized ground of judicial review in Hong Kong.

²³⁰ Commission Against Corruption, Macao Special Administrative Region, 2016 ANNUAL REPORT OF THE COMMISSION AGAINST CORRUPTION OF MACAO (2017), <http://www.ccac.org.mo/en/intro/download/rep2016.pdf> [<https://perma.cc/9JT9-XUJJ>].

The CCAC publishes some information in its Annual Report about the compliance of investigated bodies with its recommendations. However, these are presented as case studies and give only a small sample of cases, meaning that the CCAC might simply have chosen for elaboration cases giving the impression that their work is effective, and perhaps more effective than it actually is. Indeed, of the eight case studies included in the Annual Report for 2016, investigated bodies accepted the CCAC's recommendations for implementation in 100% of cases. It may be that the CCAC's recommendations are accepted for implementation with a similarly high rate of regularity as those of the Ombudsman in Hong Kong, but it is not possible to draw this conclusion in the absence of relevant quantitative data. The coverage in the Annual Report of positive cases might also be an exercise in promoting public confidence in the utility of the CCAC as a mechanism for grievance redress, but it again does not necessarily provide a representative sample of its caseload.

Despite the relatively extensive scope of the Taiwanese Control Yuan's jurisdiction, it cannot directly apply sanctions or compel investigated bodies to implement recommendations. In this sense, it has been described in Taiwan as a “tiger without teeth.”²³¹ However, the possibility for the head of an organization who fails to implement recommendations to be impeached provides an incentive to act on those recommendations. It is possible for an individual to be impeached and for the CDSF to decide against imposing meaningful disciplinary measures. However, there are significant reputational consequences for a person found impeached, manifesting, for example, in difficulties securing career progression or in seeking election to public office. As such, an impeached person will sometimes resign from office before the CDSF issues a final decision on disciplinary measures,²³² suggesting that the “tiger” is not toothless or does not require teeth to be effective.

The most recently published Annual Report of the Control Yuan is for 2016. A total of 13,666 complaints were received, similar to the previous year, of which the top three categories, accounting for 80.4% of all complaints received, related to judicial affairs (4,890), domestic affairs (3,907) or financial and economic affairs (2,192), again similar to that of the previous year. The Control Yuan investigated 270 cases, of which 181 were assigned investigations and 89

²³¹ Ger, *supra* note 28, at 27, 55.

²³² *Id.* at 25.

were self-initiated. In the report for 2014, it was documented that 71.3% of investigated cases related to the Executive Yuan and its subordinate agencies, 19.3% to local government, 5.7% to the Judicial Yuan and its subordinate agencies, 0.8% to the Presidential Office and its subordinate agencies, 0.5% to the Examination Yuan and its subordinate agencies, and 2.5% to unspecified others.²³³ No statistic of this kind appears in the reports for 2015 or 2016. The Control Yuan impeached sixty-nine persons (more than double the figure for the previous year), of whom eighteen were elected civil officials. Eight of the impeached persons were military officials – perhaps unusual as the military tends in other jurisdictions to evade open civil scrutiny in the name of defense and national security. In 2014, a total of 419 persons were punished by their agencies for minor misconduct on the request of the Control Yuan, but no comparable statistic appears in the reports for 2015 or 2016.

Eighty-two corrective measures were proposed by the Control Yuan – similar to the previous year – the top five of which related to domestic and minority affairs (28), financial and economic affairs (16), transportation and procurement affairs (15), national defense and intelligence affairs (10) and educational and cultural affairs (8). 83% of complaints received, and 41.8% of complaints investigated, by the Control Yuan related to human rights, broadly in line with the previous annual figures. The National Audit Office of the Control Yuan investigated twenty-two cases.²³⁴ The overall picture of the Control Yuan is one of relatively effective supervision, though it appears that only a small number of complaints lead to impeachment, censure or the proposal of corrective measures. No data was presented on the compliance rate of investigated bodies with proposed corrective measures, thus its effectiveness in that regard cannot be determined.

²³³ CONTROL YUAN, *Annual Report of the Control Yuan, 2014* (2015), <http://www.cy.gov.tw/dl.asp?fileName=5122417465471.pdf> [<https://perma.cc/M75Y-4FXC>]. These figures are rounded to the nearest 0.1%.

²³⁴ CONTROL YUAN, *Annual Report of the Control Yuan, 2016* (2017), <http://www.cy.gov.tw/dl.asp?fileName=7761615971.pdf> [<https://perma.cc/D7EC-Q4C7>].

9. CONCLUDING REMARKS

There are similarities between the ombudsman institutions of Greater China. Each is primarily oriented toward supervision of the public sector, with jurisdiction over administrative malpractice and deficiency in government departments and non-governmental public bodies. Each can act on the basis of complaints received from members of the public, private companies and government bodies, and can perform direct investigations of their own volition. Complaints are not filtered by legislators, and each ombudsman conveys its primary substantive power through the making of recommendations with no general power to award remedies.

