This is a pre-copyedited, author-produced version of an article accepted for publication in the Oxford Journal of Legal Studies following peer review. The version of record ((2022) 42(1) OJLS 76-103) is available online at: https://doi.org/10.1093/ojls/gqaa056.

Ombudsmen As Courts

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Abstract

The non-judicial character of ombudsmen is viewed as their greatest asset, offering a more accessible, informal and flexible channel than courts for expressing grievances. Yet the Pensions Ombudsman has objected vigorously to its characterisation in the Chancery Division as 'not a court', pointing to a range of judicial qualities with which it has been statutorily invested. This raises the broader question of whether ombudsmen can be courts; a rarely considered characterisation. It is argued in this article that, although some ombudsmen exhibit judicial or quasi-judicial attributes, they are categorically distinct from courts and should remain so. Parliament must be astute not to invest ombudsmen with too many judicial qualities, lest the boundary between exercising judicial functions and exercising the judicial power of the state is crossed. This article also gives cause to reflect more broadly on the fundamental and distinctive nature of courts, tribunals and ombudsmen.

1. *Introduction*

It is taken for granted that ombudsmen are not courts. Lacking in judicial characteristics such as procedural formality and remedial enforceability, ombudsmen sit at the 'softer' end of the administrative justice spectrum.[1] They are epitomised by greater flexibility and informality, and for offering a means of expressing grievance against public bodies that is not purely

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[1] Ann Abraham, 'The ombudsman and "paths to justice": a just alternative or just an alternative?' [2008] PL 1, 5.

remedy-driven. Rather than these attributes producing 'toothless tigers'[2] or 'ombudsmice',[3] it is precisely these features of ombudsmen that are upheld as offering a useful, alternative means of obtaining administrative justice that is not available before courts or tribunals.[4] In any event, it is features of just this kind that earmark ombudsmen as distinguishable from other mechanisms for securing redress.

The Pensions Ombudsman (PO) insists, however, that it is a court. The Chancery Division held in *Burgess v BIC UK Ltd* that the PO was not a 'competent court' for the purpose of section 91(6) of the Pensions Act 1995. This meant that the equitable right of recoupment could not be exercised notwithstanding a determination of the PO that it could be so exercised. Instead, the right could only be exercised following an order of the county court. The PO disputed the Chancery Division's findings, claiming that the judge's comments were obiter and merely an expression of his provisional view on the matter. It maintained that it was a 'competent court', setting out a number of reasons in support of that claim.[5]

This article considers whether and in what circumstances an ombudsman may be a court; a rarely considered characterisation. It is clear that terminology is not decisive in identifying courts, tribunals and ombudsmen, and that functions and characteristics are key.[6] The characterisation of a given ombudsman as satisfying or failing to satisfy the definition of a 'court' or 'court of law' is vital because there are a multitude of statutory provisions that use these terms. These extend from the far-reaching Civil Procedure Rules to provisions specific to individual ombudsmen, such as the general prohibition on the Parliamentary Commissioner for Administration (PCA)[7] investigating a matter in respect of which the 'person aggrieved has or had a remedy by way of proceedings in any court of law'.[8] While the legal framework sometimes implies that the ombudsman is not a court – including in relation to the PO and the Legal Ombudsman (LO) – this is not always the case.

[2] Anita Stuhmcke, 'The Ombudsman' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (CUP 2014) 335.
[3] William B Gwyn, 'The British PCA: "Ombudsman or Ombudsmouse?"' (1973) 35(1) *The Journal of Politics* 45.
[4] Carol Harlow and Richard Rawlings, *Law and Administration* (CUP 2009) 480.
[5] The Pensions Ombudsman, *Recoupment in Overpayment Cases: The Pensions Ombudsman is a 'Competent Court'* (April 2019) <https://www.pensions-ombudsman.org.uk/wp-content/uploads/Recoupment-in-Overpayment-case-.pdf> (accessed 21 May 2020); PO-16856 (*Dr E*) (25 October 2018).
[6] *Collins v Henry Whiteway and Co Ltd* [1927] 2 KB 378; *Attorney-General v British Broadcasting Corporation* [1981] AC 303, 358; *Re Ewing* [2003] EWHC 3169 (QB) [42].
[7] The Parliamentary Commissioner for Administration and the Health Service Commissioner are technically separate ombudsmen, but functionally merged in the Parliamentary and Health Service Ombudsman.
[8] Parliamentary Commissioner Act 1967, s 5(2)(b).

Though the PO is used as the primary lens through which the question is analysed, not least because it is the 'most judicial' of the UK ombudsmen, a range of public and private sector ombudsmen are considered in the course of the discussion.[9] After an introduction to the *Burgess* case, the article considers the three main dimensions in which courts and ombudsmen are traditionally regarded as distinct. First, it discusses the concept of judiciality in the categorisation of grievance mechanisms. The fact that ombudsmen share some of the features and functions of courts is argued not to render them as courts in their own right. In particular, ombudsmen are shown not to exercise the judicial power of the state, and several statutory provisions are demonstrated by necessary implication to categorically segregate ombudsmen from courts. Second, the article examines multiple aspects of procedural formality that could merit the categorisation of ombudsmen as courts, including the public visibility of proceedings, the role of evidence and witnesses, the power to refer questions of law for determination, and the role of contempt. Third, it addresses the issue of remedial finality and enforceability, including the appealability of decisions. It is shown that, despite the PO's claims of its own powers, none of the ombudsmen's determinations are final, binding and enforceable in the manner of court judgments. The article concludes that ombudsmen do not qualify as courts using either the measure of sufficient judicial functions or exercising the judicial power of the state, and argues that the taxonomical distinction between courts and ombudsmen must be maintained.

2. *Background to the* Burgess *Case*

[9] The article does not consider every body capable of being understood as performing an ombudsman function in the UK context – see Richard Kirkham and Alexander Allt, 'Making sense of the case law on Ombudsman schemes' (2016) 38(2) J of Soc Welfare & Fam L 211, 214 – but does include the main public sector ombudsmen in the UK. These are ombudsmen that receive complaints against public bodies or bodies delivering public services, as opposed to private sector ombudsmen, which receive complaints (often but not exclusively from consumers) against private sector entities such as banks, pension providers and legal service providers. The PO is regarded as a private sector ombudsman – Walter Merricks, 'Where and How Should the Private Sector Ombudsman be Seen in the Administrative Justice Landscape?' in Michael Adler (ed), *Administrative Justice in Context* (Hart Publishing 2010) 251 – but is prominently included for its unusually 'judicial' quality. A selection of other private sector ombudsmen (namely the Financial Ombudsman Service, the Housing Ombudsman and the Legal Ombudsman) are also included for the purpose of comparison, in particular with the PO. Nevertheless, categorical difficulties persist at the boundaries of the ostensible public/private divide, as in other aspects of administrative law (see Stephen Thomson, 'Judicial Review and Public Law: Challenging the Preconceptions of a Troubled Taxonomy' (2017) 41(2) Melbourne U L Rev 890), and some have considered whether administrative justice principles should be extended to purely 'private' activity – Dawn Oliver, 'Towards the Horizontal Effect of Administrative Justice Principles' in Adler (ibid) 229.

The PO, established in 1990, is a statutory body tasked with the investigation and determination of complaints, and factual and legal disputes, in relation to the conduct of trustees or managers of occupational or personal pension schemes.[10] At the conclusion of the investigation process, the PO makes a determination on the complaint or dispute,[11] and may direct the trustees or managers of the pension scheme to take, or refrain from taking, such steps as he may specify.[12] PO determinations and directions are 'final and binding' on the complainant and the trustees or managers of the scheme,[13] and are enforceable in the county court (in England and Wales) or sheriff court (in Scotland).[14] In line with standard ombudsman practice, the PO may publish a report at the conclusion of an investigation.[15]

The *Burgess* case concerned an occupational pension scheme of BIC UK Ltd (BIC). The scheme had a large surplus in the early 1990s which the trustees were obliged to reduce under the relevant tax regime. The claimants, who were the current trustees, averred that the former trustees and BIC decided to apply limited price indexation increases to pensions in payment insofar as they exceeded the Guaranteed Minimum Pension. The increases were applied from April 1992 but, since 2011, BIC challenged the validity of the increases made from April 1992 to April 1997. The proceedings were brought to determine the validity of those increases and related issues.

BIC contended that, if the increases were not validly granted, then the trustees would be under a duty to exercise their equitable right of recoupment to recover the sums overpaid. However, this is subject to section 91(6) of the Pensions Act 1995, which provides that:

> Where a charge, lien or set-off is exercisable by virtue of subsection (5)(d), (e) or (f) –
>
> …where there is a dispute as to its amount, the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an order of a competent court or in consequence of an award of an arbitrator or, in Scotland, an arbiter to be appointed (failing agreement between the parties) by the sheriff.[16]

[10] Pension Schemes Act 1993, s 146(1).
[11] ibid s 151(1).
[12] ibid s 151(2). See also Julian Farrand, 'Courts, tribunals and ombudsmen – II' (2000) 27 Amicus Curiae 4, which delineates limitations on what steps may be specified.
[13] Pension Schemes Act 1993, s 151(3).
[14] ibid s 151(5).
[15] ibid s 151(6).
[16] Pensions Act 1995, s 91(6).

