

Ensuring Accountability in Privatized and Decentralized Delivery of Public Services: The Role of the Asian Ombudsman¹ (Conference Paper)

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“Probably the greatest change that will impinge on the activities of the Ombudsman in the future flows from the contraction of performance of government functions by central agencies in favor of contracting out of functions to the private sector. The right of the citizen to complain about adverse decisions or inappropriate action is lost unless the private organization is brought within the aegis of the Ombudsman.”³

I. Introduction

Countries around the world have embraced new public management (NPM) as a framework within which government can be modernized and the public sector reengineered.⁴ This involves the reduction of the public sector’s direct responsibility for service delivery in favor of the private sector. The shifting of responsibility from the public to the private sector is expected to make public services more efficient in their use of resources.⁵ It is also envisioned that the citizen will benefit both as a customer, with the promise of better public services, and as a taxpayer, with better value for money paid.

The participation of private capital and management in public service delivery covers a wide range of options and includes the transfer of ownership from the public sector to private companies, the conversion of public enterprises into private entities, the involvement of private entities in the operation of public enterprises, or some form of public-private partnership (PPP).⁶ It can be through such means as government downsizing, outsourcing, and partnership;⁷ and the fragmentation and decentralization of public services.⁸

Decentralization is another approach for improving service delivery. It is seen to enhance allocative and productive efficiency in the delivery of public services through the transfer of functions, powers, and responsibilities to lower-level institutions or local authorities. Allocative efficiency is achieved through a better matching of resources to local

¹ This is the abridged version of the study, which was co-authored with Alex Brillantes, Ranjani Jha and Jose O. Tiu Sonco II found in Asian Development Bank’s “Strengthening the Ombudsman Institution in Asia: Improving Accountability in Public Service Delivery through the Ombudsman”. The whole book can be downloaded from this site:

<http://beta.adb.org/publications/strengthening-ombudsman-institution-asia-improving-accountability-public-service-delive>

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³ Philip Giddings, “The Ombudsman: Accountability and Contracts,” in *Contracts, Performance Measurement and Accountability in the Public Sector*, ed. Gavin Drewry, Carsten Greve, and Thierry Tanquerel (Amsterdam: IOS Press, 2005), 93.

⁴ Kempe Ronald Hope Sr. “The New Public Management: Context and Practice in Africa,” *International Public Management Journal* 4, no. 2 (2001): 119.

⁵ World Bank, “What is Decentralization?,” The Online Sourcebook on Decentralization and Local Development, http://www.ciesin.org/decentralization/English/General/Different_forms.html.

⁶ Brooke Chambers, “A Critical Appraisal of Privatization in Nigeria,” HG.org Worldwide Legal Directories (October 8, 2008), <http://www.hg.org/article.asp?id=5491>.

⁷ M. Shamsul Haque, “Theory and Practice of Public Administration in Southeast Asia: Traditions, Directions, and Impacts,” *Intl Journal of Public Administration* 30 (2007): 1306.

⁸ Roger Levy, “Modernization, Decentralization and Governance: A Public Management Perspective” (paper, Political Studies Association Annual Conference, Aberdeen, UK, April 4–6, 2002), 3, <http://www.psa.ac.uk/journals/pdf/5/2002/levy.pdf>.

preferences, while productive efficiency results from the increased accountability of local governments, the involvement of fewer levels of bureaucracy, and the better knowledge of local costs.⁹

But the outcomes of decentralization, privatization, and the various forms of PPP (such as outsourcing) have not always been positive. Decentralization has failed to deliver all its promised benefits, and has so far been unable to fix the problems it was expected to resolve. While it has been widely embraced as a strategy for improving the quality of services provided by central governments, “in too many cases no significant improvements have been realized and service delivery has actually declined.” In some cases, “decentralization appears to have generated new sets of problems, sometimes opening new arenas of conflict between the national government and subnational officials.”¹⁰ In addition, because local government officials are susceptible to “capture” by special interest groups—and often slacken their efforts to improve public services when there is no risk of losing their jobs—accountability, efficiency, and equity in service delivery may even take a turn for the worse under decentralization.¹¹

Various studies have shown that, while privatization has led to the improvement of *managerial* accountability, *political* accountability was greatly diminished; and the studies have shown that many people were not happy with privatization.¹² Graeme A. Hodge and Ken Coghill pointed out that “[t]he common thread throughout was the consistent reductions observed in political accountability and judicial/quasi-judicial accountability, along with a simultaneous rise in market-based and managerial accountabilities, particularly through contract law.”¹³ They mentioned several earlier studies that demonstrate their point. One was a survey of 828 water customers in the United Kingdom in 1994 by Peter Saunders and Colin Harris, which found only 28% of respondents believing that the privatization of water had improved accountability, with 39% disagreeing, and 34% having no opinion.¹⁴ The other studies included those by David Heald and Lydia Thomson, which both concluded that voluntary disclosures of performance, costs, and financial information declined following privatization in the United Kingdom;¹⁵ and one on New Zealand by Michael Taggart, which was especially scathing about the effects of privatization on accountability.¹⁶ Taggart claimed that the legal process of privatization created an “accountability vacuum” by stripping away most of the public sector’s broader accountability mechanisms, including ombudsman review,

⁹ Satu Kahkonen and Anthony Lanyi, “Decentralization and Governance: Does Decentralization Improve Public Delivery?” (PREM Notes Number 55, Washington DC: World Bank, 2001), 1, www1.worldbank.org/prem/PREMNotes/premnote55.pdf.

¹⁰ United States Agency for International Development (USAID), *Democratic Decentralization Programming Handbook* (Washington, DC: USAID Office of Democracy and Governance, 2009), 2. http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/DDPH_09_22_09_508c.pdf.

¹¹ Royal Economic Society, “Delivering Public Services in Developing Countries: How The Poor Can Benefit From Decentralisation” (Media Briefing, Royal Economic Society, 2006), <http://www.res.org.uk/society/mediabriefings/pdfs/2006/jan06/bardhan.asp>.

¹² Refers to the constraints placed on the behavior of public officials by organizations and constituencies with the power to apply sanctions on them. See the World Bank Anti-Corruption web page: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPUBLICSECTORANDGOVERNANCE/EXTANTICORRUPTION/0,,menuPK:384461~pagePK:149018~piPK:149093~theSitePK:384455,00.html>.

¹³ Graeme A. Hodge and Ken Coghill, “Accountability in the Privatized State,” *Governance: An International Journal of Policy, Administration, and Institutions* 20, no. 4 (2007): 693. Market accountability refers to the expectation of customers/consumers that a provider/company will offer an acceptable service/product.

¹⁴ Peter Saunders and Colin Harris, *Privatization and Popular Capitalism* (Philadelphia, PA: Open University Press, 1994).

¹⁵ David Heald, “A Financial Autopsy on the CEGB,” *Energy Policy* 17, no. 4 (1989): 337–350; Lydia Thomson, “Reporting Changes in the Electricity Supply Industry,” *Financial Accountability and Management* 9, no. 2 (1993): 131–157.

¹⁶ Michael Taggart, “The Impact of Corporatisation and Privatisation on Administrative Law,” *Australian Journal of Public Administration* 51, no. 3 (1992): 368–373

freedom of information, scrutiny by the Auditor-General, and ministerial responsibility.

