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Kirkham, R. and O'Loughlin, E.A. (2020) Judicial review and ombuds: a systematic analysis. Public Law, 2020 (Oct). pp. 680-700. ISSN 0033-3565

Accepted Copy for *Public Law* pre proof reading February 2020. Scheduled for Autumn 2020 publication.

Judicial Review and Ombuds: A Systematic Analysis

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Key words: administrative law; judicial review; empirical methods; content analysis; judicial discretion; ombudsman

There is a growing body of literature that studies the amorphous nature of administrative law and identifies the ways that its practice does not perfectly map onto the general principles of administrative law as expounded in textbooks.[1] This is well evidenced in the existence of silos of administrative law scholarship, with discrete specialisations long existing in areas such as housing law, or social security and welfare law. Such scholarship recognises and critiques legal questions that are particular to the administrative context, and developed through narrow case law developments on the meaning of statutory provisions.[2]

This article makes two contributions to this body of literature. First, it provides a systematic account of the approach the courts take in reviewing decisions of ombuds. In scholarship on ombuds in the UK, there is a paucity of studies on the relationship between the courts and ombuds[3] and no systematic study that analyses ombud judicial review as a discrete body of law. To that end, this article finds that the dominant approach of the courts is one of deference to ombud decision-making and loyalty to general principles of administrative law. Even so, there is a significant strand of case law that has exercised a powerful structuring function over the ombud sector. Through this function the courts have filled a gap in the oversight of the sector, interpreting legislation and the common law to facilitate new remedies and encourage the development of heightened standards of procedural fairness and transparency in decision-making. Such findings assist in the second contribution: albeit in relation to only one confined body of case law, this article further demonstrates the existence of a lacuna between general accounts of administrative law doctrine and empirical reality. In doing so, it evidences one key explanation for that lacuna, that the courts use the opportunity of reviewing specialised statutory functions to develop tailored case law for particular administrative contexts.

The article progresses in three stages. The first section details the contribution and method of the study. The second stage presents the results of our case study in two parts. We conclude with an analysis of our findings and some implications for wider research on judicial review.

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[1] For a recent example, see generally *Sarah Nason, Reconstructing Judicial Review* (Hart 2016).

[2] For example, what amounts to 'intentional homelessness' under s. 193 Housing Act 1996. See Carla Reeson, 'Intentional Homelessness and Affordability of Accommodation' (2019) 41(4) JSWFL 483.

[3] Exceptions include Richard Kirkham and Alexander Allt, "Making Sense of the Case Law on the Ombudsman" (2016) 38(2) JSWFL 211; Brian Thompson, "The Courts' Relationship to Ombudsmen – Supervisor or Partner?" (2015) 37(1) JSWFL 137; and Richard Kirkham, Brian Thompson and Trevor Buck, "When Putting Things Right Goes Wrong: Enforcing the Recommendations of the Ombudsman" [2008] PL 510; *Jason NE Varuhas, Judicial Capture of Political Accountability* (Policy Exchange 2016).

The Ombud/ Judiciary Relationship

The ombud as a case study

A main focus of this study is the approach of the judiciary towards the ombud office in public law litigation, and what this tells us about the relationship between the two. The ombud has been described as a 'constitutional misfit'[4] given its novel status in the legal order, which renders its relationship with the courts somewhat opaque. For most ombuds, statute itself has virtually nothing to say on this relationship.

There is no single definition of an ombud, but its main role is handling complaints about maladministration, poor service or unfair treatment by those whom the ombud has the power to investigate.[5] It is this complaint handling function that is primarily challenged in judicial review. Although many public bodies provide a complaint-handling service, ombud services are distinct. They are an independent office that operates autonomously from day-to-day political control, with decisions on complaints considered by the courts only on points of law. The first ombud introduced in the UK was the Parliamentary Commissioner for Administration in 1967.[6] The full impact of this innovation is contested, but the transplant of the ombud into the UK represented a novel and bold shift in approach towards administrative justice at a time when there was a wider rebalancing of relationships between the administrative state and the citizen.[7] There are now at least 17 separate statutory schemes that perform ombud-like functions, and several others that could potentially be subject to judicial review.[8]

Two ombud-like institutions, the Pensions Ombudsman and the Scottish Legal Complaints Commissioner (SLCC), are provided with a statutory appeal process, with the latter's legislation detailing a set of grounds of appeal to courts that are broadly comparable to the grounds of judicial review.[9] For both appeal processes, however, judicial consideration is based on appeal on the law, not on fact.[10] For all other schemes, judicial review is the only legal remedy available to complainants if they are unhappy with the decision of an ombud.[11] The first judicial review against an ombud was heard in 1978, and as of December 2019 this study had identified 109 public law challenges against ombuds decisions.[12] Most of these cases (93)