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The question arose as to whether a determination of the PO would amount to an order of a 'competent court', noting that the PO could determine that the trustees were entitled to exercise their right of recoupment. BIC contended that the PO's determination would amount to an order of a competent court (thus permitting the trustees to exercise their right of recoupment), whereas the claimants contended that the trustees would have to apply to the county court to enforce the PO's determination 'as if it were a judgment or order of that court'.[17] Arnold J was of the view that although an order of the county court would constitute an order of a competent court, a determination by the PO would not, 'because the Ombudsman is not a court'.[18] He went on to summarise this point in his conclusion by stating that 'a determination by the Pensions Ombudsman on a reference by a member would not amount to an order of a competent court within section 91(6) of the Pensions Act 1995, but an order of the County Court enforcing such a determination would'.[19]

The PO vigorously disputed Arnold J's view that it was not a competent court. It published a 'factsheet' in which it claimed that his comments were obiter, and that his view was merely provisional and did not form part of the judgment on the issues before him.[20] Although the factsheet purported to relate to recoupment in overpayment cases, for the purposes of section 91(6) of the Act, it invoked other, additional provisions and its claims as to the PO's status are so broad that they must be interpreted as claims exceeding the scope of section 91(6) or even the Pensions Act 1995 as a whole. The PO's position was also restated in a determination of an unrelated dispute on 25 October 2018.[21]

3. *Judiciality*

The PO stated that one of the reasons that it was a competent court was that the PO is judicial and its determinations are orders or judgments.[22] The central logic of its argument was as follows. The PO is a tribunal under the Tribunals and Inquiries Act 1992 due to its power to

[17] Pension Schemes Act 1993, s 151(5)(a).
[18] *Burgess v BIC UK Limited* [2018] EWHC 785 (Ch), [2018] Pens LR 13 [168].
[19] *Burgess* (n 18). The Court of Appeal allowed the appeal, but did not remark on the categorisation of the PO as a court or otherwise – *BIC UK Ltd v Burgess* [2019] EWCA Civ 806, [2019] ICR 1386.
[20] Pensions Ombudsman, *Recoupment* (n 5).
[21] *Dr E* (n 5).
[22] Pensions Ombudsman, *Recoupment* (n 5) 2.

determine any dispute of fact or law under the Pension Schemes Act 1993.[23] Tribunals with the characteristics of a court of law are properly to be regarded as courts,[24] and the PO is such a tribunal. A 'lower court' is defined by CPR 52.1(3)(c) as 'the court, tribunal or other person or body from whose decision an appeal is brought', and the PO is therefore a lower court for the purposes of the Civil Procedure Rules.

First, the classification of the PO as a tribunal under the Tribunals and Inquiries Act 1992 is of little consequence. The PO is a tribunal to which the Act applies only in respect of its functions under section 146(1)(c) and (d) of the Pension Schemes Act 1993, namely the determination of disputes of fact or law.[25] This could, at most, render it a 'tribunal' only when determining such disputes, but not when exercising any of its other powers and functions. Moreover, the Tribunals and Inquiries Act 1992 is principally a statute setting out the powers and functions of the Council on Tribunals. Its only provision of any real consequence for the PO, other than subjecting it to the supervision of the Council on Tribunals when exercising its power to determine disputes of fact or law, was to place it under a statutory duty to give reasons for its decisions.[26] The Act also applied to a number of administrative tribunals that could not be considered to be courts.[27] It would therefore be a considerable stretch to regard the Act as supporting the contention that the PO is a court.

The most problematic aspect of the PO's reasoning, however, is regarding itself as a court because it has court-like characteristics. An industrial tribunal was considered to be a court because it exercised 'judicial functions', namely:

> [I]t was established by Parliament, it has a legally qualified chairman appointed by the Lord Chancellor… It sits in public to decide cases which affect the rights of subjects and it has power to compel the attendance of witnesses, administer oaths, control the parties' pleadings by striking out and amendment and order discovery; the parties before it can have legal representation; it has rules of procedure relating to the calling and questioning of witnesses and addresses on behalf of the parties; it can award costs; it must give reasons for its decisions which, on a point of law, can be appealed to the Employment Appeal Tribunal and Court of Appeal.[28]

[23] ibid.
[24] *Peach Grey & Co v Sommers* [1995] ICR 549.
[25] Tribunals and Inquiries Act 1992, sch 1, para 35(e).
[26] ibid s 10.
[27] ibid sch 1, pt 1.
[28] *Peach Grey* (n 24) 557.

The Information Tribunal was likewise held to be a court because it had a chairman appointed by the Lord Chancellor, legally qualified members, the governing statute used language that showed the tribunal was effectively exercising the functions and power of judicial review, and 'typical judicial powers' were conferred such as those relating to amendment, disclosure of documents, summoning of witnesses, the conduct of proceedings and hearings, and costs.[29] A 'court' for the purposes of section 42 of the Senior Courts Act 1981 (on vexatious proceedings) would comprise 'bodies having judicial characteristics and exercising judicial functions by means of judicial procedures, such that they can properly be categorised as courts'.[30]

This raises the fundamental question of the litmus test for a body to be defined as a court. For Lord Edmund-Davies in *Attorney-General v British Broadcasting Corporation*, there was 'unfortunately… no sure guide, no unmistakable hall-mark by which a "court" or "inferior court" may unerringly be identified', and '[i]t is largely a matter of impression'.[31] True as that may be, there must clearly be more structure to that evaluation. The possession of sufficient judicial characteristics[32] is an apparent prerequisite to a body's definition as a court, yet as will be seen the possession of such characteristics is not in itself enough to confer the status of 'court'.

Viscount Dilhorne stated that:

> While every court is a tribunal, the converse is not true. There are many tribunals which are not courts despite the fact that they are charged with dealing with certain matters and have features in common with courts. A distinction is drawn in this country between tribunals which are courts and those which are not… Generally I would say that just because a tribunal has features resembling those of a court, it should not be held to be a court. Tribunals created by or under Acts of Parliament are not as a general rule courts unless constituted as such by the Act creating them.[33]

The specific distinction was between:

[29] *Ewing* (n 6) [40]-[40.4].
[30] ibid [42].
[31] *A-G v BBC* (n 6) 351.
[32] See Section 4 below.
[33] *A-G v BBC* (n 6) 338.

> courts which discharge judicial functions and those which discharge administrative ones, between courts of law which form part of the judicial system of the country on the one hand and courts which are constituted to resolve problems which arise in the course of administration of the government of this country.[34]

According to this analysis, an entity which acts judicially is not necessarily a court of law:

> The fact that [a local valuation court] has to act judicially means as Fry L.J. said in *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 Q.B. 431 that its proceedings must be "conducted with the fairness and impartiality which characterize proceedings in courts of justice, and are proper to the functions of a judge" and not, though established by law, that it is a court of law and part of the judicial system of the country.[35]

A local valuation court was therefore a 'court' but one 'which discharges administrative functions and is not a court of law'.[36] That was notwithstanding the valuation court's duty to act judicially in discharging its administrative functions.[37]

The distinction between courts and tribunals is no longer as emphatic as it once was, particularly in view of the reforms enacted by the Tribunals, Courts and Enforcement Act 2007.[38] Yet still there must be an identifiable boundary. Lord Scarman expressly pointed out that 'not every court is a court of judicature, i.e. a court in law':

> The word "court" does, in modern English usage, emphasise that the body so described has judicial functions to exercise: but it is frequently used to describe bodies which, though they exercise judicial functions, are not part of the judicial system of the Kingdom… When, therefore, Parliament entrusts a body with a judicial function, it is necessary to examine the legislation to discover its purpose.[39]

[34] ibid 339-340 (Viscount Dilhorne).
[35] ibid 340 (Viscount Dilhorne).
[36] ibid (Viscount Dilhorne). In the Court of Appeal, Lord Denning MR stated that commercial arbitrations were not courts because they were not set up by or under the authority of Parliament or the Crown; planning inquiries were not courts because their function was not to hear and determine, but only to inquire and report; licensing bodies were not courts because they exercised administrative functions, not judicial functions; and assessment committees were not courts because they were manned by laypersons and not lawyers – ibid 314.
[37] ibid 360.
[38] See 12 below.
[39] *A-G v BBC* (n 6) 358.

It is here that the analysis transcends the possession of judicial characteristics to require that the body be capable of being classified as part of the judicial system. Lord Scarman referred to courts of law as those established by law to exercise the judicial power of the state, as contrasted with legislative and executive (or administrative) power.[40] Likewise, Lord Fraser of Tullybelton referred to courts exercising the judicial power of the state as 'those which are truly courts of law'.[41] It may be noted that legislation including the Contempt of Court Act 1981,[42] Freedom of Information Act 2000,[43] and Defamation Act 2013,[44] similarly regard a court as 'any tribunal or body exercising the judicial power of the State'.

Although the exercise of the judicial power of the state is about as close as the law has come to the core definition of a court,[45] it is ill-defined and hardly a ready litmus test with which to determine a body's categorisation. The term does, however, allude to certain features of courts that would appear to be essential definitional criteria.

First, a court should principally serve the function of dispute resolution or adjudication. That does not mean that the possession of other functions, such as quasi-administrative functions, disqualifies a body from the definition of a court, but that dispute resolution and adjudication are the quintessential functions of a court.[46] Second, the court should exercise the power of the state when resolving disputes, thus exercising a public function and in this manner distinguishable from most ADR mechanisms which are private in nature. Third, the parties must be bound by the jurisdiction and decisions of the court regardless of whether they consent. That is particularly true of the defendant or respondent in an action. In this manner courts are likewise distinguishable from ADR mechanisms, the vast majority of which rest on party consent to submit to the decision-maker's jurisdiction, and from ombudsmen such as the Financial Ombudsman Service (FOS) whose determinations are binding only with complainant acceptance.[47] Fourth, and perhaps most importantly of all,

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[40] ibid 359.
[41] ibid 353.
[42] Contempt of Court Act 1981, s 19; and see *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370, 380.
[43] Freedom of Information Act 2000, s 32(4)(a).
[44] Defamation Act 2013, s 7(1). See also the Deregulation and Contracting Out Act 1994, s 71(1)(a), and Public Bodies Act 2011, s 21(3)(a).
[45] See *General Medical Council v BBC* [1998] 1 WLR 1573.
[46] There are some limited exceptions to this, as for example coroners' inquests which are better characterised as the coroner making a determination.
[47] Financial Services and Markets Act 2000, s 228(5). It has been argued that findings of public services ombudsmen should be binding – see Richard Kirkham, 'Strengthening Procedural Fairness and Transparency Through Ombudsman Legislation' in Richard Kirkham and Chris Gill (eds), *A Manifesto for Ombudsman Reform* (Palgrave Macmillan 2020) 131-2.

courts' dispute resolution or adjudication function is terminal: there is no further recourse to check for legality beyond courts themselves.[48] Tribunals, ombudsmen, inquiries, appellate bodies, arbitrators and other decision-makers are, by contrast, subject to the jurisdiction of courts for checks on legality. These criteria for identifying courts are in addition to the possession of sufficient judicial characteristics as aforementioned and as elaborated in Section 4 of this article. Accordingly, rather than there being a single litmus test or 'unmistakeable hall-mark'[49] for defining a court, their definition is an aggregation of functions and features. It is the particular sum of a body's functions and features that define it as a court, read in the context of legislative intention.

