

# Chapter I:

## Introduction

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### 1. Significance and Historical Development of the Ombudsman Concept in Asia

The history of grievance redress institutions in Asia is one of different origins and gradual development. In a first phase, **Communist governments** in the People's Republic of China (hereinafter: China) and Vietnam established systems of **internal supervision** – internal in the sense of being part of the executive branch. These would allow the top of the respective parties and States to monitor the entire corpus of public administration on their own initiative. At the same time it allowed for broader public participation through channelling people's pertinent complaints. The formation of these institutions took place in the **late 1940s and early 1950s**, without reference to Western European models and without using the term 'Ombudsman'. However, both the People's Supervisory Commission (later: Ministry of Supervision) in China and the Special Inspection Board (later: Government Inspectorate) in Vietnam carried on with European Communist traditions.<sup>1</sup> Although established during the same period, the other current Chinese institution, the State Bureau for Letters and Calls, has its roots in much older traditions.

In a second phase, certain **non-Communist governments** also went on to establish **internal mechanisms of grievance redress** in the **late 1960s and early 1970s**. The Administrative Inspection Bureau (later:

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<sup>1</sup> The relationship between State and party institutions of administrative supervision was complicated in the Soviet Union. The first relevant institution actually predates the establishment of the State. The 'Rabkrin' ('Workers and Peasants Inspectorate') was founded in 1920, followed later by the Control Committees of the Communist Party and the Council of Ministers of the Soviet Union. Their branches extended throughout the entire Soviet system. The Ministry of State Security and the Ministry of Internal Affairs carried out similar work.

Administrative Evaluation Bureau) in Japan was established as part of the Ministry of Internal Affairs and the Public Complaints Bureau in Malaysia as part of the Prime Minister's Office. The Japanese situation became more complicated as Administrative Counselors – citizen volunteers, supported by the National Federation of Administrative Counselors' Associations, a private organization – became a second part of the overarching Japanese administrative grievance redress system.

In a third phase, beginning with the **early 1970s and lasting until the present day**, the **Ombudsman idea spread** across Europe and, starting with New Zealand, was further exported to countries of the Commonwealth. Asian countries gradually and increasingly embraced the idea. During this period a series of more independent institutions were formed, most of which explicitly referenced existing Ombudsman traditions or were even named 'Office of the Ombudsman' or 'Ombudsman'. The first country implementing this idea was India, where federal States established regional institutions, mostly in the 1970s and 1980s.<sup>2</sup> The first country to explicitly name an institution 'Ombudsman' in its legal basis was Bangladesh in 1980 – however, the institution was never established. In 1981, Sri Lanka followed with the 'Parliamentary Commissioner for Administration' and Iran, with the General Inspection Organization.<sup>3</sup> Pakistan set up its system of federal and regional Ombudsmen starting with the Federal Ombudsman in 1983. The Philippines followed suit, opening the Office of the Ombudsman in 1988. Next came the Ombudsman of the Republic of Korea (hereinafter: South Korea), which was later renamed Anti-Corruption and Civil Rights Commission, as well as those of Thailand and Indonesia. Portuguese authorities in Macao instituted the High Commission Against Corruption and Administrative Illegality in 1992, which was transformed into the Commission Against Corruption following the transfer of the city to China. Newer additions include Ombudsman institutions in the Arab world, namely the Jordanian Ombudsman Bureau established in 2009 and two Bahraini institutions created in 2012.

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<sup>2</sup> The Indian institution of Lokayukta (sometimes termed an 'anti-corruption Ombudsman') was first established in the Indian State of Maharashtra, in 1971. The oldest Indian institution to be included in this study is the Lok Ayukta Uttar Pradesh, which was founded in 1977. While the Indian institutions share certain features (including their name), their legal bases vary considerably with regard to issues such as independence, scope of supervision and investigatory powers.

<sup>3</sup> While the General Inspection Organization refers to itself as 'Ombudsman', the institution is part of Iran's judicial system and has a distinctly different set-up than the European 'Ombudsman' model.

Apart from the Ombudsman concept, Asian institutions sometimes refer to **other traditions within their respective legal and historic traditions**. Most notably, the Chinese State Bureau for Letters and Calls, which goes back to the much older Imperial Chinese traditions of petitioning against both administrative and judicial decisions.