Similar problems have also been reported with PPPs. In a study of water privatization and restructuring in Asia-Pacific, for example, David Hall and others documented some failed PPP projects and recommended a review of PPPs, including the Build-Operate-Transfer (BOT) model:

A number of water supply BOT projects have been abandoned or are causing serious problems in Vietnam, China, Malaysia and elsewhere, due to unaffordable levels of prices being built into take-or-pay contracts. Similar problems have been observed elsewhere in the world. There should be a serious re-appraisal of the economics of existing water supply BOTs, and a moratorium on further developments, while the lessons of this experience are explored. Otherwise long-term economic liabilities may be accumulated which damage the ability of water utilities to function.¹⁷

Given the tendency to reduce or streamline the role of the public sector in service delivery, there is a clear need to strengthen state accountability mechanisms in order to protect the public from private sector abuses or administrative neglect that may arise as a result of decentralization, privatization, and PPPs. This is particularly a problem in Asia, where most people do not have the resources to invoke the intervention of the courts to redress their complaints, especially those regarding public services.

Although it is only one of several formal accountability institutions in democratic states, the ombudsman is in a unique position to help ordinary citizens lodge complaints about public services. Ombudsman offices are accessible. Often referred to as the poor man's court, they provide the public with a fast, cheap, and simple means of redressing grievances. There have been concerns, however, about the diminution of the ombudsman's role as a result of decentralization, as noted by a former Commonwealth Ombudsman in Australia:

Probably the greatest change that will impinge on the activities of the Ombudsman in the future flows from the contraction of performance of government functions by central agencies in favor of contracting out of functions to the private sector. The right of the citizen to complain about adverse decisions or inappropriate action is lost unless the private organization is brought within the aegis of the Ombudsman.¹⁸

This paper examines how decentralization and private sector involvement in public service delivery can affect the role of the ombudsman. It poses the following questions: What are the implications on the role of the ombudsman—and on the right of the citizens to seek redress of their grievances—when public services are decentralized, privatized, or delivered under a PPP arrangement? How do Asian ombudsmen process complaints about public services that are delivered by the private sector? When the private sector takes over the delivery of a public service, does the ombudsman maintain the power to enforce accountability measures if some public funds or resources are used (e.g., as in subsidized housing and education)? Does the ombudsman office have—or should it have—a role in grievance redress concerning public services that have been decentralized, privatized, or handled by a PPP? While these questions have already been discussed in various conferences, a review of the debate will be informative as we look at how Asian ombudsmen have

¹⁷ David Hall, Violeta Corral, Emanuele Lobina, and Robin de la Motte, "Water Privatisation and Restructuring in Asia-Pacific" (report, Public Services International Asia-Pacific meeting, Changmai, Thailand, 2004, <http://www.psir.org/reports/2004-12-W-Asia.doc>).

¹⁸ Philip Giddings, "The Ombudsman: Accountability and Contracts," in *Contracts, Performance Measurement and Accountability in the Public Sector*, ed. Gavin Drewry, Carsten Greve, and Thierry Tanquerel (Amsterdam: IOS Press, 2005), 93.

responded to this issue.

II. Reforms in Public Service Delivery

Public services are a “set of services provided for large numbers of citizens in which there are potentially significant market failures (broadly interpreted to include equity as well as efficiency) that justify government involvement, whether in production, finance or regulation.”¹⁹ The manner of delivery has become immaterial: what defines a public service is the fact that the government has a fundamental responsibility to provide it. Whether the government chooses to provide public services directly, rely on nongovernmental or private sector agents (e.g., for toll roads, electricity, contracted functions), or to devolve the task to local administrative units, is merely a question of the government’s mode of engagement. Among the core areas for which there is a consensus in favor of government responsibility are: law and order, infrastructure (i.e., major irrigation works, transport services, water resources, road construction and maintenance), education, health (promotive, preventive, and curative), tax collection, sanitation, and social safety nets.²⁰

In the last 25 years, Asian countries have used various strategies to improve the delivery of public services, among them decentralization and private sector participation (i.e. PPPs and privatization).

A. Decentralization²¹

As a key component of the NPM philosophy, decentralization is considered to be the best approach for enabling governments to provide high-quality services that citizens will value; increasing managerial autonomy, particularly by reducing central administrative controls; demanding, measuring, and rewarding both organizational and individual performance; enabling managers to acquire the human and technological resources needed for meeting performance targets; generating a receptiveness to competition and an open-mindedness when deciding which public services should be provided by the public and which by the private sector;²² empowering citizens through their enhanced participation in decision making, planning, and management; improving economic and managerial efficiency or effectiveness; and creating better governance.²³ Thus, if properly implemented, it can be an effective management approach to make public service more efficient.²⁴ It also broadens the reach of national government, enabling its policies and service to penetrate even into remote rural areas.²⁵

B. Private Sector Participation

¹⁹ Grout, “Private Delivery of Public Services, 6.

²⁰ World Bank, “India Inclusive Growth and Service Delivery: Building on India’s Success, Development Policy Review,” (Report No.34580-IN, Washington, DC: World Bank, 2006), 31-32, http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/DPR_FullReport.pdf.

²¹ This section draws from Alex B. Brillantes Jr., “Decentralization Imperatives: Lessons from Some Asian Countries,” *Journal of International Cooperation Studies* 12 (2004a): 33–55, http://www.research.kobe-u.ac.jp/gsics-publication/jics/brillantes_12-1.pdf.

²² Sandford Borins, “Government in Transition: A New Paradigm in Public Administration” (paper, Inaugural Conference of the Commonwealth Association for Public Administration and Management, Charlottetown, Prince Edward Island, Canada, August 28–31, 1994), cited in Hope, “The New Public Management,” 124.

²³ Jerry M. Silverman, *Public Sector Decentralization: Economic Policy and Sector Investment Programs* (Washington, DC: World Bank, 1992), cited in Hope, “The New Public Management,” 124.

²⁴ Kahkonen and Lanyi, “Decentralization and Governance,” 1.

²⁵ G. Shabbir Cheema and Dennis A. Rondinelli, eds., *Decentralization and Development: Policy Implementation in Developing Countries* (Beverly Hills, CA: Sage, 1983).

The role of the private sector in public service delivery has taken a variety of forms, including outright privatization (partial or full divestiture) and variations of PPPs, such as contracted services, concession agreements, and partnerships with privately funded mechanisms.²⁶ The growth of the private sector's role in public service delivery can happen in a number of ways, for instance, when a government:

- allows private companies to perform functions that it had previously monopolized;
- contracts out the provision or management of public services or facilities to private companies;
- finances public sector programs through the capital market, with adequate measures to protect itself from risk, and allows private organizations to participate;
- transfers responsibility for providing public services to the private sector through the divestiture of state-owned enterprises (i.e., privatization);
- deregulates by reducing or eliminating restrictions imposed on private firms providing specific services.²⁷

C. Public-Private Partnerships

The term “public-private partnership” (PPP) refers to an arrangement in which a private company or organization complements “the role for government in ensuring that social obligations are met and successful sector reforms and public investments achieved.”²⁸ It proceeds from the acknowledgment that the public and private sectors each have certain advantages when it comes to performing specific tasks:

The government's contribution to a PPP may take the form of capital for investment (available through tax revenue), a transfer of assets, or other commitments or in-kind contributions that support the partnership. The government also provides social responsibility, environmental awareness, local knowledge, and an ability to mobilize political support. The private sector's role in the partnership is to make use of its expertise in commerce, management, operations, and innovation to run the business efficiently. The private partner may also contribute investment capital depending on the form of contract.²⁹

It is also a contractual arrangement between a public and private entity that defines their risks and obligations, as well as the skills and assets each will contribute to the provision of a service or facility to the general public.³⁰ Aside from defining the responsibilities of the parties, PPPs have two other key characteristics: (i) sensible risk sharing between the public and private sector partners, and (ii) financial rewards to the private partner commensurate with the achievement of pre-specified outputs.³¹

The basic PPP contract types are: service contracts, management contracts, affermage or lease contracts, build-operate-transfer (BOT) and similar arrangements, concessions, and joint ventures.³² The schemes that have the most direct bearing on public service delivery are service contracts and management contracts (both of them forms of outsourcing), lease

²⁶ Hodge and Coghill, “Accountability in the Privatized State,” 675–702.