Ombudsmen may share, to varying extents, some of the functions and features of courts (and tribunals),[50] and may conform to a 'substantial degree of due process'.[51] Crucially, however, these functions and features are never possessed to the full extent of that of courts. Some ombudsmen, such as the PO and the FOS, exercise a dispute resolution function, yet fail to meet other criteria characteristic of courts. Most ombudsmen are not empowered to exercise any formal dispute resolution function but are instead limited to the issuance of unenforceable recommendations for the resolution of individual grievances and/or the broader improvement of standards in public administration. This is consistent with ombudsmen's characteristic focus on maladministration[52] – clearly broader than legal considerations – and their so-called 'fire-watching' and even 'fire-prevention' functions,[53] which could never be present to any significant degree in courts due to the separation of powers. However, not only do most ombudsmen have no formal dispute resolution function, those that do (such as the PO and FOS) cannot decide disputes or award remedies in the final and binding manner of courts.[54] Moreover, ombudsmen cannot terminally resolve disputes, as they are never immune from further recourse to courts to check for legality. Ombudsmen are categorically distinct from courts even at this level of analysis, unable to bear an aggregated definition of a court of law. In addition to ombudsmen not exercising the judicial power of the state, as shall be seen, they neither possess sufficient judicial characteristics to

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[48] Subject to appeals and to the limited capacity for judicial review of courts (see 27 and fn 85), both of which are in any event a check for legality within the same institutional category as the court under challenge.
[49] *A-G v BBC* (n 6) 351 (Lord Edmund-Davies).
[50] Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing 2009), 260-263.
[51] *R (Bradley) v Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin), [2007] Pens LR 87 [58].
[52] Richard Crossman MP, HC Deb 18 October 1966, vol 734, cols 42-172.
[53] See Harlow and Rawlings (n 4) 528-569; and Ann Abraham, 'Making sense of the muddle: the ombudsman and administrative justice, 2002-2011' (2012) 34(1) J of Soc Welfare & Fam L 91.
[54] See Section 5 below; and Stephen Thomson, *Administrative Law in Hong Kong* (CUP 2018) 329-30.

be classified as courts. This is true not only of the more archetypal ombudsmen, such as the PCA, but also of ombudsmen that appear relatively 'court-like', such as the PO.

Appointment procedures are also relevant to this categorisation. Since April 2006, judicial appointments (to courts) have generally been made by Her Majesty on the recommendation of the Lord Chancellor or the Lord Chief Justice, in turn on the recommendation of the Judicial Appointments Commission.[55] Judges of the Supreme Court are appointed by Her Majesty on the recommendation of the Prime Minister, who must recommend a person selected by a selection commission convened by the Lord Chancellor.[56] Ombudsmen are appointed using a variety of processes: the PCA[57] and Health Service Commissioner (HSC)[58] (who are the same individual) are appointed by Her Majesty by Letters Patent upon approval by the House of Commons;[59] the Local Government and Social Care Ombudsman (LGSCO) is appointed by Her Majesty on the recommendation of the Secretary of State;[60] the Scottish Public Services Ombudsman (SPSO),[61] Public Services Ombudsman for Wales (PSOW)[62] and Northern Ireland Public Services Ombudsman (NIPSO)[63] are appointed by Her Majesty on the nomination of the respective devolved legislatures; the PO[64] and Housing Ombudsman (HO)[65] are appointed by the Secretary of State; the FOS ombudsmen are appointed by Financial Ombudsman Service Ltd, a company limited by guarantee which is the ombudsman 'scheme operator';[66] and the LO is appointed by the Office for Legal Complaints.[67] Most ombudsman appointments are therefore capable of being described as political appointments, and while it is true that the same could technically be said of judges prior to April 2006, it is notable that there was not considered to be a need to reform appointment of ombudsmen alongside that of judges. Moreover, whereas

[55] Constitutional Reform Act 2005, pt 4. First-tier Tribunal judges are appointed by the Senior President of Tribunals, and Upper Tribunal judges are appointed by Her Majesty on the recommendation of the Lord Chancellor – Tribunals, Courts and Enforcement Act 2007, schs 2 and 3.
[56] Constitutional Reform Act 2005, pt 3.
[57] Parliamentary Commissioner Act 1967, s 1.
[58] Health Service Commissioners Act 1993, sch 1, para 1.
[59] House of Commons, Public Administration Select Committee, *Pre-appointment hearing for the post of Parliamentary and Health Service Ombudsman: Ninth Report of Session 2010–12*, HC 1220-I (The Stationery Office Ltd 2011) 16.
[60] Local Government act 1974, s 23(4).
[61] Scottish Public Services Ombudsman Act 2002, s 1(1).
[62] Public Services Ombudsman (Wales) Act 2019, sch 1, para 1.
[63] Public Services Ombudsman Act (Northern Ireland) 2016, s 3(1).
[64] Pension Schemes Act 1993, s 145(2).
[65] Housing Ombudsman Scheme, r 59.
[66] Financial Services and Markets Act 2000, s 225(2) and sch 17, paras 4-5.
[67] Legal Services Act 2007, s 122(1).

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judges enjoy security of tenure,[68] ombudsmen do not and, in the case of public sector ombudsmen, appointment is limited to a specified period of time.[69] The respective appointment frameworks further dispute the characterisation of ombudsmen as exercising the judicial power of the state.

Similarly, whilst the Tribunals, Courts and Enforcement Act 2007 'judicialized' tribunals and further integrated them into the court system, there was not considered to be a corresponding need or desire to judicialize ombudsmen.[70] This is partly a reflection of the fact that courts and tribunals – the boundary between which can be remarkably elusive[71] – perform more similar functions than do courts and ombudsmen. Notably, whereas tribunal members were included as members of the judiciary for the purpose of guaranteed judicial independence, none of the ombudsmen were included within that definition.[72] The placement of ombudsmen in the separation of powers, namely as part of or closer to the executive than tribunals, neither suggests that ombudsmen should benefit from the extent of the protections afforded by guaranteed judicial independence. Nevertheless, if statute was to confer such protections on ombudsmen, boundaries would be further tested and redrawn.

There are a number of other provisions that imply that the ombudsman is not a court. For example, as noted,[73] ombudsmen such as the PCA are subject to a general prohibition on investigating in respect of a matter in relation to which the 'person aggrieved has or had a remedy by way of proceedings in any court of law'.[74] It is provided that the PO shall not

[68] Senior Courts Act 1981, s 11(3); Constitutional Reform Act 2005, s 33.
[69] Parliamentary Commissioner Act 1967, s 1(2A) and (2B) ('not more than seven years'); Health Service Commissioners Act 1993, sch 1, paras 1A and 1B ('not more than seven years'); Local Government Act 1974, s 23(5A) ('not more than 7 years'); Scottish Public Services Ombudsman Act 2002, sch 1, para 4(1)(a) ('not exceeding eight years'); Public Services Ombudsman (Wales) Act 2019, sch 1, para 3(1) ('seven years'); Public Services Ombudsman Act (Northern Ireland) 2016, s 3(2) ('7 years'). There is no limitation on the duration of appointment of the private sector ombudsmen, and both the PO and HO may be removed from office by the Secretary of State at any time – Pension Schemes Act 1993, s 145(3)(a) and Housing Act 1996, sch 2, para 10(3), respectively.
[70] The PO is a relatively judicialized ombudsman, but this is a fairly unique example and is not representative of a broader trend to judicialization among ombudsmen. It also preceded the period of tribunal judicialization that began with the publication in 2001 of Sir Andrew Leggatt's report *Tribunals for Users – One System, One Service* (Department for Constitutional Affairs 2001) and culminated in the enactment of the Tribunals, Courts and Enforcement Act 2007 (a period which continued a longer process that began in earnest with the publication in 1957 of Sir Oliver Franks' *Report of the Committee on Administrative Tribunals and Enquiries* 1957 Cmnd 218).
[71] See Cane (n 58) 262-272; Peter Cane, 'Understanding Administrative Adjudication' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State* (Hart Publishing 2008) 273-299; Robert Carnwath, 'Tribunal justice – a new start' [2009] PL 48; Mark Elliott and Robert Thomas, 'Tribunal justice and proportionate dispute resolution' (2012) 71(2) CLJ 297; and Harlow and Rawlings (n 4) 486-527.
[72] Constitutional Reform Act 2005, s 3 and sch 14; Tribunals, Courts and Enforcement Act 2007, s 1.
[73] At 2 above.
[74] Parliamentary Commissioner Act 1967, s 5(2)(b).

investigate or determine a complaint or dispute 'if before the making of the complaint or the reference of the dispute, proceedings in respect of the matters which would be the subject of the investigation have been begun in any court or employment tribunal',[75] and parties may elect to pursue their cause through the courts instead of resorting to the PO, which would in most circumstances preclude an investigation by the PO.[76] It is also provided that the PO may receive evidence of any fact 'notwithstanding that such evidence would be inadmissible in proceedings before a court of law'.[77] These provisions imply that the PO is not a court or a court of law.[78]

Moreover, the PO was distinguished from a court in relation to the effect of the Limitation Act 1980 on PO investigations. The PO was found to be empowered to investigate a complaint that would have been statute barred if brought by an action in court,[79] necessarily implying that the PO was not a 'court of law' within the meaning of the Limitation Act 1980.[80] Though the PO was nevertheless held to be required to give effect to a valid limitation defence, '[o]therwise he would be deciding the legal rights and obligations of the parties according to a unique system of law, rather than according to the law of England and Wales', there would be no applicable limitation period in a case of pure maladministration.[81] Similarly, the Legal Ombudsman Scheme Rules provide that, in determining what is a fair and reasonable determination of a complaint, the LO shall take into account (but is not bound by), inter alia, 'what decision a court might take'.[82] This, too, implies that the LO is not a court.