[4] Rick Snell, "Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma" in *Chris Finn (ed), Sunrise or Sunset? Administrative Law in the New Millennium* (Canberra: Australian Institute of Administrative Law, 2000) 188.
[5] See Ombudsman Association, 'Schedule 1 to the Rules: Criteria for the Recognition of Ombudsman Offices' <http://www.ombudsmanassociation.org/docs/OA-Rules-Schedule-1.pdf> accessed 21 January 2020, 1.
[6] Parliamentary Commissioner Act 1967.
[7] See *Trevor Buck, Richard Kirkham, and Brian Thompson, The Ombudsman Enterprise and Administrative Justice* (Routledge 2010), ch 1.
[8] Kirkham and Allt, "Making Sense of the Case Law on the Ombudsman", 214.
[9] S 21(4), Legal Profession and Legal Aid (Scotland) Act 2007.
[10] ibid. See also s 151(4), Pension Schemes Act 1993.
[11] For some schemes the question of whether they can be subject to judicial review is as yet unresolved, eg Prisons and Probation Ombudsman, Ombudsman Services, Furniture Ombudsman.
[12] See Richard Kirkham and Elizabeth O'Loughlin, *A Study into Ombud Judicial Review Online Appendix: Evidence of Results* (2020) A2-3 www.xxx; and n 44 below.

have been heard since 2002.[13] There therefore seems to be a correlation between the expansion of the sector, and an increase in the amount of users choosing recourse to judicial review, with there being on average five fully heard cases per year plus a similar number of permission hearings since that date.[14]

The ombud and general principles of administrative law

At the heart of this study is a desire to systematically record the approach that the courts take in reviewing ombud decisions. Academic debate on the relationship between the courts and ombuds ranges from describing it as appropriately deferential[15] to close to triggering a legitimacy crisis.[16] In order for such arguments to take place, there must be a solid evidence base of the real practice of ombud administrative law. In our pursuit of this evidence base, we present a hypothesis: that the courts are likely to tailor the development of case law to the demands of the sector, taking into account the ombud's distinct features as an independent actor in the accountability architecture. Such "institutional entrepreneurship"[17] is possible because the judiciary possesses considerable scope to shape how judicial review is undertaken,[18] and within the common law tradition can deploy the standards found in administrative law doctrine as adjustable parameters, applied more or less intensely dependent on the context and the individual judge.[19] It is only possible to test this hypothesis in relation to the dataset presented here, but is likely that such dynamics are present in other corners of administrative law.

If a bespoke approach to ombud case law is identified, this evidence complements those accounts of administrative law which are skeptical of the treatment of the discipline as "a cluster of legal structures which apply *generally* across all areas of public administration".[20] The generalist approach is most often associated with the way in which administrative law principles are presented as a coherent taxonomy of legal grounds.[21] The attractiveness of this approach as an instruction on the judicial role can be understood to have at least two normative underpinnings: the importance of establishing certainty and predictability in decision-making, and the need to render the judiciary properly accountable for their choices.[22]

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[13] This study did not include the small jurisprudence of the pre-2002 private sector financial ombud schemes, as at the time the courts did not apply a consistent approach towards reviewing such schemes eg *R. v Insurance Ombudsman Bureau Ex p. Aegon Life Assurance Ltd* [1995] L.R.L.R. 101.

[14] See *Kirkham and O'Loughlin, Online Appendix*, A8.

[15] See Kirkham and Allt, "Making Sense of the Case Law on the Ombudsman", 224.

[16] *Varuhas, Judicial Capture of Political Accountability*, 5.

[17] TT Arvind and Lindsay Stirton, "Legal Ideology, Legal Doctrine and the UK's Top Judges" [2016] PL 418, 422.

[18] Richard Rawlings, "Modelling Judicial Review" (2008) 61(1) CLP 95.

[19] *Eric A Posner and Adrian Vermeule, The Executive Unbound: After the Madisonian Republic* (OUP 2011) ch 3.

[20] Joanna Bell, "Reason-Giving in Administrative Law: Where We Are and Why Have the Courts Not Embraced the 'General Common Law Duty the Give Reasons'?" (2019) 82(6) MLR 983, 1004. Harlow and Rawlings have referred to this tendency as a form of 'tailoring': *Carol Harlow and Richard Rawlings, Law and Administration* (3rd Edn, CUP 2009) 625.

[21] See e.g. *William Wade, Administrative Law* (OUP 1961).The lasting impact of Wade's 'common law method' is well-explored in Carol Harlow and Richard Rawlings, "Administrative Law in Context: Restoring a Lost Connection" [2014] PL 28, 39.

[22] Jason Varuhas, "Taxonomy and Public Law" in *Mark Elliott, Jason Varuhas and Shona Wilson Stark (eds), The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart 2018) 39.