²⁷ Hodge and Coghill, “Accountability in the Privatized State,” 675–702; *Encyclopedia of Business*, 2nd ed., s.v. “Privatization,” <http://www.referenceforbusiness.com/small/Op-Qu/Privatization.html>.

²⁸ Asian Development Bank (ADB), *Public-Private Partnership Handbook* (Manila: Asian Development Bank, 2004), 1.

²⁹ ADB, *Public-Private Partnership*, 1.

³⁰ The National Council for Public-Private Partnerships, “How PPPs Work,” <http://www.ncppp.org/howpart/index.shtml>.

³¹ ADB, *Public-Private Partnership*, 11.

³² ADB, *Public-Private Partnership*, 27.

contracts, concessions, and BOT and similar arrangements. A brief description of each scheme, including that of privatization, is given below.

Table 1: Comparative Matrix of PPP Arrangements

Scheme	Role of government	Role of private sector
<i>Service Contracts (Outsourcing)</i>	Remains the primary provider of the public service.	Specific tasks at an agreed cost according to pre-set performance standards.
<i>Management Contracts (Outsourcing)</i>	Monitors compliance of contractor with its contractual obligations	Full line management and must realize performance targets.
<i>Lease Contracts</i>	Monitors compliance with lease agreement.	Delivery of a service at its own expense and risk, and undertakes all the obligations relating to quality and service standards.
<i>Concessions</i>	Limited to setting performance standards and ensuring that the concessionaire meets them.	Full delivery of services in a specified area—including the operation, maintenance, management, construction, and rehabilitation of a facility ³³ for an extended period of time.
<i>Build-Operate-Transfer and Similar Arrangements</i>	Provide legal and regulatory framework to enable private sector to recover investment and to protect the public.	Finances and develops a new infrastructure project or a major component according to performance standards set by the government.
<i>Privatization</i>	None unless privatized service is regulated.	Takes over full ownership and operations.

D. Privatization

Privatization involves the sale of shares or ownership in a company or the sale of operating assets or services owned by the public sector. When services are privatized, the government's role is limited to regulation within the scope of the regulator's powers.³⁴ As a development strategy, privatization has paved the way to an increasingly diversified role for the private sector in the public service delivery. It is based on the assumption that the introduction of market forces or their equivalent in government operations could enhance the efficiency of those operations, including the delivery of public services.

One of the more striking advantages of privatization is the extent to which it can make the behavior and performance of companies more transparent. The reason given is that privatization facilitates the emergence of distinct enterprises with clearly defined lines of responsibility, in contrast to public sector enterprises, which are often submerged in the depths of government ministries, making accountability almost impossible to establish.³⁵ It has been adopted throughout the world for large utilities such as telecommunications, energy, and, to a lesser extent, water and transport. A comprehensive international survey of relevant studies concluded that privatization has worked in the sense that "divested firms always become more efficient, more profitable, and financially healthier, and increase their capital

³³ ADB, *Public-Private Partnership*, 34.

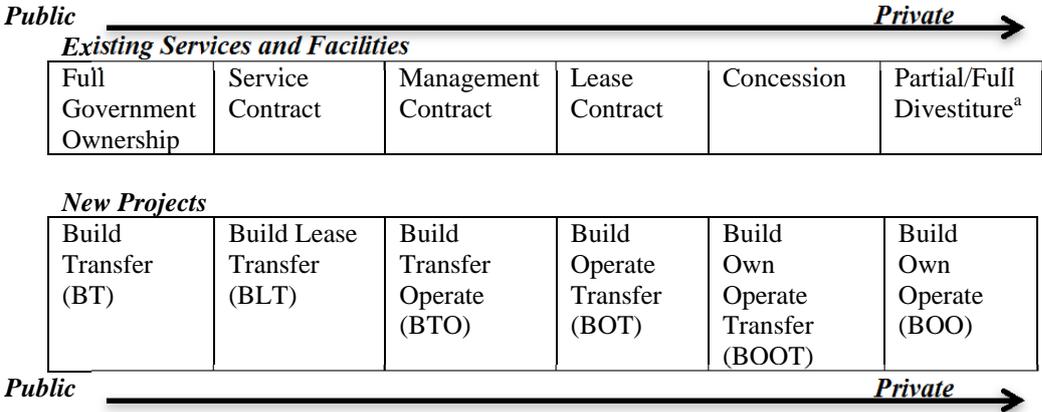
³⁴ Grout, "Private Delivery of Public Services, 6.

³⁵ Matthew Bishop, John Kay, and Colin Mayer, *Privatization and Economic Performance* (Oxford, UK: Oxford University Press, 1994), cited in Hodge and Coghill, "Accountability in the Privatized State," 682.

investment spending.”³⁶

Not all PPPs, especially those with BOT-type arrangements, result in a full public divestment of responsibility. In some types of PPP, ownership of a facility remains with the government, while in others it is partially or completely transferred to the private sector, as can be seen in the continuum below.³⁷

Figure 1. Continuum of Public-Private Service Delivery, including PPPs



Source: Seader, D.L. “The United States’ Experience with Outsourcing, Privatization and Public-Private Partnerships,” (National Council for Public-Private Partnerships, 2002), 4, http://www.ncppp.org/resources/papers/seader_usexperience.pdf.

^a Partial and full divestiture, found at the “private” end of the continuum, are forms of privatization, not of public-private partnerships.

III. Implications of Decentralization, Privatization, and PPPs for the Role of Ombudsman

The major criticism against delivery of public services by the private sector is that, unlike the public sector, whose stated objective is to serve the interest of the public, the priority and mandate of private corporations are to ensure profitable and growing businesses.³⁸ Private companies answer to their shareholders, not to the taxpayers, and they are usually outside the ambit of formal accountability mechanisms of the state, including the ombudsman.

The most obvious question arising from this discussion is how to ensure that private sector providers of public services remain accountable. Past experience has shown that service delivery can be made effective if accountability is strengthened. It is true that people can make the private service provider accountable by refusing to patronize it or by filing cases in court when the service has caused dissatisfaction or injury. But what about those situations in which people do not have the possibility or the resources to pursue such courses of action? This is why accountability should not be effected solely through the market, but also through state accountability mechanisms, in particular the office of the ombudsman.

³⁶ Grout, “Private Delivery of Public Services,” 14.
³⁷ Seader, “The United States’ Experience with Outsourcing,” 4.
³⁸ Canadian Union of Public Employees, “Ten Reasons to Say NO to Privatization,” February 2010, <http://www.cupe.bc.ca/sites/default/files/ten-reasons-no-privatization1.pdf>. Note, however, that European companies have a duty to citizen stakeholders. There is a social obligation of private companies in Europe that distinguishes them from US companies [e.g., the German model].

A related question is how to bring the private sector provider of public services within the ombudsman's mandate, directly or indirectly. With many of the ombudsman offices created or organized before the advent of decentralization, privatization, and PPPs, one can readily assume that their jurisdiction would be limited to public sector providers of public services. In fact, ensuring accountability in public service delivery was not traditionally part of the ombudsman's direct mandate at all. Yet, with its power to investigate specific instances of bureaucratic injustice, provide redress, recommend corrective measures, and make erring public officials accountable, the ombudsman has come to assume a crucial role in the government's provision of basic services.