There is a further hurdle for the PO's claim that it is a court. Appeals against PO determinations are heard in the Chancery Division.[83] The PO is not formally a respondent in the appeal, and seemingly has no right to be heard in it, but as a matter of practice has been permitted to be heard with the appeal court's permission.[84] By contrast, judges do not appear

[75] Pension Schemes Act 1993, s 146(6)(a).
[76] *Arjo Wiggins Ltd v Ralph* [2009] EWHC 3198 (Ch), [2010] Pens LR 11 [7]; *Pell Frischmann Consultants Ltd v Prabhu* [2013] EWHC 2203 (Ch), [2014] ICR 153 [20]-[29].
[77] Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053 r 15(5).
[78] As do judicial pronouncements such as in *Edge v Pensions Ombudsman* [1998] Ch 512, 520.
[79] *Arjo Wiggins* (n 64) [20]-[23].
[80] Limitation Act 1980, s 38(1).
[81] *Arjo Wiggins* (n 64) [26]. See also *Wakelin v Read* [2000] Pens LR 319 [73]-[76].
[82] Legal Ombudsman Scheme Rules (1 April 2019), r 5.37.
[83] 52D PD 5.1(8). The court's permission is required under CPR 52.29.
[84] CPR 52.1(3)(e)(ii); *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] Pens LR 73 [78]-[79].

as respondents, nor are they heard, in regular appeals.[85] In July 2016 the PO adopted a policy of 'extended criteria' for participating in appeals, with a 'more pro-active role for the Ombudsman in appeals' whereby the PO would seek increased participation in certain categories of appeal.[86] In one example, the PO filed written representations in the appeal for the matter to be remitted back to the PO from the Chancery Division for further investigation and the making of a new determination (which the court declined to do).[87] It is difficult to conceive of a lower court, in the ordinary sense of the term, making written representations in an appeal court that the matter should be remitted back to it for further consideration and a fresh decision.[88] The PO's ability to appear as a party in the appeal operates strongly against the notion that the PO is a court of law in the sense espoused in *A-G v BBC*, namely as part of the judicial power of the state. Moreover, if the PO was a court, it would not have attacked the views of Arnold J in the manner in which it did, publishing a rebuttal before the Court of Appeal had even handed down its judgment.[89]

It was said to have 'long been recognised that judicial processes should be open to public scrutiny unless and to the extent that there are valid countervailing reasons',[90] and that this principle of open justice is 'at the heart of our system of justice and vital to the rule of law'.[91] As put by Lord Toulson in the Supreme Court, '[l]etting in the light is the best way of keeping those responsible for exercising the judicial power of the state up to the mark and for maintaining public confidence'.[92] The Court of Appeal held that the 'requirements of open justice apply to all tribunals exercising the judicial power of the state'.[93] Yet the public sector ombudsmen are statutorily obligated to conduct their proceedings in private, while the private sector ombudsmen tend not to hold hearings even though they are empowered to do

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[85] A court may, rarely, appear as the respondent in an application for judicial review – *R (on the application of Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, [2003] 1 WLR 475; *MRH Solicitors Ltd v Manchester County Court* [2015] EWHC 1795 (Admin), [2015] ACD 147.

[86] Pensions Ombudsman Service, *Appeals against Ombudsman determinations* (2017) <http://lgpslibrary.org/assets/minutes/TG20171212AppD.pdf> (accessed 21 May 2020) 2-3.

[87] *Fire Brigades Union v Fordham* [2018] EWHC 1978 (Ch) [16]-[17].

[88] The PO obtained an opinion from Monica Carss-Frisk on 15 September 2000 on the compatibility of the PO role and procedures with Article 6 of the European Convention on Human Rights <https://webarchive.nationalarchives.gov.uk/20090127181719/http://www.pensions-ombudsman.org.uk/publications/> (accessed 21 May 2020) but the matter has never been litigated.

[89] The PO published its condemnation of Arnold J's comments in *Burgess* (n 18) before judgment in the appeal had been handed down in *BIC UK Ltd v Burgess* [2019] EWCA Civ 806, [2019] ICR 1386 – Pensions Ombudsman, *Recoupment* (n 5).

[90] *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455 [110] (Lord Toulson).

[91] *R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] QB 618 [1].

[92] *Kennedy* (n 78) [110].

[93] *Guardian News* (n 79) [70].

so and where confidentiality and sensitivity would be no bar to their doing so.[94] As a result, ombudsman processes are largely concealed from public view. Even if a report is published at the conclusion of an investigation – where the complainant is, as standard practice, anonymised – the internal formulation and application of criteria, processes of investigation and evaluation, correspondence with relevant parties and weighting of considerations, are generally not disclosed. This also raises the question of whether ombudsman processes, were they to be regarded as judicial proceedings, would be compatible with the right to a fair and public hearing under article 6 of the European Convention on Human Rights. While the Divisional Court held that the principle of open justice 'does not apply to tribunals which are not courts',[95] the Supreme Court regarded statutory inquiries as to varying extents subject to it.[96] Even if the principle extends to quasi-judicial proceedings, the ombudsman enterprise is too concealed from public view to be considered as in conformity with it. This is a further impediment to ombudsmen's characterisation as exercising the judicial power of the state.

4. *Procedural Formality*

Just as the distinction between courts and tribunals is substantially informed by differences in their respective procedural formality,[97] so is the distinction between courts and tribunals on the one hand, and ombudsmen on the other, thus informed.[98] Of the three types of institution, ombudsmen tend to be the least formal of all, this often being seen as one of their most valued qualities, encouraging accessibility, affordability and expedition.[99] This section compares the key public and private sector ombudsmen to assess whether and to what extent they possess characteristics of procedural formality that would merit their categorisation as courts.

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[94] Discussed at [internal cross-reference: pages 13-14].
[95] *R (on the application of DSD) v Parole Board for England and Wales* [2018] EWHC 694 (Admin), [2019] QB 285 [171].
[96] *Kennedy* (n 78) [121]-[126].
[97] Hazel Genn, 'Tribunals and Informal Justice' (1993) 56 MLR 393; and see *Report of the Committee on Administrative Tribunals and Enquiries* 1957 Cmnd 218.
[98] Tom Mullen, 'Access to Justice in Administrative Law and Administrative Justice' in Ellie Palmer, Tom Cornford, Audrey Guinchard and Yseult Marique (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing 2016) 74.
[99] Harlow and Rawlings (n 4) 480.

A. *Public Visibility of Proceedings*

Court proceedings can only be held in private in limited circumstances, typically involving confidential or sensitive matters.[100] Yet Ombudsman proceedings tend to be required by statute to be conducted in private. That is true of the PCA,[101] HSC,[102] LGSCO,[103] SPSO,[104] PSOW,[105] and NIPSO.[106] The FOS will invite the parties to participate in a hearing if it considers that the complaint cannot be fairly determined without convening one.[107] The FOS must also have regard to the European Convention on Human Rights in deciding whether there should be a hearing and, if so, whether it should be in public or private.[108] The LO may only hold a hearing where it considers that the complaint cannot be fairly determined without one,[109] and it may decide whether a hearing takes place in public or private.[110] The LO has broad discretion over the manner in which the hearing is held, such as conducting it by telephone.[111] The PO is distinguishable from the other examples inasmuch as all of its hearings shall be in public except for reasons of confidentiality or sensitivity, in which case they shall be wholly or partly in private.[112] However, it is a matter for the PO's discretion whether an oral hearing takes place in connection with each investigation,[113] which is rarely exercised in favour of holding a hearing. Ombudsman proceedings are therefore much less publicly visible than court proceedings,[114] working against their potentially 'judicial' nature in addition to failing to conform to the principle of open justice.[115]

B. *Evidence and Witnesses*

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[100] CPR 39.2.
[101] Parliamentary Commissioner Act 1967, s 7(2).
[102] Health Service Commissioners Act 1993, s 11(2).
[103] Local Government Act 1974, s 28(2).
[104] Scottish Public Services Ombudsman Act 2002, s 12(1).
[105] Public Services Ombudsman (Wales) Act 2019, s 18(8).
[106] Public Services Ombudsman Act (Northern Ireland) 2016, s 30(5).
[107] Financial Conduct Authority Handbook, DISP 3.5.5.
[108] ibid 3.5.7.
[109] Legal Ombudsman Scheme Rules, r 5.33.
[110] ibid r 5.34.
[111] ibid r 5.35.
[112] Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053 r 12.
[113] ibid r 10(1).
[114] There is no relevant provision on this matter in relation to the HO.
[115] To the extent that ombudsmen have annual reporting requirements, as for example the requirement for the PCA to annually lay before each House of Parliament a general report on the performance of his statutory functions (Parliamentary Commissioner Act 1967, s 10(4)), they have broad discretion over the content of those reports including the complaints and outcomes that they choose to publish.

