The Ombudsman Reaching Outside the Public Sector

Javed Sadiq Malik, Federal Ombudsman of Pakistan

Workshop 2: The Ombudsman Reaching outside the Public Sector
Wednesday, June 10, 2009

The integration of private-sector agencies into the network of the state, through contracting and privatization of public functions, has given rise to concerns that public power is now being exercised by private bodies, increasing their ability to affect the lives of citizens. There is a concern that the public is not likely to receive the same level of protection as when services are delivered by public agencies. The tools of administrative law have to adapt to the new situation, and many examples exist today of the expansion of ombudsman oversight to include private services. Various countries have resolved these issues in various ways through various arrangements. There is no one size that fits all.

Opening Remarks (before panel discussion)

It is my pleasure to introduce to you the theme of this morning's workshop, as well as the distinguished speakers who will be speaking on this theme.

Traditionally, public and private activities have been envisaged in distinct spheres, governed by discrete systems of public and private law. The public sector has been viewed in the light of the relationship of the state to individuals. The private sector has been viewed as being insulated from the strict application of public law, with its operations dictated primarily by market principles.

We know, however, that the modern state is not susceptible to such a clear-cut dichotomy anymore. There is now a blurring of distinction between the public and private sectors, owing to the integration of private sector agencies into the network of the state through contract and privatization of public functions. This integration has given rise to a new form of governance that can be seen as the operation of private market power for public ends, without the direct involvement of public bodies. Public power is now exercised by bodies that were never in the public sector. The protection afforded by administrative law, which includes public law tools, is not generally available against such bodies in the private sector. The ability of administrative law to respond to such power will depend largely on the extent that it can overcome the limitations imposed on it by the public-private dichotomy.

There seems to be a growing trend to transfer more public authority to the private sector or to involve private companies in partnership with the public sector to have certain tasks carried out. This is increasing the power of private organizations to affect the lives of citizens. And this trend has led to serious thought being given to protection afforded to citizens by administrative law against private-sector bodies exercising such public power.

It is now being recognized that it is not the source of power that makes it public but the nature of power. The identity of the service providers can no longer be relied upon as an appropriate indicator of the proper boundaries of administrative law. A particular power is said to be public in nature if it is a public function exercised in the public interest. For instance, in the matter of a private company delivering a public utility that was earlier provided by the public sector, the nature of power is the same but the source, or the means of delivering it, has shifted. So it is possible to deliver a service, which remains public in nature through the private sector. It is evident that when state-owned enterprises are privatized, the nature of the power they exercise does not change, but citizens lose some of their public law protection against improper exercise of their power. Public services, whether delivered by a public bureaucracy or a private firm, must meet set standards.

The concern, then, is that the public is not likely to receive the same level of protection as when the services are provided directly by public agencies. Hence the body of thought that advocates that the province of administrative law needs to be extended beyond the public/private divide to encompass the actions of the private sector. The deliverer of public services, be it public or the private sector, must be held accountable for the quality of the services delivered. As the government transgresses the boundary between the public and private realms, increasing attention is also being given to the necessity of extending administrative law to incorporate these new manifestations of public power. The tools to achieve the goals of administrative law have to adapt to the new situation, and many examples exist today of the growth and expansion of ombudsman oversight into private services oversight.

But the matter is not necessarily straightforward – and cannot be oversimplified. There are implications for free-market initiatives and commercial competitiveness that may have to be kept in mind. Nor can such jurisdictional mechanisms be envisaged across the board without careful attention to the importance of keeping clear of encroachments upon activities that are purely private. In being selective, a state's priorities, as determined by its economic and social policies, would also figure as an important determinant. So there is not, and never will be, a single model for universal adoption. Public accountability models for private service delivery will differ from situation to situation and from environment to environment.

So, what are the important dimensions of extending the ombudsman to the private sector? To what extent can accountability of private sector activity be left to self-regulation and industry ombudsmen? Or, just as the public/private divide is closing, can there be possibilities of collaboration between the two in matters of public accountability? What is the implication of this shift on human rights?

These are some of the issues that today's theme raises.

Closing Remarks (after panel discussion)

The debate on the ombudsman extending himself to the private sector continues to be a matter of general concern. Considerable initiative has been taken to bring the private sector actively into the realm of administrative law. Thought seems to be crystallizing now in favor of the position that the ombudsman has an important role in the accountability of private-sector service providers of public services.

We already have a fair number of hybrid ombudsmen today – ombudsmen created by statute – covering private industry and services. Some examples are the Financial Services Ombudsman's Service, the Housing Ombudsman and the Legal Services Ombudsman (in England), the Banking Ombudsman and the Insurance Ombudsman (in Pakistan), the Commonwealth Ombudsman, the Telecommunications Industry Ombudsman, the Financial Ombudsman Service and the Private Health Insurance Ombudsman (in Australia), the Danish Consumer Ombudsman, the Malaysian Public Complaints Bureau, the Ireland Financial Services Ombudsman and the Insurance Ombudsmen in India and Sri Lanka.

All of them have jurisdiction over the private sector in varying ways and under varying conditions. Most of these ombudsmen have been created in the areas of finance (banking, pensions, insurance), public utilities (energy, telecommunications, water) and in the health sector. All these areas have an intimate relationship with the everyday lives of citizens. Clearly, there is concern all around that private-sector services affecting the daily lives of people should be subject to minimal standards and must be publicly accountable.

It is also evident that there is an array of options and models to achieve accountability of private-sector entities, and countries can look at them from available international arrangements and practices to reconfigure them to their own environment and purposes. Each will have to figure out what reconfiguration suits it best, keeping in view implications for jurisdictional spread, for maintaining flexibility for coverage of private entities, for funding patterns for structures that may or may not be participative and for determining measures for enforcement of the ombudsman's decisions.

Various countries have resolved these issues in various ways through various arrangements. There is no one size that fits all. This is exactly what the Danish Ombudsman meant when he concluded in a recent address that such interventions for accountability have necessarily to be determined by states on a case-by-case basis.

I expect the proceedings of this workshop will usefully contribute to the conference objectives and outcomes, insofar as they contribute to a better understanding of the role of the ombudsman in respect of private-sector service delivery in areas of public importance.