Criticisms against the increasing role of the private sector in public service delivery:

- private companies focus too much on profit-making, to the detriment of essential public services;
- private firms generally fail to invest in infrastructure;
- privatization leads to a reduction in the public workforce and in experienced personnel;
- private companies are interested only in short-term benefits;
- state monopolies are replaced by private monopolies;
- private firms have difficulty delivering high-quality public services such as water, public health, and transportation at affordable costs;
- privatization usually leads to the creation of wealth for the rich while making the poor poorer;
- privatization reduces public accountability;
- privatization is subject to abuse by regulators and private enterprises (i.e. regulatory capture); and
- it can result in private corruption replacing state corruption.¹

The ombudsman institution stems from a phase of administrative development when the state was thought of as a provider of public services affecting many areas of a citizen's life. It is closely associated with democratic development, good governance, and public administration, and is viewed as a simple means for citizens to address grievances they may have with government bureaucracy, ranging from simple clerical errors to oppression, including:

...injustice, failure to carry out legislative intent, unreasonable delay, administrative error, abuse of discretion, lack of courtesy, clerical error, oppression, oversight, negligence, inadequate investigation, unfair policy, partiality, failure to communicate, rudeness, maladministration, unfairness, unreasonableness, arbitrariness, arrogance, inefficiency, violation of law or regulation, abuse of authority, discrimination, errors, mistakes, carelessness, disagreement with discretionary decisions, improper motivation, irrelevant consideration, inadequate or obscure explanation, and all the other acts that are frequently inflicted upon the governed by those who govern, intentionally or unintentionally.³⁹

Over the years, Asian ombudsmen have assumed or been given roles and mandates that were not typically included in their traditional portfolios. In her review of the growth and evolution of the Asian ombudsmen, Alice Tai observed that, while the region has embraced the concept of ombudsman as an accountability institution, it has not done so slavishly. Of the institutions she reviewed, she identified the ombudsmen of Hong Kong, China; Pakistan, and Thailand as the only ones that adhere closely to the classical ombudsman model, which originated in Sweden. According to Tai, most Asian governments have developed their own models according to their own requirements:

Beyond sharing a common purpose of redressing public complaints, Asian ombudsman offices

³⁹Bernard Frank, "The Ombudsman and Human Rights—Revisited," in *Israel Year Book on Human Rights 1976*, vol. 6, ed. Yoram Dinstein (Tel Aviv: Israel Press Ltd., 1989), 134.

are not at all homogeneous in terms of remit and organizational structure. A country's institutions reflect the state of its political, social, cultural and economic development. Hence, there cannot be a blueprint that fits all. Each country or jurisdiction must select those features that best serve its community.⁴⁰

In some jurisdictions—among them Hong Kong, China; Indonesia; Japan; Pakistan, the Philippines; South Korea; and Thailand—the office of the ombudsman performs the role of mediator or conciliator in order to expedite the resolution of individual grievances. In the Philippines and India, the ombudsman office is granted authority to prosecute erring government officials and to impose administrative sanctions. Other ombudsman offices have taken on the role of advocate for the rights of important sectors of society or on issues of public interest, as Pakistan's Federal Ombudsman has done on children's rights. Ombudsmen in Azerbaijan, the Kyrgyz Republic, Tatarstan, and Uzbekistan, on the other hand, focus solely on human rights protection, while those in the PRC; the Philippines; Macao, China; South Korea; Viet Nam; and Yemen have varying mandates, including anti-corruption issues.⁴¹

Asian countries also differ in their methods of ensuring accountability in the wake of NPM. There appears to be no common thread—even among the members of the Asian Ombudsman Association (AOA)—in their policies, practices, and procedures for handling complaints against private sector providers of public services. This diversity actually reflects the public's assertiveness in demanding a more accountable bureaucracy, the result of fast-changing social, political, and economic conditions in the region. It also reflects the growing recognition of the ombudsman's role in service delivery, as well as the willingness of authorities to respond to the public's demand for better governance.

A. On the Capacity and Jurisdiction of Asian Ombudsmen

Based on the literature and the relevant laws and regulations of various countries, decentralization of service delivery from the central to local governments should not diminish the mandate of the ombudsman. Local public officials who assume the responsibility of delivering devolved services continue to be within the jurisdiction of the ombudsman office. Our review of the laws and regulations that created the various ombudsman offices in Asia has shown that ombudsman jurisdiction over local and central government officials concerning administrative malfeasance is comprehensive, except for well-defined exceptions, such as when specific officials are identified as being outside their jurisdiction. In fact, decentralization may actually open up new areas of intervention by the ombudsman, as shown in Table 2.

⁴⁰ Alice Tai, "Diversity of Ombudsmen in Asia – Back to Roots: Tracing the Swedish Origin of Ombudsman Institutions," (paper, International Ombudsman Institute 9th World Conference, Stockholm, June 8–13, 2009), 3.

⁴¹ Based on the Fact Sheets submitted by AOA member institutions. See the AOA website: <http://www.asianombudsman.com>. Clarify context and credibility of survey as fact as opposed to legislative frameworks.

Table 1: Decentralization and the Role of the Ombudsman in Exacting Accountability

Forms	Definition	Operationalization	Accountability Issues
Fiscal decentralization	Decentralizes fiscal resources and revenue-generating powers	<ul style="list-style-type: none"> ■ Self-financing ■ Expansion of local revenues ■ Local expenditure ■ Intergovernment fiscal transfers ■ Authorization of municipal borrowing 	<ul style="list-style-type: none"> ■ Corruption ■ Poor spending allocations ■ Poor utilization of fiscal transfers from the central government ■ “Pork barrel” ■ Use of finances for purposes other than those specified in technical and financial documents
Political decentralization	Transfers political power and authority to subnational levels	<ul style="list-style-type: none"> ■ Local elections ■ Representation ■ Local decision making 	<ul style="list-style-type: none"> ■ Abuse of decision-making powers ■ Interference in public transactions, such as the bidding process
Administrative decentralization	Transfers decision-making authority, resources, and responsibilities for the delivery of some public services from the central government to lower levels of government or to field offices of central government line agencies	<ul style="list-style-type: none"> ■ Deconcentration ■ Delegation ■ Devolution 	<ul style="list-style-type: none"> ■ Abuse of authority ■ Poor public service delivery of devolved functions such as health, education, social services, and agriculture
Market decentralization	Allows functions that had been primarily or exclusively the responsibility of government to be carried out by businesses, community groups, cooperatives, private voluntary associations, and other nongovernment organizations	<ul style="list-style-type: none"> ■ Deregulation ■ Debureaucratization 	<ul style="list-style-type: none"> ■ Collusion ■ Conspiracy ■ Noncompliance or substandard services ■ Citizen complaints

Sources: Brillantes 2004; World Bank Institute 2004; authors’ findings.

The continuation of the ombudsman’s jurisdiction after decentralization was confirmed by the responses to the survey questionnaire administered by the authors to the participants of the AOA workshop conducted by the Asian Development Bank (ADB) in Bangkok, in February 2010. Most of the respondents felt that their policy frameworks for enforcing accountability remained largely in place vis-à-vis decentralized powers and services.⁴² Respondents agreed that under decentralization the ombudsman’s powers, mandates, and jurisdictions over the delivery of public services have been maintained.