There is some resemblance with court proceedings among the various ombudsman provisions with regard to the calling in of documents and information. The PCA,[116] HSC,[117] LGSCO,[118] SPSO,[119] PSOW,[120] and NIPSO[121] have similar statutory powers to require the investigated body or another person to furnish information or produce documents. In each case, that power overrides any applicable secrecy obligations or disclosure restrictions.[122] The requirement does not, however, extend beyond the giving of evidence, and the production of documents, that could be compelled in a court in specified civil proceedings.[123] The PO,[124] FOS[125] and LO[126] have similar powers to require a person to furnish information or produce documents relevant to the investigation, though it is not provided that this is limited to those that could be compelled in civil proceedings.

The power to compel the attendance and examination of witnesses, including the administration of oaths and affirmations and the examination of witnesses abroad, and to produce documents, is an area in which there is broad alignment between ombudsmen and the courts. In fact, the template statutory provision invests ombudsmen with the 'same powers as the court' in this regard. The PCA,[127] HSC,[128] SPSO,[129] PSOW[130] and NIPSO[131] are invested with such powers. The LGSCO has the 'same powers as the High Court' in relation to the attendance and examinations of witnesses, and the production of documents,

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[116] ibid s 8(1).
[117] Health Service Commissioners Act 1993, s 12(1).
[118] Local Government Act 1974, ss 29(1) and (3).
[119] Scottish Public Services Ombudsman Act 2002, s 13(1).
[120] Public Services Ombudsman (Wales) Act 2019, ss 19(2) and (4).
[121] Public Services Ombudsman Act (Northern Ireland) 2016, ss 31(1) and (4).
[122] Parliamentary Commissioner Act 1967, s 8(3); Health Service Commissioners Act 1993, s 12(3); Local Government Act 1974, s 29(4); Scottish Public Services Ombudsman Act 2002, s 13(5); Public Services Ombudsman (Wales) Act 2019, s 19(6); Public Services Ombudsman Act (Northern Ireland) 2016, s 32(1).
[123] Parliamentary Commissioner Act 1967, s 8(5) (general); Local Government Act 1974, s 28(7) (High Court); Scottish Public Services Ombudsman Act 2002, s 13(9) (Court of Session); Public Services Ombudsman (Wales) Act 2019, s 19(5) (High Court); Public Services Ombudsman Act (Northern Ireland) 2016, s 31(5) (High Court).
[124] Pension Schemes Act 1993, s 150(1).
[125] Financial Services and Markets Act 2000, s 231.
[126] Legal Ombudsman Scheme Rules, rr 5.25 and 5.26.
[127] Parliamentary Commissioner Act 1967, s 8(2) ('same powers as the Court', meaning, under section 12(1), the High Court (in England and Wales), the Court of Session (in Scotland) and the High Court of Northern Ireland (in Northern Ireland)).
[128] Health Service Commissioners Act 1993, s 12(2) ('same powers as the Court', meaning, under section 19, the High Court (in England and Wales) and the High Court in Northern Ireland (in Northern Ireland)).
[129] Scottish Public Services Ombudsman Act 2002, s 13(4) ('same powers as the Court of Session').
[130] Public Services Ombudsman (Wales) Act 2019, s 19(3) ('same powers as the High Court').
[131] Public Services Ombudsman Act (Northern Ireland) 2016, s 31(3) ('same powers as the High Court').

but no provision is made for the LGSCO to administer oaths or affirmations.[132] The PO has the 'same powers as the court' in relation to the attendance and examination of witnesses, including the administration of oaths and affirmations and the examination of witnesses abroad, and the production of documents.[133] However, the PO may, at an oral hearing, 'receive evidence of any fact which appears to him to be relevant notwithstanding that such evidence would be inadmissible in proceedings before a court of law, but shall not refuse to admit any evidence which is admissible at law and is relevant'.[134] This provision not only extends the powers to receive evidence beyond those that apply in a court of law, it also necessarily implies that the PO is not a 'court of law'.

Similarly, the FOS has significant discretion in relation to the manner and form of evidence,[135] and may exclude evidence that would otherwise be admissible in a court, include evidence that would not be admissible in a court, and accept information in confidence so that only an edited version, summary or description is disclosed to the other party.[136] Not only does this exclude the FOS from the definition of a court, it goes further inasmuch as this partial sharing of information with (or withholding of information from) a party could not be tolerated by the principles of natural justice in a tribunal, let alone in a court of law. The LO is similarly positioned. It may not require the provision of any information or giving of any evidence that could not be compelled to be provided or given in evidence in civil proceedings before the High Court, or produce any document that could not be compelled to be produced in such proceedings.[137] However, the LO has significant discretion in relation to the manner and form of evidence,[138] and may include or exclude evidence that would be admissible or inadmissible in court, and accept information in confidence where it considers that is both necessary and fair.[139] The statute provides for the LO to be authorised to administer oaths,[140] but the Legal Ombudsman Scheme Rules[141] do not confer that specific power on the LO. The acceptance of information in confidence, and partial sharing of information with or

[132] Local Government Act 1974, s 29(2).
[133] Pension Schemes Act 1993, s 150(2).
[134] Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053 r 15(5).
[135] Financial Conduct Authority Handbook, DISP 3.5.8.
[136] ibid 3.5.9.
[137] Legal Services Act 2007, s 133(5); Legal Ombudsman Scheme Rules, r 5.22.
[138] Legal Ombudsman Scheme Rules, r 5.23.
[139] ibid r 5.24.
[140] Legal Services Act 2007, s 133(3)(e).
[141] Made by the Office for Legal Complaints under part 6 of the Legal Services Act 2007.

withholding of information from one party, are also emblematic of the ombudsman's inquisitorial rather than adversarial mode of proceeding.[142]

Finally, the HO lacks procedural formality in relation to evidence. The HO may ask a scheme member to provide information relevant to the complaint, and the member is expected to do so;[143] and require the member to allow the HO to interview staff, have their representative attend any meetings convened by the HO, use its best and reasonable efforts to help the HO obtain information from third parties, and provide such other reasonable help as the HO may request.[144] However, the HO is 'not bound by any legal rule of evidence'.[145] There is, furthermore, no provision for HO equivalence with court powers in relation to witnesses and evidence.

C. *Reference to Law and Legality*

The determination of disputes by reference to law and legality is a central feature of a court of law. Equally true, however, is that determination by reference to law and legality does not necessarily mean that the determining body is a court of law.[146] Reference to law and legality is a common feature of determinations by courts, tribunals and ombudsmen.[147] While courts routinely adjudicate on the basis of law and legality, and tribunals adjudicate on the basis of law, legality and merits; ombudsmen adjudicate (or make recommendations) on the basis of law, legality and (to a varying extent[148]) merits as part of a broader range of considerations.[149] For example, the FOS[150] and LO[151] each determine a complaint by

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[142] Discussed at [internal cross-reference: page 24].
[143] Housing Ombudsman Scheme, para 49.
[144] ibid para 50.
[145] ibid para 30.
[146] See Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice* (Routledge 2016) 36-37.
[147] Cane (n 58) 257.
[148] The extent to which merits may be reviewed varies by ombudsman. The PCA and the LGSCO are each prohibited from questioning the merits of a decision taken without maladministration – Parliamentary Commissioner Act 1967, s 12(3); Local Government Act 1974, s 34(3); and see *R v Local Commissioner for Administration for the North and East Area of England, ex parte Bradford CC* [1979] QB 287, 311-312. The HSC may question the merits of a decision taken without maladministration to the extent that it was taken in consequence of the exercise of clinical judgment – Health Service Commissioners Act 1993, ss 3(4)-(7). See also Scottish Public Services Ombudsman Act 2002, s 7; Public Services Ombudsman (Wales) Act 2019, s 15; Public Services Ombudsman Act (Northern Ireland) 2016, ss 15-17 and 23; Financial Conduct Authority Handbook, DISP 3.3-3.6; Legal Services Act 2007, ss 133(3)(a) and 137(1); and Housing Act 1996, sch 2, para 7(1). There is no provision directly regulating the PO's consideration of merits.
[149] Cane (n 58) 257. See also Anita Stuhmcke, 'Ombudsmen and Integrity Review' in Pearson, Harlow and Taggart (n 79) 349-376.
[150] Financial Conduct Authority Handbook, DISP 3.6.1, 3.6.4 and 3.6.5.

reference to what is, in their opinion, fair and reasonable in all the circumstances of the case, including, but not limited to, the relevant laws. Most typically an ombudsman will consider a complaint in relation to maladministration – quintessentially ombudsman jurisdiction[152] – which will tend to include a failure to comply with legal obligations, but which will include a range of other considerations such as bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude and arbitrariness.[153] Thus the HO determines a complaint by reference to what is, in its opinion, fair in all the circumstances of the case,[154] with maladministration including failure to comply with relevant legal obligations.[155] Maladministration will often include unlawful acts or conduct, but it will never be entirely confined to legal considerations.[156] Ombudsmen may also call policy into question,[157] an area into which courts are reluctant to tread by reason of the separation of powers.