However, these similarities seem too thin to bind the institutions to a single paradigm of administrative supervision. There are significant differences among the institutions in terms of their organizational bases, powers, processes, and practices—and in the context of the specific jurisdiction where each operates. Only in Mainland China is the ombudsman part of the executive proper, and is the work of the ombudsman shared with, and apparently subordinate to, the disciplinary arm of the ruling political party. Only in Macau and Taiwan is the ombudsman constitutionally entrenched, but only in Taiwan is it on an equal constitutional footing with the executive. The ombudsman's budget ultimately comes from the executive in each jurisdiction, though it is allocated or approved by the legislature in Hong Kong and Taiwan. The Ombudsman of Hong Kong alone performs no active anti-corruption function, has no general jurisdiction over maladministration in the police force, and has no power to investigate anonymous complaints. Only the MOS in Mainland China has the power to impose penalties on investigated persons, whereas the other institutions can only make recommendations or indirectly secure compliance to varying extents. Only the Control Yuan actively monitors human rights compliance.

There is no overall pattern to these characteristics. They point to underlying differences in the way that the ombudsman institution is conceived in each jurisdiction, the way in which it operates, the powers that it exercises, and the ends to which its powers are exercised. Mainland China is an obvious outlier in terms of the status, role and method of the institution; and the political context in which the MOS operates is substantially different to that found in the other jurisdictions under review. However, Taiwan is also an outlier in terms of the constitutional foundation of the Control Yuan and the

fact that its key power is that of impeachment—one usually found in legislatures. Hong Kong could also be classified as an outlier in terms of its Ombudsman's minimal oversight of anti-corruption and the police.

It is to be expected that each institution is a product of local historical, cultural, political and social contexts. However, notwithstanding continuing uncertainty over the status of Taiwan, the jurisdictions under review have broadly been on a path of political, constitutional, and economic convergence. The variation between the institutions and their respective systemic contexts spells difficulties for a unified "Chinese" conception of the ombudsman. Any future attempt to align or harmonize the ombudsman institutions would face significant obstacles from the conceptual to the practical. Although the ombudsman is undoubtedly not unique in this regard, it is illuminating that even in a comparison of the institutions performing this relatively innocuous function across Greater China, there is considerable diversity from the level of practical rules to constitutional first principles. The ombudsman may have become a global phenomenon, but even in an area as politically, constitutionally, and economically associated as Greater China, there is no single paradigm of administrative supervision. It is common for officials in Mainland China to describe aspects of its legal, political, and economic systems as having "Chinese characteristics," but this portrayal simply does not work in a comparison of the state ombudsman institutions in Greater China. None of the jurisdictions under review can make an exclusive claim to "Chineseness" in the characteristics of its public sector ombudsman. Just as Greater China comprises four, diverse constituent jurisdictions, so it exhibits four diverse "Chinese" models of administrative supervision.

10. TABLE 1

	<u>Ministry of Supervision (Mainland China)</u>	<u>Ombudsman (Hong Kong)</u>	<u>CCAC (Macau)</u>	<u>Control Yuan (Taiwan)</u>
Year of establishment	1949; abolished 1959; re-established 1987	1989	1999	1931; officially established under ROC Constitution 1948
Major relevant legislation	Law on Administrative Supervision	Ombudsman Ordinance	Organic Law of the Commission Against Corruption	Control Act
Constitutional entrenchment of institution	No	No	Yes (Basic Law of Macau)	Yes (ROC Constitution)
Independent institution	No	Yes	Yes	Yes
Institution has clearly defined / distinct jurisdiction from other supervisory bodies	No	Yes	Yes	Yes
Formally part of executive	Yes	No	No	No
Financially reliant on	Government	Government; budget allocated by Legislative Council	Government	Government allocated budget; approved by Legislative Yuan

Head of institution appointed by	President of PRC on nomination of Premier with approval of Standing Committee of National People's Congress	Chief Executive of Hong Kong	Central People's Government ("PRC") on nomination of Chief Executive of Macau	President of ROC with consent of Legislative Yuan
Head of institution removed / dismissed by	No specific provision	Chief Executive of Hong Kong with approval by resolution of Legislative Council	Central People's Government ("PRC") on recommendation of Chief Executive of Macau	No specific provision
Circumstances in which head of institution can be removed / dismissed	No specific provision	Inability to discharge functions of office; misbehavior	No specific provision	No specific provision
Substantive focus of institution's work	Political, economic, and administrative discipline	Maladministration	Corruption and administrative illegality	Violation of law, neglect of duty, and maladministration
Power to investigate corruption	Yes	No ²³⁵	Yes	Yes
Monitors human rights compliance	No specific provision ²³⁶	Limited	Limited	Yes

²³⁵ This is properly in the domain of the ICAC.