The empirical accuracy of the generalist administrative law approach has long come under scrutiny. For some the concern is the failure of the judiciary to develop or sufficiently adhere to a consistent model of formal legal doctrine in public law.[23] For others, judicial decision-making has become too focused on the contextual circumstances of the case.[24] Elsewhere it has been argued that there is a dissonance between theory and practice in administrative law, with the grounds stressed in standard textbook templates frequently not matching the pattern of actual judicial decision-making applied in the courts.[25] This latter finding does not necessarily entail that general principles of administrative law are either inappropriate or non-existent but, at best, it would suggest that a generalist approach under-explains the nature of judicial decision-making. This finding might also point to an in-built tailoring dimension to administrative law which has been inadequately captured in most accounts. There may, in other words, be good reasons why flexibility should be catered for in administrative law and not driven out by normative presuppositions imposed by common law design.[26] Far from being a license for uncertainty, the tailoring of administrative law is a very standard example of the common law in action with principles applied consistently in a specific context. One obvious driver for variability in judicial decision-making is the differences in the nature of statutory schemes that are subject to judicial review and the impracticability of devising one set of useable doctrine to define all public law.[27]

Research methods in public law

If there is a dissonance between general theories of administrative law and judicial practice, part of the explanation is that although forceful claims about the appropriate parameters of judicial decision-making are sometimes made, in UK legal scholarship at least, there is a relative shortage of studies that attempt *systematically* to evidence practice.[28] This shortfall in the literature is surprising given the long tradition of legal realist critique that legal doctrine, by itself, fails to explain the manner in which judicial decisions are made.[29] This tendency exposes legal scholarship to a number of risks, such as an excessive focus upon appellant-level and strong precedent setting cases, or that case analysis is driven by conscious or unconscious research biases,[30] or that supporting evidence is sometimes "unclear or difficult for others to probe or falsify".[31] These combined deficits carry the risk that claims and counter-claims as to the state of judicial review are conducted through a 'war of examples' and absent of full context.[32] To counter-balance these various risks, empirical legal research is an important part of legal scholarship. This article uses one form of empirical research, systematic content

[23] See generally Christopher Forsyth, "'Blasphemy Against Basics' Doctrine, Conceptual Reasoning and Certain Decisions of the UK Supreme Court" in *John Bell, Mark Elliot, Jason NE Varuhas and Philip Murray (eds), Public Law Adjudication in Common Law Systems: Process and Substance* (Hart 2016) 145.
[24] Varuhas, "Taxonomy and Public Law", 51-53.
[25] *Nason, Reconstructing Judicial Review*, ch 6.
[26] Paul Craig, 'Taxonomy and public law: a response' [2019] PL 281, 300-301.
[27] Bell, "Reason-Giving in Administrative Law", 1007-1008.
[28] For a reference list of recent examples of systematic empirical scholarship on judicial review, see *Kirkham and O'Loughlin, Online Appendix*, A7.
[29] Victoria Nourse and Gregory Shaffer, "Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?" (2009) 95(1) Cornell L Rev 61.
[30] Adam S Chilton and Eric A Posner, "An Empirical Study of Political Bias in Legal Scholarship" (2015) 44(2) JLS 277, 286–293.
[31] Will Baude, Adam S Chilton, and Anup Malani, "Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews" (2017) 84(1) U Chi L Rev 37.
[32] Colm O'Cinneide, "Democracy and Rights: New Directions in the Human Rights Era" (2004) 57(1) CLP 175, 180.

analysis, to provide an in-depth account of how judges reason their decisions in a particular context.

Care should be taken not to overstate the capacity of empirical legal research. Where coding criteria is applied it must very carefully and rigorously constructed. Even once such design work has been put in place, any endeavour to reduce the meaning of a large body of cases to a uniform system of coding will lose some of the subtleties and nuances upon which a decision is based. Judicial decision-making is driven by various factors, including the factual context of the case, the judge's internal approach to legal reasoning, and other personal or case management features of the dispute such as the quality of representation.[33] Further, judgments may only provide a 'post-decision' rationalisation of the judge's thought-process and the real driver behind a decision might be hidden.[34] Given the room for uncertainty as to cause and effect, therefore, the argument for systematic empirical scholarship is primarily a supportive one to other methods and insights. Systematic studies can provide an objective means by which to identify "anomalies which may escape the naked eye".[35] It has a role to play in testing, and possibly confirming, pre-held positions, and isolating outlier cases.[36] It also provides a stronger foundation for future research than snapshot perceptions of the law based on a selective overview. Above all, by forcing the author to supply the evidence and methods behind the claims being made, the systematic approach obliges the researcher to be more transparent about the research limits of their work and thereby reduces the risk of normative biases driving the analysis. In all these respects, the systematic approach offers value in informing debates about the real practice of judicial decision-making.

Methodology

To simplify the empirical study in this article, we focus only upon the textual evidence of the judge's reasoning and the recorded outcomes of cases. In order to establish a "similarly weighted"[37] and easily repeatable selection of cases for empirical enquiry, this study focuses on 109 cases up to December 2019 in which a determination of an ombud-like body[38] had been challenged in the senior courts *and* heard by way of a full hearing.[39] Although it is not possible to verify that all ombuds cases have been captured, where possible, the selection was verified with the scheme concerned.