It should be added that there is a view that a court does not necessarily need to have a lawyer presiding. Lord Denning MR did not regard the local valuation court as a court because:

> [T]his body lacks one important characteristic of a court. It has no one in it or connected with it who is legally qualified or experienced. To constitute a court there should be a chairman who is a lawyer or at any rate who has at his elbow a clerk or assistant who is a lawyer qualified by examination or by experience, as a justices' clerk is.[158]

However, Eveleigh LJ did not agree:

> It is not necessary that there should be a lawyer presiding, in my opinion, or indeed that there should be a legally trained clerk. A coroner's court is a court. It lacks or may lack these attributes when a doctor presides as he so frequently does. In practice the clerk actually present in the magistrates' court is not always legally qualified. So too at quarter sessions the

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[151] Legal Services Act 2007, s 137(1); Legal Ombudsman Scheme Rules, rr 5.36 and 5.37.
[152] See *Miller v Stapleton* [1996] 2 All ER 449, [1996] Pens LR 67, 78.
[153] HC Deb 18 October 1966, vol 734, col 51. These are typically referred to as the 'Crossman catalogue', so named after the then Leader of the House of Commons, Richard Crossman MP, who spoke in the debate on the Parliamentary Commissioner Bill.
[154] Housing Act 1996, sch 2, para 7(1).
[155] Housing Ombudsman Scheme, r 42(a).
[156] Timothy Endicott, *Administrative Law* (OUP 2018) 492. See also *R v Insurance Ombudsman Bureau, ex parte Aegon Life Assurance Ltd* [1995] LRLR 101, [1994] CLC 88, 94.
[157] Carol Harlow, 'Ombudsmen in Search of a Role' (1978) 41(4) MLR 446, 453-454.
[158] *A-G v BBC* (n 6) 314.

> chairman used not to have to be a person with legal training and it was not essential for there to be present a legally trained clerk.[159]

The lack of a statutory requirement for ombudsmen and their case handlers to be legally qualified does not necessarily defeat their claim to judicial status, but neither would it support it.

D. *Power to Refer Questions of Law for Determination*

The PO considered that its statutory power to refer questions of law to the courts[160] buttressed its contention that it is a judicial body whose determinations are orders or judgments.[161] Neither the PCA, HSC, LGSCO, SPSO, PSOW, NIPSO or HO have such a power, though the LO may 'exceptionally' refer a question of law to a court.[162] The FOS may suspend an investigation to allow for litigation, but cannot itself refer a question of law to a court.[163] The Law Commission recommended that public services ombudsmen[164] be given the power to refer a question of law to the Administrative Court.[165] This would, according to the PO's analysis, accentuate the judicial character of ombudsmen. Yet the Law Commission's proposed reference mechanism 'should… be conceptualised as a part of the ombudsman process, rather than as the transfer of the whole of a dispute to an alternative forum'.[166] Moreover, the power to refer a question of law does not in itself seem to support the claimed judicial nature of the entity referring that question of law, as other examples show.

The Advocate General, Lord Advocate or Attorney General have the power to refer to the Supreme Court for decision the question of whether a bill or any provision of a bill relates to a protected subject-matter,[167] or would be within the legislative competence of the Scottish

[159] ibid 317. Newly appointed coroners must now be legally qualified – Coroners and Justice Act 2009.
[160] Pension Schemes Act 1993, s 150(7).
[161] Pensions Ombudsman, *Recoupment* (n 5) 2-3.
[162] Legal Ombudsman Scheme Rules, r 5.8.
[163] Financial Conduct Authority Handbook, DISP 3.4.
[164] This would not include the PO. The Law Commission consultation paper on public services ombudsmen considered 'public services ombudsmen' to comprise the PCA, the Commissioners for Local Administration (LGSCO), HSC, PSOW and Independent Housing Ombudsman Scheme – Law Commission, *Public Services Ombudsmen: A Consultation Paper* (Consultation Paper No. 196) para 1.14; and see Law Commission report, *Public Services Ombudsmen* (Law Com No 329) (HC 1136) paras 1.4-1.6.
[165] Law Commission report, *Public Services Ombudsmen* (Law Com No 329) (HC 1136) paras 4.69-4.95.
[166] ibid para 4.89.
[167] Scotland Act 1998, s 32A(1).

Parliament.[168] Yet there is no suggestion that the Advocate General, Lord Advocate or Attorney General would be conceived of as a court. On the contrary, the Law Commission stated that this was evidence that 'such a single actor, non-adversarial, reference power does exist in modern statutes, and was envisaged to be useful for questions of jurisdiction'.[169] Similar examples apply mutatis mutandis in Wales and Northern Ireland. The Counsel General or the Attorney General have the power to refer to the Supreme Court for decision the question of whether a matter which a proposed Order in Council under section 95 of the Government of Wales Act 2006 proposes to add to Part 1 of Schedule 5 relates to a field listed in that Part,[170] or a proposed Assembly Measure or any provision thereof would be within the Welsh Assembly's legislative competence,[171] or whether any provision of a bill relates to a protected subject-matter,[172] or whether a bill or any provision thereof would be within the Welsh Assembly's legislative competence.[173] The Advocate General for Northern Ireland or the Attorney General for Northern Ireland have the power to refer to the Supreme Court for decision the question of whether a provision of a bill would be within the legislative competence of the Northern Ireland Assembly.[174] Outside the devolution context, the Attorney General has the power to refer to the Court of Appeal for its opinion a question of law where a person tried on indictment has been acquitted.[175] Again, there is no suggestion that any of these law officers are courts or judicial in nature, or that they are made so by their power to refer questions of law to courts for determination.

Another reference procedure is found in the Monarch's statutory power to refer to the Judicial Committee of the Privy Council (JCPC) for hearing or consideration any matter as the Monarch thinks fit.[176] There are various cases in which this power has been used, such as in relation to the crime of piracy jure gentium,[177] the clergy disqualification in the House of Commons,[178] parliamentary privilege,[179] the removal of the Chief Justice of Gibraltar,[180] and the position of the Chief Justice of the Cayman Islands (and an important case on the scope of

[168] ibid s 33(1).
[169] Law Commission report, *Public Services Ombudsmen* (Law Com No 329) (HC 1136), para 5.65.
[170] Government of Wales Act 2006, s 96.
[171] ibid s 99(1).
[172] ibid s 111B(1).
[173] ibid s 112(1).
[174] Northern Ireland Act 1998, s 11(1).
[175] Criminal Justice Act 1972, s 36(1).
[176] Judicial Committee Act 1833, s 4.
[177] *Re Piracy Jure Gentium* [1934] AC 586.
[178] *Re MacManaway* [1951] AC 161.
[179] *In Re Parliamentary Privilege Act 1770* [1958] AC 331.
[180] *Re Chief Justice of Gibraltar* [2009] UKPC 43.

the JCPC's advice to the Monarch under the reference procedure).[181] The Monarch is not a court or a judicial organ in any ordinary sense of the term, nor would she be so considered by virtue of her power to refer to the JCPC. The power of referral does not, therefore, enhance the claim to court status of the referring organ.

E. *Contempt*

In relation to the PCA,[182] HSC,[183] LGSCO,[184] SPSO,[185] PSOW,[186] NIPSO[187] and PO,[188] if any person without lawful excuse obstructs the ombudsman, or does any thing in relation to an investigation which, if the investigation were a proceeding in court, would constitute contempt of court, then the ombudsman may certify the offence to the court. The court may then inquire into the matter and may deal with the person as though they had committed contempt of court. The PO regarded its power to 'certify an offence of contempt of court to the county or sheriff court' as evidence of the PO's judicial role and status as a court,[189] but the statutory provisions make it clear that the offence is one that *would have* constituted contempt of court had it related to a court proceeding. Though the provisions on the obstruction of ombudsman investigations being equivalent to contempt have a role in solemnifying ombudsman proceedings, they are in place precisely because ombudsmen are not courts. Otherwise, the Contempt of Court Act 1981 would apply wherein a court 'includes any tribunal or body exercising the judicial power of the State'.[190]

The same principle applies in relation to the FOS which, if a person fails to provide documents or information requested by it, may certify that fact to the High Court (in England and Wales) or the Court of Session (in Scotland). The court may enquire into the case, and may deal with that person (and, in the case of a body corporate, any director or other officer) as if he were in contempt.[191] Similarly, the LO may certify to the High Court a person's failure to provide requested documents or information, whereupon the court may enquire into

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[181] *Chief Justice of the Cayman Islands v Governor of the Cayman Islands* [2012] UKPC 39, [2014] AC 198.
[182] Parliamentary Commissioner Act 1967, s 9.
[183] Health Service Commissioners Act 1993, s 13.
[184] Local Government Act 1974, ss 29(8), (9) and (10).
[185] Scottish Public Services Ombudsman Act 2002, s 14.
[186] Public Services Ombudsman (Wales) Act 2019, s 20.
[187] Public Services Ombudsman Act (Northern Ireland) 2016, s 33.
[188] Pension Schemes Act 1993, ss 150(4) and (5).
[189] Pensions Ombudsman, *Recoupment* (n 5) 3.
[190] Contempt of Court Act 1981, s 19.
[191] Financial Services and Markets Act 2000, s 232.

the case and deal with the person as if they were in contempt.[192] The matter may, in certain circumstances, also be reported by the LO to the Legal Services Board.[193] There is no specific provision on obstruction or contempt in relation to the HO. Provision for obstruction of an ombudsman investigation that would have constituted contempt of court had it related to a court proceeding, to be certified to a court of law for the court's further inquiry, is (contrary to the claims of the PO) further evidence that the ombudsman is not a court of law.

F. *Procedural Flexibility*

A further element of procedural formality is the extent to which the procedure is flexible. While courts have some flexibility, the overall process continues to be typified by relative complexity and rigidity. Ombudsmen, by contrast, tend to see greater flexibility in various aspects of the investigation procedure. This ranges from discretion on whether to accept a complaint for investigation or to launch an investigation on the ombudsman's own motion, to how the investigation is conducted, and whether to discontinue an investigation.