⁴² However, as suggested earlier, their responses have to be considered in light of how “mature” or established their organizations are.

According to the respondents, their powers are broad enough to prevent significant constraints, dilution, or weakening by decentralization. In fact, they claimed that they had aggressively and successfully pursued cases of abuse at the local government level even after decentralization.

Respondents said that their offices were capable of addressing complaints about decentralized services. About 75% of the key respondents said that the organizational structures of their ombudsman organizations were properly designed. More than 50% said that they were responsive to complaints about decentralized services, and most responded positively to questions regarding the competencies (i.e., knowledge, skills, and attitudes) of ombudsman officers and field investigators. Respondents also felt that their field investigators were motivated to pursue erring local government officials.

The respondents' concerns regarding decentralization lay more with practical issues arising from the additional responsibilities involved. Several respondents said that they may not have enough personnel to address cases at both the national and subnational government levels, while nearly half said that the rules and procedures for decentralized cases were not clear to investigators. Moreover, they noted that the coordination and links between ombudsman institutions and other accountability and oversight agencies were weak and needed to be strengthened.

While the ombudsman's jurisdiction in the context of decentralization is generally clear, the same is not true with respect to privatization and PPPs. Of the relevant laws that we reviewed, only those of Japan and Malaysia explicitly state that the jurisdiction of accountability institutions extend to the private sector. In other jurisdictions, the mandate of the ombudsman vis-à-vis the private sector is not very clear or consistent. Many of the ombudsman offices in Asia were created before their countries started to privatize or outsource public services, or their governments never considered the implications for accountability. Thus, most of the enabling laws that we examined do not explicitly describe the ombudsman's jurisdiction over private entities with respect to privatized services or to the various forms of PPP.

On the question of ombudsman jurisdiction over private sector providers of public services, the survey responses were mixed. Although all the respondents agreed that their respective offices had a broad policy framework for decentralization, not all thought that they had jurisdiction over the private sector. Most believed that, since their enabling laws limited their jurisdiction to public officials, the private sector was outside their mandate.

Those who answered otherwise argued that because their laws did not prohibit them from looking into complaints against the private providers, they should be able to do so. However, they hesitated when asked whether they were actively pursuing cases regarding public services that had been outsourced or relegated to some other form of PPP. About 60% of the respondents thought that their organizational structures were unsuited for such cases. This is consistent with their previous claims that they deal with the concerned government agencies and public officials, but not directly with private entities.

It also appears from the responses that, while ombudsman institutions have broad mandates, explicit powers and appropriate organizational structures are lacking when it comes to handling private sector providers of public services. Thus, a majority of respondents

(about 76%) felt that the role of the ombudsman should be further clarified in the context of new public management (NPM).

B. Responses of Asian Ombudsmen to NPM Challenge

Asian governments and their ombudsmen have addressed the challenges of NPM in different ways. In most countries, the ombudsman's jurisdiction covers maladministration by elected and appointed officials at the national and subnational levels of government, as well as in state enterprises or government-owned and controlled corporations. As mentioned above, there are only two jurisdictions in which the ombudsman's mandate over the private sector is clearly specified via laws or administrative issuance: Japan and Malaysia.

One of the main functions of Japan's Administrative Evaluation Bureau is mediating "citizen's complaints *regarding business* within the jurisdiction of national administrative organs, Incorporated Administrative Agencies (IAA), and public corporations."⁴³ (italics added) Malaysia's Development Administration Circular No. 4 of 1992, which lays out the roles of different levels of government (i.e., ministries, state or federal statutory bodies, and local authorities) in the management of public complaints, says that the public may lodge complaints regarding dissatisfaction caused by "any administrative action, including those made by Government agencies that have been *privatized* or institutions that have a monopoly."⁴⁴ (italics added) Pursuant to this provision, Malaysia's Public Complaints Bureau is able to investigate the private sector and make it accountable for the delivery of public services.

In countries where the mandate over the private sector is not explicit, ombudsman and/or other accountability institutions have devised resourceful ways to provide redress to the public. The discussion below is not exhaustive, as it focuses on AOA members, but it provides a good picture of how ombudsmen in Asia are responding to the growing role of the private sector in the provision of public services.

⁴³ Asian Ombudsman Association (AOA), "Fact Sheet: Administrative Evaluation Bureau of Japan" (Institutional Overview Number 1, 2010a), 1,

http://asianombudsman.com/ORC/factsheets/2010_4_22_FINAL_JAPAN_Fact_Sheet_Member_Profile.pdf.

⁴⁴ AOA, "Fact Sheet: Public Complaint Bureau of Malaysia" (Institutional Overview Number 1, 2010b), 1, <http://asianombudsman.com/ORC/factsheets/MalaysiaFactsheet.pdf>.

Hong Kong

The Ombudsman of Hong Kong has the power to investigate alleged acts of maladministration committed by government departments and public organizations. It may also initiate direct investigations, even without a complaint, if it thinks that a person may have incurred an injustice resulting from maladministration. After an investigation, the Ombudsman may report its opinions and recommendations to the head of the concerned agency, together with a time frame for actions to be taken. If no action is taken, or if the action taken is inadequate, the Ombudsman can submit its report to the Chief Executive, together with such observations as it thinks fit. If the Ombudsman considers that a serious injustice has taken place, it may submit an extended report to the Chief Executive. In such cases, the Chief Executive is mandated to table the report in the Legislative Council within one month or such period as he may determine.

As in many jurisdictions, a number of public services have been outsourced in Hong Kong, including cleaning, garbage collection, the management of housing estates, and others. Under its ordinance, the Ombudsman does not have any direct responsibility for complaints involving the private providers of public services, which are subject to different regulations. The law limits its mandate to public officials.

This limitation has not, however, prevented the Hong Kong Ombudsman from ensuring accountability regarding outsourced public services. While authority over these services has been delegated elsewhere, accountability remains with the government, specifically with the department or agency that entered into the contract with the private entity.⁴⁵ The government department or agency concerned must closely monitor the contractor's performance and provide necessary guidance for meeting public expectations.⁴⁶ Nevertheless, in dealing with grievances concerning outsourced services, the Ombudsman's strategy is not to intervene directly, but to refer the case to the department(s) that outsourced the services in the first place. This approach has proven successful, as is illustrated by the following case:

Case No. 1: Garbage Collection.

The complainant alleged that, at around 4:00 a.m. every morning, a refuse collection vehicle would come to collect garbage in front of the building in which he lived, causing nuisance and odor. The complainant had repeatedly complained to the Food and Environmental Hygiene Department (FEHP), but the problem remained unsolved because it was not within the purview of the FEHP. Nonetheless, the FEHP referred the case to the police and to the Environmental Protection Department (EPD) for action.

In this case, the complaint declined EPD assistance. However, the department still investigated the case. Records showed that no similar complaints had been received in the prior few years. As the complainant refused to disclose his personal information and did not contact the department directly, the EPD could not conduct any odor assessment at his flat. Still, it asked the cleansing contractor to consider another location for garbage collection in order to reduce the nuisance. The contractor complied.

Source: Office of The Ombudsman, Hong Kong, Annual Report of The Ombudsman Hong Kong 2009: 20 Years On (Hong Kong, China: Hong Kong Ombudsman, 2009), 81–82.

⁴⁵ Office of the Ombudsman, Hong Kong, *Annual Report of The Ombudsman Hong Kong 2009: 20 Years On* (Hong Kong, China: Hong Kong Ombudsman, 2009), 11.

⁴⁶ Hong Kong Ombudsman, *Annual Report 2009*, 6.