To unpick the work being carried out by the judiciary in this body of case law, we coded all the arguments considered in judgments.[40] The primary research method deployed was content

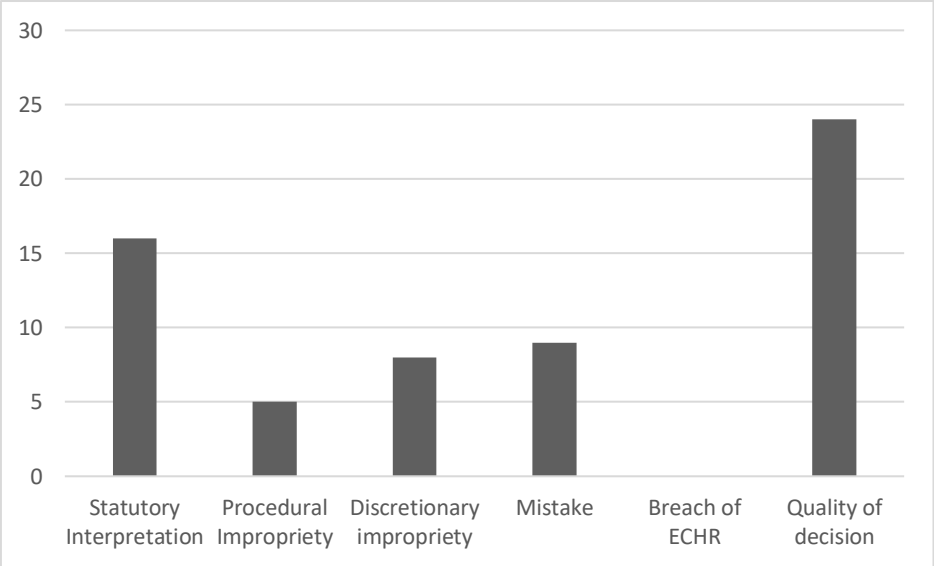
[33] David Williams, "The Case-Law of Administrative Law" (1982) 6 Trent LJ 1, 3.
[34] Dan Simon and Nicholas Scurich, "Judicial Overstating" (2013) 88(2) Chi-Kent L Rev 411.
[35] Alan L Tyree, "Fact Content Analysis of Case Law: Methods and Limitations" (1981) 22(1) Jurimetrics J 1, 23.
[36] Ibid.
[37] Mark A Hall and Ronald F Wright, "Systematic Content Analysis of Judicial Opinions" (2008) 96(1) CLR 63, 64.
[38] We chose not to include appeal cases brought against the Pensions Ombudsman in this study (there have been over 200 such cases) as its remit is subtly different to most ombud-like schemes. We did though include eight appeal cases brought against the Scottish Legal Complaints Commission. We justify this inclusion on the basis that it is a heavily constrained form of appeal, and the legal grounds for appeal in essence match those available in judicial review: Legal Profession and Legal Aid (Scotland) Act 2007, s 21(4). Overall, the patterns we identified for this scheme were in line with other schemes in the study.
[39] As identified through the law databases: British and Irish Legal Information Institute, Westlaw and LexisNexis. See *Kirkham and O'Loughlin, Online Appendix*, A2-3 for further details on our database search.
[40] For a full explanation of the method and typology deployed, see *Kirkham and O'Loughlin, Online Appendix*, A1.

analysis, which is a form of discourse analysis used to record and code targeted aspects of the content of documented decisions. The claimed value of content analysis studies is an epistemological one, in that 'the research results matter more than the researcher's authority'.[41] Value-judgements cannot be avoided altogether, as any form of qualitative assessment creates the potential for subjective evaluation.[42] Value judgments, however, can be reduced to a minimum by working though specific coding protocols which are fully disclosed. Through this approach, potential criticisms are offset by being open about the choices that have been made. To be credible, content analysis requires the themes selected for interrogation, and the design of a codification scheme, to be capable of enough objective detail to allow others to replicate the study. Arbitrary subjectivity can be further reduced by double-blind coding on a sample of cases, as was applied in this study. To foster transparency we have made available on an open access website more detail on the findings listed in this article, together with a full account of our method and coding scheme.[43]

For our purposes here the choice of grounds that we coded for is not important, instead what is of interest is the extent to which different grounds of law drove the arguments presented to the court and judicial decision-making. To isolate relevant lines of inquiry, we grouped the grounds of administrative law under six broad categories of review that capture the essence of what is being considered by the court (statutory interpretation, procedural impropriety, discretionary impropriety, mistake, breach of ECHR and quality of decision).[44] According to this taxonomy of grounds, our study revealed that the main targets of legal argument adopted by the claimant are decisions allegedly made outside an ombud's powers (statutory interpretation) and decisions which are allegedly flawed either in substance or in the reasoning that accompanies them (quality of decision).[45] This pattern becomes even more pronounced when we consider only the grounds that are successful against an ombud (see Figure 1).[46]