The PCA,[194] HSC,[195] LGSCO,[196] SPSO,[197] PSOW,[198] and NIPSO[199] have discretion on whether to initiate, continue or discontinue an investigation. The PO may discontinue an investigation if he considers it appropriate to do so,[200] and the FOS,[201] LO[202] and HO[203] have broad discretion on the dismissal, discontinuation and suspension of complaints. The closest to discretion at the 'initiation' stage in a court is a leave or permission stage,[204] while the closest to discretion at the 'discontinuation' stage in a court is the power to strike out a statement of case.[205] However, neither of these are as 'discretionary' and potentially unstructured or informal as the ombudsman's decision on whether to initiate, accept or

[192] Legal Services Act 2007, s 149.
[193] ibid s 148.
[194] Parliamentary Commissioner Act 1967, s 5(5).
[195] Health Service Commissioners Act 1993, s 3(2).
[196] Local Government Act 1974, ss 24A(6) and (7).
[197] Scottish Public Services Ombudsman Act 2002, s 2(3).
[198] Public Services Ombudsman (Wales) Act 2019, ss 4(3) and 17.
[199] Public Services Ombudsman Act (Northern Ireland) 2016, s 30(1).
[200] Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053 r 16(1)(c).
[201] Financial Conduct Authority Handbook, DISP 3.3.4.
[202] Legal Ombudsman Scheme Rules, r 5.7.
[203] Housing Ombudsman Scheme Rules, rr 32 and 35.
[204] CPR 54.4.
[205] CPR 3.4.

discontinue a complaint for investigation. Moreover, the PSOW,[206] NIPSO[207] and to some extent the LGSCO[208] have the power to initiate investigations on their own initiative, and although most ombudsman do not have this power (as is the case for the PCA,[209] HSC,[210] SPSO,[211] PO,[212] FOS,[213] LO[214] and HO[215]), this is a power that never resides in a court, which requires a litigant to bring a cause.

When a complaint is accepted for investigation, or an investigation is otherwise initiated, the PCA,[216] HSC,[217] SPSO,[218] PSOW,[219] and NIPSO[220] all have broad discretion in terms of investigation procedure. The LGSCO's investigatory discretion even extends to adopting different procedures for different cases or cases of different descriptions.[221] The PO has broad discretion both in terms of investigation procedure,[222] and, if the PO decides to convene an oral hearing (which it rarely does),[223] in terms of how the hearing is conducted.[224] It is specifically provided that the PO 'shall so far as seems appropriate seek to avoid formality in the hearing'.[225] However, the hearing is not devoid of formality, with parties entitled to give evidence, call witnesses and question any witness or party to the investigation.[226] Across the board in ombudsman proceedings there is therefore significant flexibility that allows for reduced or minimal procedural formality.

In addition, ombudsmen often have flexibility in relation to whether disputes are to be resolved and, if so, how they are to be resolved. The LGSCO may appoint a mediator or

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[206] Public Services Ombudsman (Wales) Act 2019, s 4.
[207] Public Services Ombudsman Act (Northern Ireland) 2016, s 8.
[208] Local Government Act 1974, ss 24A and 26D.
[209] See Parliamentary Commissioner Act 1967, s 5.
[210] See Health Service Commissioners Act 1993, s 3.
[211] See Scottish Public Services Ombudsman Act 2002, s 2.
[212] See Pension Schemes Act 1993, s 146.
[213] See Financial Conduct Authority Handbook, DISP 2.2-2.5
[214] See Legal Ombudsman Scheme Rules, pts 2, 4 and 5.
[215] See Housing Ombudsman Scheme Rules, pt 2. See also Chris Gill, 'The Ombud and Own-Initiative Investigation Powers' in Kirkham and Gill (n 47) 77.
[216] Parliamentary Commissioner Act 1967, s 7(2).
[217] Health Service Commissioners Act 1993, s 11(3).
[218] Scottish Public Services Ombudsman Act 2002, s 12(3).
[219] Public Services Ombudsman (Wales) Act 2019, s 18(9).
[220] Public Services Ombudsman Act (Northern Ireland) 2016, s 30(6).
[221] Local Government Act 1974, s 28(2)(a).
[222] Pension Schemes Act 1993, s 149(4).
[223] See Pensions Ombudsman Service, *How we investigate complaints* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/867819/Factsheet-how-we-investigate-complaints.pdf> (accessed 21 May 2020) 5.
[224] Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053 r 15.
[225] ibid r 15(2).
[226] ibid r 15(3).

other appropriate person to assist him in the conduct of an investigation.[227] The HO may establish arrangements for dispute resolution, with the consent of the parties, such as by way of local resolution, mediation, arbitration or otherwise.[228] The HO may also suspend or not progress an investigation if he thinks there is opportunity to resolve the dispute locally.[229] The NIPSO may take any action which it considers appropriate with a view to resolving a complaint, either in addition to or instead of conducting an investigation.[230] The FOS may resolve complaints by whatever means appear to it to be most appropriate, including mediation or investigation.[231] Ombudsmen may also issue guidance to public authorities in relation to good administrative practice,[232] which courts would never do beyond dicta germane to legality due to separation of powers constraints. Courts are, by contrast, dispute resolution fora by definition, and they must come to a binding decision. While there are various categories of 'quasi-administrative' proceedings in courts, such as non-contentious probate applications, the overwhelming majority of court proceedings involve two or more litigants in a remedy-driven dispute. While courts may encourage[233] (and rarely require[234]) the use of ADR instead of litigation (and noting that the Civil Procedure Rules regard ombudsman schemes as a form of ADR[235]), litigation is almost always an adversarial procedure that does not make use of substitute or adjunct methods of dispute resolution.

The flexible nature of ombudsman proceedings also manifests in their typically inquisitorial rather than adversarial approach.[236] Courts are by definition adversarial in a common law system, and while tribunals may incorporate an element of inquisitorial procedure, '[a]n ombudsman's inquisitorial role extends beyond investigating the facts by questioning the parties to instructing independent experts and consultants such as doctors, surveyors or actuaries'.[237] The PCA, HSC, LGSCO and PO were each established by statute '[f]or the purpose of conducting investigations',[238] an activity that would never be attributed

[227] Local Government Act 1974, s 29(6A).
[228] Housing Ombudsman Scheme, para 33.
[229] ibid para 35.
[230] Public Services Ombudsman Act (Northern Ireland) 2016, s 10.
[231] Financial Conduct Authority Handbook, DISP 3.5.1.
[232] Local Government Act 1974, ss 23(12A) and 34R; Scottish Public Services Ombudsman Act 2002, s 22(3); Public Services Ombudsman (Wales) Act 2019, s 34.
[233] Pre-Action Conduct and Protocols PD 8-11.
[234] ibid PD 13-16.
[235] ibid PD 10.
[236] Harlow and Rawlings (n 4) 528-9.
[237] Julian Farrand, 'Courts, tribunals and ombudsmen – I' (2000) 26 Amicus Curiae 3, 7.
[238] Parliamentary Commissioner Act 1967, s 1(1); Health Service Commissioners Act 1993, s 1(1); Local Government Act 1974, s 23(1); Pension Schemes Act 1993, s 145(1). Similar language is used in the Public Services Ombudsman Act (Northern Ireland) 2016, s 1(2). cf section 225(1) of the Financial Services and

This is a pre-copyedited, author-produced version of an article accepted for publication in the Oxford Journal of Legal Studies following peer review. The version of record ((2022) 42(1) OJLS 76-103) is available online at: https://doi.org/10.1093/ojls/gqaa056.

to a court of law in a common law system.[239] The ways in which the ombudsman's inquisitorial role can manifest, including the extent to which he may define the issues, investigate the facts, proactively marshal evidence, advocate on behalf of the complainant and have an existing relationship with the investigated authority, would run into serious difficulties with the rules on procedural fairness and natural justice were ombudsmen to be regarded as courts.[240]

5. *Remedial Finality and Enforceability*

The PO stated that one of the reasons why it is a competent court is:

> because under section 151(3) of the [Pension Schemes Act] 1993, the Determination by the Pensions Ombudsman of a complaint or dispute and any direction given by him is final and binding, subject only to an appeal on a point of law to the High Court.[241]

The determination, in this regard, 'brings a dispute to an end'.[242] This raises the broader question of whether a statutory provision that a body's determination is 'final and binding' does anything to elevate the status of the body to that of a court. This is different from considering such a provision as an ouster clause, for the question here is not whether a 'final and binding' clause excludes the availability of judicial review of the body's decisions (it would not,[243] even if the PO was regarded as a court[244]). The question is whether and to what extent such a provision invests the body with a court-like quality. An older judicial view held that a tribunal is not necessarily a court 'in the strict sense of exercising judicial power'

Markets Act 2000, which provides for a 'scheme under which certain disputes may be resolved quickly and with minimum formality'.

[239] With the exception of coroners' inquests in England and Wales, and fatal accident inquiries in Scotland.

[240] See HWR Wade and Christopher F Forsyth, *Administrative Law* (11th edn, OUP 2014).

[241] Pensions Ombudsman, *Recoupment* (n 5) 2. Section 151(4) of the Pension Schemes Act 1993 provides that: 'An appeal on a point of law shall lie to the High Court or, in Scotland, the Court of Session from a determination or direction of the Pensions Ombudsman at the instance of any person falling within paragraphs (a) to (c) of subsection (3)'.

[242] Pensions Ombudsman, *Recoupment* (n 5) 2.

[243] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219.