Pakistan

Established in 1983, the Wafaqi Mohtasib (Federal Ombudsman) of Pakistan functions as an “administrative justice institution” against maladministration.⁴⁷ Its primary objective is to “diagnose, investigate, redress and rectify any injustice done to a person through Mal-administration” committed by “any agency or any of its officers or employees. The ‘Agency’ includes a Ministry, Division, Department, Commission or office of the Federal Government or statutory corporation or other institution established or controlled by the Federal Government.”⁴⁸ As a general rule, the Federal Ombudsman does not have jurisdiction over the private sector, although ombudsman offices exist for the banking and insurance industries, both with jurisdiction over the private sector.

There is no specific legislation granting the federal and provincial ombudsmen jurisdiction over private providers of public services that have been decentralized, privatized, or made subject to a PPP. Pakistan’s Ministry of Law, however, has ruled that privatized public utilities and companies must remain answerable to the Federal Ombudsman regarding public complaints and consumer issues. It held that completely privatized companies, over which the government no longer has any control, still fall under the jurisdiction of Federal Ombudsman because the government established them in the first place. Regulatory bodies like National Electric Power Regulatory Authority, Oil and Gas Regulatory Authority, and the Pakistan Telecommunication Authority continue to help resolve complaints about service delivery, and are also answerable to the Federal Ombudsman.⁴⁹

Significantly, the Ministry of Law’s ruling arose when two privatized companies—the Pakistan Telecommunication Company (PTCL) and the Karachi Electric Supply Company—refused to appear before the ombudsman’s office or answer queries arising from public complaints on the grounds that “they had become private concerns after partial or full management transfers and hence not answerable to the ombudsman.”⁵⁰

In the case of the PTCL, it is worth noting that the Federal Ombudsman has developed an innovative approach to helping customers obtain redress, albeit indirectly, for complaints they have filed against the company. The PTCL used to be a state-owned entity, but was privatized in 2006 when the private investor Etisalat took over its management. Although the government is still a significant shareholder, the PTCL is no longer a government entity.⁵¹ It remains, however, within the jurisdiction of the Federal Ombudsman. In fact, of all the major federal agencies within the Wafaqi Mohtasib’s jurisdiction, the PTCL ranks third in the number of complaints received.

In partnership with the United Nations Development Programme (UNDP), the Federal Ombudsman is helping the PTCL and four other companies to improve their redress and

⁴⁷ Wafaqi Mohtasib (Federal Ombudsman) of Pakistan, *Annual Report 2008* (Islamabad: Wafaqi Mohtasib, 2009), 17.

⁴⁸ AOA, “Fact Sheet: Wafaqi Mohtasib (Ombudsman) Pakistan” (Institutional Overview Number 1, 2010c), 1, <http://www.asianombudsman.com/ORC/factsheets/WafaqiMohtasibFactsheet.pdf>.

⁴⁹ Khaleeq Kiani, “Privatised public utilities remain answerable to ombudsman,” *Dawn*, August 3, 2007, <http://archives.dawn.com/dawnftp/72.249.57.55/dawnftp/2007/08/03/nat11.htm>.

However, their policy decisions and determinations could only be challenged before the superior judiciary.

⁵⁰ Kiani, “Privatized public utilities,” *Dawn*, August 3, 2007.

⁵¹ Iffat Idris, “Capacity Mapping and Assessment: Grievance Redress Systems of 5 Federal Agencies” (report, Strengthening Public Grievance Redress Mechanisms Project, UNDP Pakistan, 2009).

response systems, as well as their procedures for aligning public services with the needs and expectations of citizens.⁵²

Thailand

The Ombudsman of Thailand was established on 14 September 1999 to consider and investigate complaints of injustice, illegality, or maladministration done to persons by “a civil

<p>Case No. 2: Foul Smell from a Shrimp Processing Company</p> <p>After receiving a complaint from community residents about a foul smell coming from a shrimp processing company, the Thai Ombudsman’s office instructed the Provincial Industrial Office (PIO) to investigate the cause of the problem by inspecting the company’s equipment. The PIO found some defects and ordered the company to replace the defective parts. Still, the problem remained unresolved. The Ombudsman’s office conducted a further investigation of the concerned government agencies, and found that public officials had failed to ensure compliance by the companies in the area. The Ombudsman’s office instructed the Tambon Administrative Organization, the PIO, and the Provincial Health Office to perform their duties and strictly enforce the rules and regulations for industry expansion and pollution control. They ordered the Provincial Health Office to monitor the companies’ plants on the third and sixth month of every year. The concerned public agencies were also required to report their performance, and failure to improve their services would generate further action by the Ombudsman’s office.</p> <p><i>Source:</i> Office of the Ombudsman of Thailand. <i>Thai Ombudsman at a Glance</i> (Bangkok, Thailand: Office of the Ombudsman of Thailand, 2009).</p>
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servant, member or employee of a government body, state agency, state enterprise or local government.”⁵³ According to the 2004 guiding code of conduct, the Ombudsman and his staff must redress public grievances promptly and fairly. The 2007 Constitution of Thailand substantially changed the mandate of the Ombudsman to that of a constitutional body that would safeguard the people’s rights and “inspect the exercise of state power.” It also gave enormous *suo moto* power to the Ombudsman to investigate cases that involve adverse effects on the public or in which the safeguarding of the public interest is required.⁵⁴

Though the Thai Ombudsman’s jurisdiction is limited to public authorities, and does not cover private individuals or companies, the Ombudsman investigates any complaint against an individual or firm engaged in the delivery of a public service by

focusing on the public authorities that outsourced the service. The Ombudsman has also documented resolved cases involving decentralized functions and services of the Thai government.

⁵² The other agencies are Sui Northern Gas Pipelines Ltd (SNGPL), the National Database and Registration Authority (NADRA), Pakistan Post, and State Life Insurance Corporation (SLIC).
⁵³ The Ombudsman Act, B.E. 2542 (1999), sec. 16, http://thailaws.com/law/t_laws/tlaw0292_4.pdf.
⁵⁴ Office of the Ombudsman of Thailand, *Thai Ombudsman at a Glance* (Bangkok: Thai Ombudsman, 2009), 17.

These cases include complaints about the operations of the Bangkok Metropolitan Administration, the national government's unexplained decreases in financial assistance to villages and subdistricts, an unlawful purchase of waste disposal services by the Tambon Administrative Organization, failure in the performance of duties by the Provincial Industrial Office and the Provincial Health Office, failure to dredge a clogged drainage system by a municipality and the Department of Highways, and other unlawful practices.⁵⁵ Case No. 4 illustrates a situation wherein the Ombudsman acted on a complaint against a private company regarding air pollution. While it has no jurisdiction over the private company, the Ombudsman retained its authority over the decentralized government instrumentalities that are supposed to enforce rules and regulations and monitor operations and safety standards.

Case No. 3: Complaint on Outsourced Public Service

Citizens complained to the ombudsman that the public toilet in their community was very dirty. Aside from the foul smell, it posed a health hazard—particularly to young children and the elderly—and also gave tourists a bad image of the community. The private company contracted to clean the toilet had not been doing its job for a long time.

The Ombudsman can take action by investigating the public agency that outsourced the service. It cannot investigate the private contractor directly. Instead, its purpose is to determine why the government agency did not supervise the private contractor to ensure that the expected services were delivered. After the investigation, the Ombudsman may give its recommendation on how to resolve the case.

Source: Office of the Ombudsman of Thailand. *Thai Ombudsman at a Glance* (Bangkok, Thailand: Office of the Ombudsman of Thailand, 2009).