Figure 1: Successful grounds in ombud judicial review by category of legal reasoning[47]

[41] See Hall and Wright, "Systematic Content Analysis of Judicial Opinions", 66.
[42] For a critique of the concept of objectivity in research methodologies, see Andrew Halpern, "The Methodology of Jurisprudence: Thirty Years Off the Point" (2006) 19(1) CJLJ 67.
[43] See *Kirkham and O'Loughlin, Online Appendix*, A1-4, which details our method and explains our choice of sample.
[44] A subtly revised version of the template adopted in Sarah Nason's pioneering study*, Reconstructing Judicial Review*, 25, 146.
[45] See *Kirkham and O'Loughlin, Online Appendix*, A5.
[46] Figure 1 includes all grounds found against an ombud, with in some cases more than one ground being successful.
[47] For full details see *Kirkham and O'Loughlin, Online Appendix*, A6.



In order to further understand what kind of supervisory relationship exists between ombud services and the courts, we also coded to capture the judiciary's approach to statutory interpretation and other targeted aspects of judicial decision-making that would help prove or disprove the existence of a bespoke set of ombud jurisprudence.

Findings I: Statutory Interpretation

Statutory interpretation

A striking feature of this study is the central role played by statutory interpretation in ombud judicial review. In 87 out of the 109 body of cases the court undertook some form of detailed legislative interpretation (see Table 1). Further, as noted above (Figure 1), one of the most common grounds for ombud decisions to be quashed was a failure to interpret statute correctly. This finding broadly mirrors the trend in all judicial review.[48]

Statutory interpretation is an entirely conventional aspect of standard administrative law accounts and one in which choices have to be made. On those choices, there is some disagreement[49] as to the extent to which a judge can appropriately arrive at an interpretation of statute that "does not accord with the ordinary meaning of wording of the provision".[50] To gain an understanding of how the judiciary manage this disagreement, we coded the reasoning technique deployed in judgments through a threefold typology of *literal*, *textual* and *contextual* techniques, each of which we detail more below.[51] A difficulty with classifying judgments this way is that judgment writing can be opaque or misleading, or the reasoning blunt and cursory. As a result, it may not be possible to explain the interpretative choice made by the judge other than through inference. Notwithstanding this insight and the risks of 'over-interpreting',[52] the

[48] *Nason, Reconstructing Judicial Review*, 159.
[49] On this debate, see Laurence B Solum, "The Interpretation-Construction Distinction" (2010) 27(1) Const Comment 95; *Quintavalle v Secretary of State for Health* [2003] UKHL 13, [8].
[50] Bradley C Canon, "Defining the Dimensions of Judicial Activism" (1983) 66(6) Judicature 236, 242.
[51] This threefold typology differs subtly from that applied in a similar content analysis study into EU copyright law: Marcella Favale, Martin Kretschmer and Paul C Torremans, "Is there an EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice" (2016) 79(1) MLR 31.
[52] See Simon and Scurich, "Judicial Overstating".

'tools' of the judicial trade do require judges to provide reasons for their decisions and it is reasonable to hold them to account for those stated reasons.[53] In this study we have relied upon the documented evidence of the interpretation technique being deployed in the judgment (whether explicit or implicit) to understand the interpretive method that is adopted.[54] In doing so, we identified four broad trends in ombud case law.

(i) The dominance of literal and narrow interpretations of statutes

The dominant finding is that in almost all cases the judiciary did not use their interpretative powers expansively. This suggests that in ombud judicial review cases, the courts adhere fairly closely to standard accounts of *ultra vires*: that the courts apply the intent of the legislature as expressed in the words.[55] Table 1 presents the results of the coding exercise.

Table 1: Judicial approach towards statutory interpretation in ombudsman judicial review[56]

No interpretation approach applied	22
Literal	70
Textual	12
Contextual	5

Of those cases in which a measure of interpretation or direct application of the law was required, we found that in 80 per cent the judiciary adopted a strict *literal* interpretation of the law. The most obvious scenario for the literal approach to be adopted is where the case hinges upon the meaning of a specific legal provision about which the parties disagree.[57] An expanded version of this form of interpretation is where the provision in question directs the interpreter to an additional legal source in order to confer it meaning.[58]

Although our study indicates that judges display a strong preference for narrow literal interpretations of statute, Table 1 reveals an occasional adoption of interpretation techniques that rely less on the specific text being applied, which we grouped into textual and contextual approaches. With *textual* interpretation the distinction from literal techniques is not water-tight, but in essence meaning of a single legal provision is constructed in situations where it cannot be confidently asserted from the wording of that single legal provision alone. For instance, by this method the provision in question might be read alongside other parts of the statute to establish consistency and purpose in legislation, or the judge might seek to examine the 'four corners of the statute' to gain an understanding of Parliament's intent in the context of its text alone (reading the statute in the round).[59] This approach is defended by many as the most legitimate approach to judicial reasoning in difficult cases where ambiguity or vagueness in the text is present.[60] By contrast, with *contextual* interpretations of statute, the judge overtly