²³⁶ A supervisory organ may make recommendations in situations including those "where the interests of the State or the collective or the lawful rights and interests of citizens are impaired and remedial measures need to be taken" (Law on Administrative Supervision (Mainland China), art.23(3)), however no specific mention is made of human rights.

Jurisdiction over government departments	Yes	Yes	Yes	Yes
Jurisdiction over non-governmental public bodies	Yes	Yes	Yes	Yes
Jurisdiction over police	Yes	No ²³⁷	Yes	Yes
Jurisdiction over courts	Unclear ²³⁸	No ²³⁹	No specific provision	Yes
Jurisdiction over private bodies	Partly ²⁴⁰	No	Partly	No
Can receive complaints	Yes	Yes	Yes	Yes

²³⁷ Except in relation to the Code on Access to Information.

²³⁸ It is unclear whether the MOS has formal jurisdiction over courts and judges (consider Law of the People’s Republic of China on Judges (adopted at the 22nd Meeting of the Standing Committee of the Ninth National People’s Congress, 30 June 2001, arts. 32–35 and 44–47)). The Law on Administrative Supervision (Mainland China), art. 43, states that where a supervisory organ, in the course of handling a matter under supervision, finds that the matter under investigation does not fall within the scope of the supervisory organ’s functions and duties, it shall transfer it to the unit that has the authority to handle it, which could include the transfer of a legal case to court. It is specifically provided that a criminal case be transferred to a judicial organ. However, it is further provided in the same article that the unit or organ that accepts the matter so transferred shall notify the relevant supervisory organ of how the matter is handled – it is unclear what happens if the unit or organ fails to do so, or reports back in a manner deemed unsatisfactory by the supervisory organ. The People’s Courts and the procuratorates nevertheless have the power to supervise courts and judges, Constitution of the People’s Republic of China arts. 124–33; as does the Party through the CCDI. The Complaint Redress Department of the Supreme People’s Court also receives complaints about judicial cases.

²³⁹ The Ombudsman only has jurisdiction over courts in relation to the registries and administrative offices of courts and tribunals for which the Judiciary Administrator has responsibility, Ombudsman Ordinance (Hong Kong), Sched. 1.

²⁴⁰ Implementation Regulations of Law on Administrative Supervision (Mainland China), Article 2 states that supervision extends to “persons in enterprises, institutions or social organizations who are appointed by the administrative organs of the State by means of delegation or dispatching or by other means.”

from the public				
Can receive complaints from private companies	Yes	Yes	Yes	Yes
Can receive complaints from government bodies	Yes	Yes	Yes	Yes
Can process anonymous complaints	Yes	No	Yes	Yes
Duty of secrecy or confidentiality in relation to complainant	Yes	Yes	Yes	Yes
Complaints filtered by legislators	No	No	No	No
Can initiate investigations on own motion	Yes	Yes	Yes	Yes
Can obtain evidence	Yes	Yes	Yes	Yes
Can summon witnesses	Yes ²⁴¹	Yes	Yes	Yes
Penalty for	No specific	Yes	Yes	No specific provision

²⁴¹ The MOS can question departments and individuals under supervision, but can also call on the assistance of the "relevant administrative departments," which are required to render assistance. See Law on Administrative Supervision (Mainland China) art. 22.

failure to cooperate with institution	provision ²⁴²			
Power to award remedy	Indirect ²⁴³	No	No	No
Power to impose penalty on investigated bodies	Partly ²⁴⁴	No	No	No
Power to impose penalty on investigated persons	Yes	No	No	No
Power to make recommendation to investigated body	Yes	Yes	Yes	Yes
Power to compel investigated body to implement recommendation	Partly	No	No	Indirect
Power to make reports public	Yes	Yes	Yes	Yes

²⁴² It is only stated that a unit or person “shall accept the supervisory proposal made by the supervisory organ in accordance with the law.” See Implementation Regulations of Law on Administrative Supervision (Mainland China) art. 27.

²⁴³ See Law on Administrative Supervision (Mainland China) art. 23(3); see also Implementation Regulations of Law on Administrative Supervision (Mainland China) art. 22.

²⁴⁴ The MOS can circulate a notice of criticism against a department. See Law on Administrative Supervision (Mainland China) art. 45.

Decisions subject to internal review	Yes	Yes	Yes	Yes
Decisions subject to external review (on merits)	No ²⁴⁵	No	No	No

²⁴⁵ Decisions of the MOS are not subject to external review, though decisions of lower supervisory organs are subject to external review by hierarchically superior organs.