Philippines

The Office of the Ombudsman of the Philippines has a very broad mandate that covers all government instrumentalities, personnel, services, and functions, including national government agencies, local government units, and government-owned and controlled corporations. The Philippines Ombudsman's legal framework originates from the 1987

Case No. 4: Task Force Illegal *Hatak* (Towing)

This case illustrates the Philippines Ombudsman's lack of jurisdiction over private contractors authorized by the public sector to perform towing functions. The Task Force Illegal *Hatak* was created to address the abuses committed by towing companies contracted by local governments units to tow vehicles that were illegally parked and/or blocking traffic. Although the abuses of these companies were proven, the Ombudsman had difficulty pursuing cases against them because they were not within its jurisdiction, as they were not public officials, and the legal government unit concerned refused to cooperate.

Source: A field investigator from the Office of the Ombudsman of the Philippines.

Constitution, which states that it can “investigate on its own, or on complaint by any person, any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient.”⁵⁶ It can enforce administrative, civil, and criminal liability laws in every

case for which there is sufficient evidence. And it has preventive, investigative, and prosecutorial powers in cases of graft and corruption.

⁵⁵ See *Thai Ombudsman at a Glance*, 44–75, for the 50 highlighted cases of the Thai Ombudsman. Many of these cases involved complaints about public services that were supposed to be delivered by subnational government institutions.

⁵⁶ Philippines Constitution (1987), art. 11, sec. 13, <http://www.chanrobles.com/article11.htm>.

The 1987 Constitution and Republic Act No. 6770, which created the Office of the Ombudsman, limit the jurisdiction of the Ombudsman to government bureaucrats. According to Ombudsman officials, complaints filed against private entities are usually dismissed due to lack of jurisdiction, or they have been very difficult to pursue or prove (as in Case No. 4). It has therefore been suggested that the Ombudsman be mandated to look into private persons or corporations engaged in public service delivery if public funds or other resources are involved, which is similar to the ‘follow the dollar approach’ espoused by the Australian Commonwealth Ombudsman. According to him “the Ombudsman’s jurisdiction would be attracted if the decision making is government funded no matter who makes the decision.”⁵⁷

However, the Ombudsman can claim jurisdiction over outsourced services, or those delivered via PPPs, when there is established proof or evidence that collusion or conspiracy between public official(s) and the private partner has occurred. Under a specific law (Republic Act No. 3019), private individuals can be investigated and prosecuted together with public officers if a conspiracy to commit an irregularity is established.

Case No. 5 illustrates a situation in which the Philippines Ombudsman can pursue a case of suspected conspiracy between government officials and a private entity if citizens bring the case to its attention.

Thus, while the Ombudsman is viewed as having some authority over private sector entities, but it can only look into the operations of the government agencies for possible illegal or unethical acts. It cannot take direct action against a private service contractor, especially if the dispute is about the quality of service.

Case No. 5: A Case of Outsourcing in the Philippines

In the Philippines, certain functions of the Land Transportation Office (LTO) have been outsourced. A case in point is the drug-testing requirement for drivers before they are issued licenses. Since the government does not have the capacity to administer drug tests, certain private companies have been accredited to perform such tests. The question was raised whether the Ombudsman should pursue possible cases of collusion between certain frontline LTO officials and private drug testing companies.

There have been cases in which LTO officials encouraged applicants to go to their “preferred” drug testing companies to obtain their tests. Either citizens don’t suspect potential collusion and corruption, or they simply let it go because all they want is to get the driver’s license. Some Ombudsman officials have told us that they may pursue a case if it is warranted and brought before them. However, there are accompanying issues that must be addressed, including the resources of the Ombudsman office and the willingness of citizens to testify.

Source: Authors’ experiences at the Land Transportation Office.

Case No. 6 concerns a nongovernment organization: a cooperative. The Ombudsman handled this case by investigating a government agency that lent money to the cooperative.

⁵⁷ Giddings, “The Ombudsman: Accountability and Contracts,” 93.

Case No. 6: The Case of Rural Electric Cooperatives in the Philippines

Cooperatives are considered nongovernment organizations in the Philippines, and are therefore not part of the public sector. Electrical cooperatives are among the most common in the Philippines. Any misdemeanor committed by officers of these electric cooperatives is considered outside the ombudsman's jurisdiction. However, if a cooperative has a loan from the National Electrification Agency (NEA), a government-owned and controlled corporation, the NEA can step in to ensure that the borrowed funds are properly utilized. And the Office of the Ombudsman can file the case if the NEA finds evidence of misuse of public funds.

Source: Case related by a key respondent to the survey of participants at the Asian Ombudsman Association workshop in Bangkok, February 2010.

The Philippines Ombudsman can also enforce private sector accountability through partnerships with its own stakeholders. In 2005, the Ombudsman entered into a Memorandum of Agreement with the Department of Public Works and Highways (DPWH), the Department of Education, and the Boy Scouts of the Philippines, together with the Parents-Teacher Community Associations in every community where a public school was to be built.

The Memorandum of Agreement sought to address corruption and irregularities in the construction of public school buildings, which the DPWH was outsourcing to private contractors. The partnership, called the “Bayanihang Eskwela,” was based on the premise that communities could monitor such construction (i.e., to see whether it is compliant with the terms of reference), and thereby served as a complementary accountability mechanism to improve project performance.

These partnerships proved to be effective. By February 2007, 16 of 25 projects were 100% completed, while 9 were 50%–85% completed. Of the completed projects, 6 involving DPWH engineers and contractors finished early. The average completion period of 81 days, although still considered long, is remarkable when compared with those of other projects, which generally take more than one year to finish. The quality of the school buildings was reported to be satisfactory, and they were completed within the prescribed costs.

IV. Conclusions and the Way Forward

Decentralization, privatization, and PPPs have provided a new context for ombudsmanship. This must be recognized as the structures and procedures of ombudsman offices continue to evolve. The process of decentralization continues to be a challenge for ombudsmen, who must adjust at the policy, organizational, and individual levels. Our study has shown that most ombudsman offices in the region have done just that, but they need to enhance their organizational capability if they are to perform their expanded role more effectively.

The ombudsman's accessibility may be a concern, inasmuch as the devolution of public services does not automatically mean a corresponding decentralization of ombudsman operations. In this regard, an IT system similar to ePeople, of South Korea's Anti-Corruption & Civil Rights Commission, would be helpful in increasing ombudsman accessibility. This is a one-stop IT system for civil/administrative complaints that connects 56 offices of the central government through the internet, making the filing and processing of cases more efficient. It also acts as an interactive forum linking citizens and policy makers through an e-portal, where citizens can raise questions and make suggestions and comments about government policies.

When the private sector provides public services, however, the jurisdiction of the ombudsman is unclear, except when it comes to consumer protection. From the survey of the participants in the AOA workshop in Bangkok, we learned that ombudsman offices need to clarify their role in addressing malfeasance and misfeasance committed by the private sector. The experience of various countries shows that government accountability diminishes once the private sector has taken over the delivery of public services. With privatization and PPPs, ombudsman offices appear constrained by their legal mandates, which in most cases do not explicitly include the private sector.

The traditional concept and role of the ombudsman has been more reactive than active in nature. With the current developments in Asia brought about by new public management (NPM), among other factors, there is a need for ombudsmen to play a more proactive role in matters of public service delivery.

Thus, a government decision to delegate the delivery of a public service to the private sector should not exclude a role for the ombudsman. As shown by the experiences of the ombudsman offices discussed above, there are various ways in which an ombudsman can still provide redress and protect the public welfare. The table below presents a summary of various types of private sector participation, along with possible entry points through which the ombudsman could enforce accountability.