[53] Keenan D Kmiec, "The Origin and Current Meanings of Judicial Activism" (2004) 92(5) CLR 1441, 1473.
[54] Leonardo Pierdominici, "Constitutional Adjudication and the 'Dimensions' of Judicial Activism: Comparative Legal and Institutional Heuristics" (2012) 3(3) TLT 207, 233.
[55] Paul P Craig, "Ultra Vires and the Foundations of Judicial Review" (1998) 57(1) CLJ 63, 64-65; Paul Craig, "Competing Models of Judicial Review" (1999) PL 428.
[56] See *Kirkham and O'Loughlin, Online Appendix*, B1 and B2.
[57] See Solum, "The Interpretation-Construction Distinction".
[58] For an example from this study, see *R (Marazona Properties Ltd) v Financial Ombudsman Service* [2017] EWHC 1135 (Admin).
[59] John F Manning, "Textualism and the Equity of the Statute" (2001) 101(1) Colum L Rev 1.
[60] Richard Ekins, "The Intention of Parliament" [2010] PL 709.

goes beyond the statute to understand the semantic context of the text with the aid of additional sources of evidence. This involves "a more open and systematic consideration of any legislative purpose, and of any relevant principles (and policies)".[61] With both textual and contextual interpretations, because they require the judge to go beyond the literal wording of an individual text, extra room is created for judicial discretion to expand the law towards a broader meaning than is strictly necessary and to develop a bespoke approach to the application of administrative law standards.

Just because a judge moves beyond literal interpretation techniques, however, it does not necessarily follow that the judiciary are overtly expanding the law. Drawing this conclusion requires deeper analysis of the nature of the intepretative challenge in question. There may be a range of reasons which justify a judge moving beyond the literal method, many of which are accounted for in standard formalist accounts of the law.[62] In the ombud case study, three justificatory reasons best explain the choices adopted (see Table 2).

Table 2: Explanations for cases in which non-literal interpretation techniques were applied

	Ombud decision upheld	**Ombud decision not upheld**	**Total**
To add rigour to literal reading	4	1	5
To resolve conflicting provisions	5	2	7
To read in meaning to statute	1	4	5

The first reason we found for non-linguistic interpretative techniques was to add *more rigour* to an interpretation, presumably because the judge felt the need to justify a decision through further legal analysis. In our sample, in all instances the non-literal approach of the court was supportive of literal reasoning, and did not exapnd the authority of the court over the ombud.[63]

The second explanation for non-literal interpretative techniques being deployed was where the core legal dispute revolved around potentially *conflicting provisions* in legislation which necessarily meant that there were two rival interpretations available. In order to resolve the dilemma, the judge read across the legislation to determine which interpretation to give precedence. For instance, in *Armagh City Council, Re Judicial Review*,[64] the legal question was whether by law the Commissioner for Complaints had the power to accept a complaint from a GP, notwithstanding that the GP received money out of the public purse. According to Article 10(1)(d)(ii) of the Commissioner for Complaints Order (NI) 1997 'bodies' that receive public monies are excluded from submitting complaints. However, the question of what constituted a 'body' under Article10(1)(d)(ii) was ambiguous, a challenge which the court chose to resolve by reading the provision alongside Article 8 which, for the entirely separate purpose of detailing the bodies that are subject to investigation, listed GPs as individuals. In only two of the seven cases which fell into this category[65] did the court conclude that the ombud had

[61] Andrew Ashworth, "Interpreting Criminal Statutes: a Crisis of Legality?" (1991) 107 LQR 419, 446.
[62] *Joseph Raz, The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009); Paul Craig, *Administrative Law* (6th edn, Sweet & Maxwell 2008) 482-84.
[63] For a list of these cases, see *Kirkham and O'Loughlin, Online Appendix*, B3.1.
[64] [2014] NICA 44.
[65] See *Kirkham and O'Loughlin, Online Appendix*, B3.2.

deployed an incorrect interpretation of the law,[66] nor did it use this interpretative method to constrain the relevant ombud's discretionary power.[67]

What this study reveals, therefore, is that in ombud case law, when judges adopt techniques of statutory interpretation that potentially allow for the judge to move away from a standard literal approach, that technique is most commonly undertaken in order to clarify narrow and ambiguous points of law, rather than to expand the law or place added controls on the ombud. Indeed, non-literal techniques of interpretation were more likely to be deployed to support administrative discretion, than to overturn it.