Pakistani officials trace the origins of the Ombudsman back to the medieval Islamic institution of ‘Mohtasib’<sup>4</sup> (or ‘Muhtasib’).<sup>5</sup> The Mohtasib, established in the Caliphate during the eighth century, was a public official charged with supervising markets, guilds and professions, who also exercised religious duties.<sup>6</sup> According to these Pakistani officials, during his time in exile in the Ottoman Empire, the Swedish King Charles XII was inspired by his experience with the organization of the local administration, in particular the ‘Mohtasib’, to implement reforms in Sweden upon return. While the historical accuracy of this claim might be disputed,<sup>7</sup> it shows a willingness to incorporate the Ombudsman concept into legal traditions and award it political, historical or even theological legitimacy.

<sup>4</sup> Some Pakistani institutions are even named ‘Mohtasib’, e.g. the Banking Mohtasib and the Wafaqi Mohtasib (Federal Ombudsman).

<sup>5</sup> See OICOA, Conference Report, Conference on Networking of Ombudsmen in the OIC Member States (OICOA Conference, Islamabad, April 2014), at iv, 13, 25–26 (Remarks by President of Pakistan Mamnoon Hussein), see also at 41 (Remarks by the Ombudsman of the Republic of Niger) available at <[http://www.oicoa.org/downloads/OICOA\\_Conference\\_Report\\_2014.pdf](http://www.oicoa.org/downloads/OICOA_Conference_Report_2014.pdf)> last visited 31 January 2016.

<sup>6</sup> Ronald P Buckley, ‘The Muhtasib’ (1992) 39 *Arabica* 59; Sami Zubaida, *Law and Power in the Islamic World* (I.B. Tauris New York, 2003) 58–60; interestingly, some scholars have argued that the institution of the Muhtasib itself had Greco-Roman roots, see Patricia Crone, *Roman, Provincial and Islamic Law: The Origins of the Islamic Patronage* (CUP Cambridge, 1987) 107–108.

<sup>7</sup> While King Charles XII established the ‘Högste Ombudsmannen’ (Highest Ombudsman) after his stay in the Ottoman Empire, the institution was soon renamed to ‘Justitiekanslern’ (Chancellor of Justice) and does not necessarily conform to today’s (European) Ombudsman concept. The Swedish Ombudsman in his ‘modern’ appearance as an officer of parliament (the first of his kind) was only established in 1809, see Julia Haas, *Der Ombudsmann als Institution des europäischen Verwaltungsrechts* (Mohr Siebeck, 2012) 36–37. For a contribution supporting the theory see Viktor Pickl, ‘Islamic Roots of Ombudsman Systems’ (1987) 6 *The Ombudsman Journal* 101–105.

## 2. Description of Research Focus

This study aims to provide a **comparative legal analysis** of Ombudsman institutions and similar **public grievance redress systems in Asia**. By comparing the applicable legal bases, this study particularly analyzes the mandate and powers of such institutions, as well as their relationship to the different branches of government – namely the executive, legislative and judicial – and, if relevant, other public bodies within their respective States.

## 3. Subject of the Study

### a. Geographical Scope

Geographically, this study provides a comprehensive overview of relevant institutions in States across the Asian continent. Countries in parts of the Asian continent that have not yet been addressed by previous comparative studies on Ombudsman institutions are examined. Therefore, this study excludes those countries and parts of the Asian continent that have been addressed by *Kucsko-Stadlmayer's* study on Europe<sup>8</sup> (thus, the Russian Federation, the Caucasus, Turkey, Central Asia and Israel) or by the study concerning Australasia and the Pacific<sup>9</sup> (Taiwan and Hong Kong). As a consequence, it deals with countries in the **Middle East, South Asia, Southeast Asia and East Asia** (see Table 1).

### b. Types of Institutions Analyzed

This study sets out to analyze **public institutions of administrative grievance redress** in Asia that **incorporate typical features** of the internationally renowned **Ombudsman concept**. Only institutions with statutes accessible for research were included, in most cases such institutions form **part of the International Ombudsman Institute (IOI)** or the **Asian Ombudsman Association (AOA)**. In addition, this study

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<sup>8</sup> Gabriele Kucsko-Stadlmayer (ed), *European Ombudsman-Institutions: A Comparative Legal Analysis Regarding the Multifaceted Realisation of an Idea* (Springer Wien New York, 2008).