Table 3. Possible Role of the Ombudsman When Public Service Provision is Given to the Private Sector

Types of Private Sector Participation	Duration	Features	Entry Points for the Ombudsman
1. Service contract	<ul style="list-style-type: none"> • 1 to 3 years 	<ul style="list-style-type: none"> • Hires a private company or other private entity to carry out one or more specified tasks or services for a period • Multiple contracts for a variety of support services, such as meter reading, billing, etc. • Useful as part of strategy for improving the efficiency of a public agency • Promotes local private sector development 	<ul style="list-style-type: none"> • Advise the government during contract negotiations and drafting to ensure that the public interest is protected through grievance redress mechanisms • Ensure that the bidding process is conducted by the public sector in a transparent and accountable manner. • Ensure that the responsible government agency strictly enforces the laws, including contractual provisions that define performance standards intended to protect the public from any form of malfeasance or misfeasance • Ensure that intense competition among private service providers does not prejudice the welfare of the public • Hold the government agency that outsourced the service accountable for abuses, neglect, and other wrongs committed by the contractor
2. Management contract	<ul style="list-style-type: none"> • 2 to 5 years 	<ul style="list-style-type: none"> • Expands the services to be contracted out to include some or all of the management and operation of a public service (i.e., utility, hospital, port) 	<ul style="list-style-type: none"> • Same as above

Types of Private Sector Participation	Duration	Features	Entry Points for the Ombudsman
		authority, etc.) <ul style="list-style-type: none"> Interim solution during preparation for more intense private participation 	
3. Lease contract	<ul style="list-style-type: none"> 10 to 15 years 	<ul style="list-style-type: none"> Responsibility for management and operation is passed to the private partner, which guarantees quality and service standards Private firm charges an agreed-upon amount for providing the service 	<ul style="list-style-type: none"> Advise the government during contract drafting to ensure that the public interest is protected through grievance redress mechanisms Ensure that the bidding process is conducted by the public sector in a transparent and accountable manner Hold the public sector agency that entered into the lease contract accountable whenever it fails to protect the welfare of the public, either through bureaucratic neglect or collusion with the private firm. Prevent regulatory capture
4. Concession	<ul style="list-style-type: none"> 25 to 30 years 	<ul style="list-style-type: none"> Responsibility for all operations, also for the financing and execution, of a specific service or facility Improves operational and commercial efficiency. Mobilizes investment finance. Development 	<ul style="list-style-type: none"> Ensure that the bidding process is conducted in a transparent and accountable manner Hold the regulator accountable for any form of maladministration that compromises the safety and welfare of the public (e.g., failure of the regulator of a water service concessionaire to enforce contractual provisions on water safety) Help enhance the capacity of the regulator to provide redress to consumers when such function is included in its mandate. Prevent regulatory capture
5. BOT and similar arrangements	<ul style="list-style-type: none"> Various 	<ul style="list-style-type: none"> Private firm develops and finances a new infrastructure project according to performance standards set by the government Private firm operates a government asset for a period set by a contract so that it can recover investment costs through user charges In some instances, the government, through a regulator, sets tariffs or user fees 	<ul style="list-style-type: none"> Advise the government during contract negotiations and drafting to ensure that the public interest is protected through grievance redress mechanisms Hold the regulator accountable for any form of maladministration that compromises the safety and welfare of the public (e.g., the failure of a regulator to compel a BOT operator to install safety measures in toll roads, despite complaints from public, thus resulting in road accidents) Prevent regulatory capture.
6. Privatization	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> Ownership and operation is transferred to the private sector 	<ul style="list-style-type: none"> Engage and capacitate stakeholders to ensure that private sector providers of public services continue to protect the public interest Help enhance the capacity of a privatized utility to provide redress

Types of Private Sector Participation	Duration	Features	Entry Points for the Ombudsman
			to consumers. • Prevent regulatory capture

Source: Asian Development Bank. *Public-Private Partnership Handbook*. (Manila: ADB, 2004); Skilling and Booth 2007; and authors' analysis.

As noted above, whenever the provision of a public service is transferred to the private sector, the government should make a conscious effort (especially at the policy level) to strengthen accountability mechanisms. Effective grievance redress should be a key component of all private sector arrangements involving public service delivery. As noted by Giddings, this was the same point made by the Ontario Ombudsman who urged the Ontario Prime Minister to ensure that effective and independent complaint-resolution mechanisms were protected in view of the government's plans for extensive privatization and self-regulation. The Ontario Ombudsman pointed out that:⁵⁸

It has become a basic feature of democracy that individuals who believe they have been treated unfairly in the provision of public services have a right of recourse to seek redress. As the government introduces a range of initiatives to re-structure the delivery of government services, it is necessary to be vigilant in ensuring the right of complaint is not overlooked in the process, or indeed lost altogether.

At the same time, the government should ensure that the standards set in public-private contracts are strictly enforced, with compliance monitored regularly. The ombudsman can play a key role in this regard by advising the government on the best ways to safeguard the public interest and by holding the service provider accountable. As an independent institution, the ombudsman can extend its jurisdiction to include examinations of the terms of contracts between the government and private agencies.

Another area worth exploring is the ombudsman's role in systemic investigations—finding the root causes of maladministration in cases involving a large number of complaints. Since PPPs normally cover public utilities serving a large number of people, the ombudsman can be tapped to look into systemic issues that are causing recurring problems.

NPM and the role of ombudsman in Asia should not be considered in isolation. In almost all Asian countries, the ombudsman plays an important role in ensuring quality public services by looking into such issues as delays in pension payments, inaction or unsatisfactory action by government departments regarding service delivery, the quality of outsourced services, the terms and conditions of outsourcing, the government's role regarding outsourced services, the need for service providers to issue service charters, and the provision of avenues for citizens' grievance redress.

Ombudsmen should continue to maintain their role under NPM. As long as the ombudsman is viewed by the public as someone who adds value in promoting higher standards of service delivery, there appears to be no threat to the institution's existence and jurisdiction. But ombudsmen need to demonstrate that value by devising new areas of service and ways of functioning. Similarly, as the administrative systems in many countries become

⁵⁸ Giddings, "The Ombudsman: Accountability and Contracts," 93.

more and more complex because of globalization, ombudsmen will require greater expertise in order to deal with such challenges as the technical nature of many citizens' complaints, the higher expectations on the part of an increasingly aware public, and, of course, the growing role of the private sector in public service delivery. Information and communication technology can help empower ombudsmen, along with other best practices by ombudsmen in the region.

Finally, another area worth looking into is the expansion of the ombudsman's jurisdiction to include private sector providers of core public services that are clearly defined in the law. One example is the law creating the Ombudsman of Argentina, the *Defensor del Pueblo* (Defender of the People), which directly addresses the issues of decentralization, privatization, and PPPs. It specifies that the ombudsman has jurisdiction over *public utilities that have been privatized*. Article 2 of Law No. 6644, which created the Ombudsman of Argentina, states that "[t]he Office of the Defender of the People shall have jurisdiction over public non-state legal entities that exercise public powers, as well as over private suppliers of public utilities."⁵⁹ This may serve as a model for ombudsman institutions in AOA member countries, should they feel the need to adapt to decentralization or expand their jurisdiction to include private sector providers of public services.

⁵⁹ De Creación Del Defensor Del Pueblo, Law No. 24.284 (1993), amended by Law No. 24.379 (1994), <http://www.dpn.gob.ar/main.php?cnt=22>

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