(ii) Use of judicial creativity to raise standards

It is only when we come to the third explanation for non-literal techniques identified in this study that the work of the court moved away from purely interpreting the law to *reading extra meaning* into the statute which was not strictly necessary from the wording. Although only five out of 109 cases fell into this category, this form of interpretative work indicates two further trends in ombud case law. First, courts are willing to use non-linguistic interpretation techniques to exert added controls over the ombud by establishing a more restricted set of parameters around the ombud's discretionary power. We only found two cases in our study that match this description, but they stand out as exhibiting a reserve ambition of the courts to ensure enhanced standards of procedural fairness in the ombudn sector. Notably, both cases were heard in the appeal courts.

In *Cavanagh*, the court read in a limitation to the discretion conferred on the ombud to determine the extent of a complaint (section 3(2), Health Service Commissioners Act 1993), by ruling that ombudsm investigations were restricted by the terms of the original complaint.[68] It achieved this result by reading section 3 of the Act alongside section 11(1), which required notice to be given to affected parties before commencing an investigation. The Court found that the ombud had expanded her investigation midway into a complaint without giving due notice, and in doing so had "exceeded [her] statutory powers, not technically or marginally but so substantially as to vitiate it in its entirety".[69] *Cavanagh*, therefore, read into the statute a clear limit on the ombud's discretionary power to establish the boundaries of the complaint that was not expressly provided for, but could be inferred following a broad reading of the Act. This finding has since been justified as upholding a level of disclosure that accords with the duty of fairness.[70]

The other example is the Supreme Court ruling in *JR55.*[71] Here the Court held that the Commissioner for Complaints for Northern Ireland did not have the power to recommend that a GP pay financial compensation. The relevant provision in question gave the Commissioner a general discretionary power to secure a settlement without any reference to possible restrictions. The Court, however, inferred restrictions on that power through an expansive

[66] *AC v Office of the Independent Adjudicator for Higher Education* (2017) (Claim Non.CO/5366/2016) available on the website of the Office of the Independent Adjudicator for Higher Education; *Council of The Law Society of Scotland v Scottish Legal Complaints Commission (SLCC)* [2017] CSIH 36.
[67] *IFG Financial Services Ltd v Financial Ombudsman Services Ltd* [2005] EWHC 1153 (Admin); *Hession v Health Service Commissioner for Wales* [2001] EWHC 619 (Admin).
[68] *R (Cavanagh) v Health Service Commissioner* [2005] EWCA Civ 1578 at [38]-[39].
[69] ibid [47].
[70] *Miller v The Health Service Commissioner for England* [2018] EWCA Civ 144 at [47].
[71] *JR55, Re Application for Judicial Review (Northern Ireland)* [2016] UKSC 22.

textual reading of the legislation as a whole. The approach of the Supreme Court has come under heavy scrutiny[72], but was justified by the court as being confined to its facts, Lord Sumption describing the case as 'moot', being that it involved an ombud scheme that was drawing to a close.[73] Though only time will tell, as of yet, the case seems to have had limited impact on the bench's approach in ombud cases more generally, there being only a cursory and dismissive reference to the case in a single later case.[74]

(iii) Using judicial creativity to emphasise the legal status of a body

The second way that the courts have interpreted legislation more expansively is to develop clarity on the ombud's powers and the ombud/court relationship. In three cases the court expanded upon the meaning of the ombud's power to determine either 'maladministration' or 'injustice' by reference to the broader purpose of the legislation.[75] In none of those cases, did the interpretation directly impact on the decision in the case or restrict the authority of the ombud, instead in all three the judiciary laid down landmark statements of support for the ombud office which have been repeated in multiple cases since.[76]

Although not specifically concerning statutory interpretation, additionally there are sixteen cases in which obiter statements were made to reinforce the broad discretionary power of the ombud with reference to the underlying intent of the statutory scheme.[77] Similarly, at least sixteen cases detail the limited public law role of the courts in reviewing an ombud, with multiple others acknowledging more briefly this position.[78] In all instances the judicial strategy was to advance an account of the ombud's legal position that was consistent with the purpose of the legislative scheme involved, and largely supportive of the ombud office.

(iv) Evidence of 'allocating powers'

A final trend is worthy of note. Although multiple different factors lead to statute being scrutinised in court, the most common theme in ombud case law is the need to adjudicate on the allocation of powers between different institutions where there is an explicit or implicit conflict in effective authority. In the case sample, perhaps the most important example of allocating power involved the competing jurisdictions of an ombud and the court. In several cases the relevant ombud/court conflict concerned the question of whether an ombud can persist with a complaint in which a judicial remedy is available, or can undertake an investigation even though a judicial remedy has already been sought.[79] An example is the jurisdictional bar upon the Local Commissioner of Administration Commissioner's commencing an investigation if there is "any action in respect of which the person has or had a remedy by way of proceedings in any court of law".[80] This provision is offset by a discretion