[244] *Sivasubramaniam* (n 73); *MRH Solicitors* (n 73).

because it gives a final decision,[245] though it was later doubted that a tribunal could be a court if it lacked such a characteristic.[246]

'Final and binding' tends to be used in the context of ADR, especially arbitration, adjudication and expert determination. A final and binding award in an arbitration will create a res judicata and issue estoppel between the parties.[247] While it may preclude the availability of a general appeal, it has been found not to exclude the possibility of appeal to a court on a point of law,[248] though it will be accorded 'great weight' in deciding whether it is just and proper for the court to decide the question in dispute.[249] Outside the ADR context, an appeal to a court on a point of law against the decision of a public authority is not necessarily limited to matters of legal interpretation, but may extend to such issues as may arise in an application for judicial review.[250] Moreover, noting that the PO appears to be a 'lower court' for the purposes of CPR 52,[251] the appeal court would allow an appeal where the PO's decision was (i) wrong or (ii) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.[252]

It is therefore apparent that the PO's determinations are appealable to this extent, and that their 'final and binding' nature applies in the context of res judicata and issue estoppel, at most precluding the availability of a general appeal. There is no suggestion that an arbitrator empowered to make 'final and binding' decisions is a court of law, or that this invests the arbitrator with sufficient judicial character to render him equivalent to a judge. Neither, therefore, does the PO (or any other ombudsman) have their judicial qualities sufficiently elevated by being able to make final and binding decisions. The only other ombudsman with the power to make final and binding determinations is the FOS, but these only become final and binding if the complainant notifies the FOS that he accepts the determination.[253] Res judicata applies to final and binding determinations even though the FOS cannot award a remedy that would only be available in a court.[254] Though there is no provision for appeal to

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[245] *Shell Company of Australia v Federal Commissioner of Taxation* [1931] AC 275 (PC), 296-297 (Lord Sankey LC).
[246] *A-G v BBC* (n 6) 348 (Lord Edmund-Davies).
[247] *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd (formerly Centurion Petroleum Corp)* [2009] EWHC 2097 (Comm), [2010] 2 All ER (Comm) 442; and see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 [17].
[248] *Shell Egypt* (n 234) 442.
[249] *Essex CC v Premier Recycling Ltd* [2006] EWHC 3594 (TCC), [2007] BLR 233 [28].
[250] *Begum (Nipa) v Tower Hamlets LBC* [2000] 1 WLR 306.
[251] CPR 52.1(3)(c) and 52.29.
[252] CPR 52.21(3).
[253] Financial Services and Markets Act 2000, s 228(5).
[254] *Clark v In Focus Asset Management & Tax Solutions Ltd* [2014] EWCA Civ 118, [2014] 1 WLR 2502.

a court on a point of law, the fact that FOS determinations are only binding if accepted by the complainant operates against its potential characterisation as a court of law, for the binding nature of court judgments does not depend on party consent.

A crucial characteristic of a court was said to be that it 'exercises judicial power; it is a body which can enforce its decisions… [A] court provided it follows its adjudicating functions can make binding orders on all parties appearing before it'.[255] Though an industrial tribunal was held to be an inferior court for the purposes of RSC Ord 52, r 1, notwithstanding that its monetary awards had to be enforced and taxation of its costs carried out by the county court,[256] most ombudsmen would fail to satisfy the definition of a court for that reason alone, for they typically have no power to make binding orders on parties subject to their proceedings. Though certain ombudsman findings and determinations may be regarded as effectively binding,[257] this does not make them directly enforceable nor does it elevate those ombudsmen to the status of courts.

The same applies to the PO. It is provided that PO determinations or directions shall be enforceable in the county court (in England and Wales) or by the sheriff (in Scotland), as if they were a judgment or order thereof;[258] though potentially with a wider scope of enforcement by the sheriff than by the county court.[259] Even though it is provided that where (in England and Wales) the PO directs the payment of money or the taking or refraining from taking of any step, the County Court Rules 1981 concerning the enforcement of judgments and the payment of judgment debts shall apply to the direction as if it were a county court judgment or order,[260] the PO is still dependent on a court of law for the enforceability of its determinations. In other words, its determinations have no intrinsic 'judicial' imperative.

Another mechanism for seeking remedial equivalence to that of a court is in the power of the Secretary of State to authorise the HO to apply to a court or tribunal for an order that a determination made by the ombudsman may be enforced 'as if it were an order of a

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[255] *A-G v BBC* (n 6) 327.
[256] *Peach Grey* (n 24) 557.
[257] *R v Local Commissioner for Administration, ex p Eastleigh BC* [1988] QB 855; and see *Bradley* (n 51); and Jason Varuhas, 'Governmental rejections of ombudsman findings: what role for the courts?' (2009) 72 MLR 102. On judicial review of ombudsman decisions and a potential 'litigation effect' for ex-users of ombudsman services, see Richard Kirkham, 'Judicial review, litigation effects and the ombudsman' (2018) 40(1) J of Soc Welfare & Fam L 110. See also Richard Kirkham and Elizabeth A. O'Loughlin, 'Judicial review and ombuds: a systematic analysis' [2020] PL 680.
[258] Pension Schemes Act 1993, s 151(5).
[259] Farrand, 'Courts, tribunals and ombudsmen – II' (n 12) 6.
[260] County Court (Pensions Ombudsman) (Enforcement of Directions and Determinations) Rules 1993, SI 1993/1978.

court'.[261] This would invest the HO's determination with the effect of a court order, but would not make the determination directly enforceable in the manner of a court order. Determinations of the NIPSO are not directly enforceable, even though there are mechanisms for an aggrieved person to obtain damages and orders against the listed authority from the county court,[262] and, in circumstances of systemic maladministration or systemic injustice as found by the NIPSO, mechanisms for the Attorney General for Northern Ireland to apply to the High Court for injunction, declaration or other relief.[263] None of the ombudsmen's determinations are therefore final, binding and enforceable in the manner of court judgments.

6. *Conclusion*

Ombudsmen have broadly similar powers. Most are invested with the 'same powers as the court' in relation to compelling the attendance and examination of witnesses, the administration of oaths and affirmations, and the production of documents. All make reference in their investigations to law and legality as part of a broader range of considerations, while most have no power to refer questions of law to the courts for determination. Most have similar powers to certify to the court an offence that, if their investigation were a proceeding in court, would constitute contempt of court. Most have significant discretion on the initiation, continuation and discontinuation of investigations, with flexibility in relation to whether and how disputes are to be resolved. All proceed inquisitorially.

The PO nevertheless emerges as the most judicialized ombudsmen. It has, like the FOS, the statutory power to make final and binding decisions, but in addition the PO is the only ombudsman to both hold its hearings in public (except for reasons of confidentiality or sensitivity) and have the statutory power to refer questions of law to the courts for determination. However, even the PO has insufficient judicial attributes to be capable of characterisation as a court of law. Prior to the statutory creation of the PO, the Council on Tribunals maintained that the proposed PO was to have features 'most of [which] were characteristic of tribunals under our supervision, while none were to be found in existing

[261] Housing Act 1996, sch 2, para 7D(1).
[262] Public Services Ombudsman Act (Northern Ireland) 2016, ss 52-53.
[263] ibid ss 54-55.

statutory ombudsmen'.[264] It would be a 'tribunal in all but name' and a 'novel and anomalous constitutional innovation'.[265] The *Review of Civil Justice and Legal Aid* concluded that the PO was 'tantamount to a court'.[266]

Yet this view was not shared by the Pension Law Review Committee, which regarded the PO as neither a court nor a tribunal.[267] Indeed, the PO's procedure is still relatively informal, with broad discretion over the investigation procedure and hearings (that are rarely convened). It is invested with various statutory powers that, by necessary implication, categorically segregate it from courts of law, as in relation to the receipt of evidence and the application of the Limitation Act 1980. Its power to refer questions of law to the courts for determination is not a necessarily judicial quality, and its power to make final and binding decisions relates more to res judicata and issue estoppel than to remedial finality and enforceability. The PO's (limited) practice of being heard in Chancery Division appeals against its own decisions is antithetical to its characterisation as a court of law. It does not conform to the principle of open justice, and parties can bypass it by opting instead to resort to the courts. The PO has vigorously asserted the four corners of its powers and jurisdiction, yet no amount of forceful assertion will transform it into a court. Whether one uses the extent of judicial functions[268] or exercising the judicial power of the state[269] as the measure for identifying a court of law, the PO does not fulfil either definition. As the PO is the most court-like ombudsman, if it fails to sustain classification as a court, then so would any of the other ombudsmen that are less judicial in character and extent.

Parliament must nevertheless ensure that ombudsmen are kept categorically distinct from courts and tribunals. The courts have made it clear that they will look to parliamentary intention to see whether a (statutory) tribunal has been constituted as a court.[270] Though it is functions and characteristics that are key to classifying courts, tribunals and ombudsmen, it is exceedingly unhelpful when Parliament applies contentious labels to institutions. The PO was so designated notwithstanding that it is the most court-like of ombudsmen to date, and traditional ombudsmen such as the PCA and HSC are not called 'ombudsmen' at all. Nevertheless, should Parliament intend for a body to be classed as other than a court, it must

[264] Council on Tribunals, *Annual Report 1989-1990*, HC 64, para 2.47.
[265] ibid paras 2.47 and 2.52.
[266] *Review of Civil Justice and Legal Aid: Report to the Lord Chancellor* (1997), annex C.8.
[267] *Pension Law Reform: The Report of the Pension Law Review Committee* (vol 1) (1993), para 4.13.42.
[268] *Peach Grey* (n 24); *Ewing* (n 6).
[269] *A-G v BBC* (n 6).
[270] ibid 338 (Viscount Dilhorne) and 358 (Lord Scarman); and see *Kennedy* (n 78) [117]-[131].

take care when investing the body with court-like qualities. If statute invests ombudsmen with too many judicial characteristics then, as with tribunals, the boundary between exercising judicial functions and exercising the judicial power of the state may be crossed. Ombudsmen need not share identical features, but grievance mechanisms cannot be conflated into an amorphous mass: the point of having different forms of dispute resolution, including ombudsmen, is that they have distinguishable functions and features.[271] The existence of borderline territory does not eradicate categorical distinctions, nor the need for them.[272] The PO may be the high-water mark as far as court-like ombudsmen are concerned, but ombudsmen are not, and should not be, courts of law.

[271] Consider parallels in David Mullan, 'Tribunals Imitating Courts – Foolish Flattery or Sound Policy?' (2005) Dalhousie LJ 1.
[272] See *A-G v BBC* (n 6) 353.