<sup>9</sup> International Ombudsman Institute (ed), *Australasia and Pacific Ombudsman Institutions: Mandates Competences and Good Practice* (Springer Berlin Heidelberg, 2013).

covers two other regional institutions in India<sup>10</sup> and Pakistan.<sup>11</sup> These were studied together with their IOI or AOA member peers to provide a more comprehensive picture, as well as the State Bureau for Letters and Calls in China, which in certain respects appears to incorporate typical Ombudsman features more comprehensively than China's member to the AOA, the Ministry of Supervision. As mentioned above, another significant factor for the choice of institutions to be included, was whether or not the appropriate **legal bases were sufficiently accessible** in terms of literature, online availability, translations and international cooperation (see Tables 37, 38).

Institutions within the scope of this study differ significantly from the concept of the parliamentary Ombudsman prevailing in European States and the European Union. They are mostly part of the relevant States' executive branch or declared as separate from the legislative, executive and judicial branch. Even those institutions that are, in terms of relative proximity, closest to the legislature do not comport with the European model of a parliamentary Ombudsman. It was thus not expedient to strictly apply the International Bar Association's 1974 standard definition of an Ombudsman institution in the selection of institutions covered herein.

'An Office provided for by the Constitution or by action of the Legislature or Parliament and headed by an independent, high-level public official, who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against Government agencies, officials and employees, or who acts on own motion, and who has the power to investigate, recommend corrective action, and issue reports.'<sup>12</sup>

Said definition demands that the institution in question be 'headed by an independent, high-level public official, who is responsible to the Legislature or Parliament'. Several pertinent Asian institutions, under the categories noted in the preceding paragraph, do not claim independence, while some that do are nonetheless integrated into the administrative branch. Depending on the respective national legislation, these institutions enjoy **varying degrees of independence. Primary**

<sup>10</sup> The Lokayukta institution of Uttar Pradesh, which was a member of the AOA.

<sup>11</sup> The Provincial Ombudsman of Khyber Pakhtunkhwa.

<sup>12</sup> Ombudsman Committee, International Bar Association Resolution (Vancouver: International Bar Association, 1974), cited in Gerald E Caiden (ed), *International Handbook of the Ombudsman: Evolution and Present Function* (1983) 44.

**responsibility to the legislature**, in the sense of the latter having the power to ultimately decide upon the removal of the head of the respective institution from office, can **only** be found in the **Philippines** and **Timor-Leste**. Nonetheless, and despite their relative heterogeneity, institutions mostly share certain common traits that are very much in line with further demands of the International Bar Association's definition. They do **'receive complaints from aggrieved persons against government agencies, officials and employees'** (and partly act on their own motion). They do generally have the **'power to investigate, recommend corrective action, and issue reports'** and **'investigate'** the administration for alleged **maladministration**. Moreover, they are usually **'provided for by the Constitution or by action of the Legislature or Parliament'** (although some are only set up by ordinance). While these institutions have no judicial powers, they are sometimes awarded quasi-judicial ones.

The institutions thus selected, on account of only partly comports with traditional definitions, will sometimes be more generally referred to as 'administrative grievance redress mechanisms'. As they often refer to themselves as 'Ombudsman' and they are indeed mostly part of the International Ombudsman Institute and/or the Asian Ombudsman Association, the term 'Ombudsman' will also be used.

A certain categorization of such institutions across Asia is possible (see Chapter V for a more detailed discussion on different 'models'), whereas arguably the most important parameter, independence, shows one group of institutions which explicitly constitute part of the administrative branch<sup>13</sup> – as a ministry, part of a ministry or component of a particular Prime Minister's Office – and others that do not.<sup>14</sup>

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<sup>13</sup> Bahrain (though declared independent), China, Japan, Malaysia, South Korea, Vietnam.

<sup>14</sup> Azad Jammu and Kashmir (Pakistan-administered Kashmir), Bangladesh (institution not yet established), India, Indonesia, Iran, Jordan, Macao, Pakistan, Philippines, Sri Lanka, Thailand.