[72] Richard Kirkham, "JR55, Judicial Strategy and the Limits of Textual Reasoning" [2017] PL 46, 54-55.
[73] *Kirkham and O'Loughlin, Online Appendix*, [5].
[74] *Miller* at [85]-[86].
[75] *Kirkham and O'Loughlin, Online Appendix*, B3.3.
[76] See e.g. *R v Parliamentary Commissioner for Administration ex parte Balchin* [1996] EWHC Admin 152 at [14], per Sedley J: "...so far as a court of judicial review is concerned the question is not how maladministration should be defined but only whether the Commissioner's decision is within the range of meaning which the English language and the statutory purpose together make possible. For the rest, the question whether any given set of facts amounts to maladministration - or by parity of reasoning, to injustice - is for the Commissioner alone."
[77] *Kirkham and O'Loughlin, Online Appendix*, B3.4.
[78] *Kirkham and O'Loughlin, Online Appendix,* B3.5.
[79] *Kirkham and O'Loughlin, Online Appendix,* B4.1.
[80] Local Government Act 1974 s.26(6)(c).

for the Commissioner to accept complaints "if satisfied that in the particular circumstances it is not reasonable to expect the person aggrieved to resort or to have resorted to it."[81] Following several cases in which the confusion caused by these conflicting provisions were considered,[82] the Court of Appeal stated that where serious allegations of maladministration are made:

> "Such allegations could best be investigated by the resources and powers of the Commissioners, with her powers to compel both disclosure of documents, and the giving of assistance to the investigation… the Commissioner's investigation and report can provide the just remedy when judicial review might fail to; and can reach facts which might not emerge under the judicial review process."[83]

In doing so, the Court of Appeal reinforced the importance of promoting the Commissioner's work, a message repeated in a later judgment which opined that "those advising individuals regarding matters potentially giving rise to both local ombud investigations and to judicial review should first seek an investigation by a local ombud."[84]

A similar overlap of jurisdictional competence occurred in disputes between ombuds and other public bodies. In several cases involving the Office of the Independent Adjudicator for Higher Education (OIA), for instance, the courts have attempted to clarify the grey line between the competences of universities and the OIA on the matter of academic judgement. In other OIA cases, the court has clarified that it is not the office's role to enforce disability discrimination law or investigate criminal conduct.[85] Likewise, three cases involving the SLCC dealt with the question of how the office should deal with complaints which contained both a 'service' and a 'conduct' element. Such 'hybrid' complaints created a boundary clash of functional responsibility between the SLCC and the legal professions responsible for investigating conduct matters.[86]

In most of these 'allocation of power' decisions, the judicial input in ombudn case law involved resolving clashes and ambiguities created by incompatible legislation which could no longer be worked around without judicial input. In doing so, the court unavoidably advanced the law incrementally and may be described as performing an essential institutional design function.[87]

Findings II: Grounds

(i) Judicial focus on the reasoning of ombuds

To evidence the contours of the relationship between ombuds and the courts, we interrogated the ways in which the bench applied common law grounds. Our study found that the most common ground for an ombud decision to be quashed was the quality of reasoning that

[81] Local Government Act 1974 s 26(6).
[82] *Kirkham and O'Loughlin, Online Appendix,* B4.1.
[83] *R v Local Commissioner for Local Government ex p Liverpool City Council* [2000] EWCA Civ 54 at [28].
[84] *R v Local Commissioner For Local Government Ex p Scholarstica Umo* [2003] EWHC 3202 at [17].
[85] *Maxwell v Office of the Independent Adjudicator for Higher Education* [2011] EWCA Civ 1236 and *Kirkham and O'Loughlin, Online Appendix*, B4.2.
[86] *Kirkham and O'Loughlin, Online Appendix*, B4.3.
[87] Peter Cane has suggested that this function is a big part of US judicial review: Peter Cane, "Understanding Judicial Review and its Impact" in *Marc Hertogh and Simon Halliday (eds), Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (CUP 2004), 15.

supported the decision (Figure 1). This category includes twelve cases in which an ombud decision was quashed due to flaws in its reasoning and ten in which decisions were found to be irrational.[88]

Several patterns of judicial decision-making were evident from this sample of ombud case law. First, judges are very prepared to deconstruct failings in the evidence provided in the ombud's determinations. This focus on adequacy of reasoning is largely justified on the basis of the statutory duty of ombuds to give reasons at various stages of the decision-making process. This chimes with other studies that have found that the judicial approach to adequacy of reasons is largely dictated by the context of the statutory scheme under review.[89]

Most of the irrationality cases in the ombud case sample can equally be understood as an attack on the quality of reasoning used to explain the decision and the weight given to the relevant factors involved. For example, in *JR55*, the court criticised the failure of the relevant ombud to provide an explanation for the quantum of compensation recommended, stating that the decision was "plucked out of the air" and was "lacking any rational basis".[90] Likewise in ruling that a decision had been made irrationally because the complaint had been misunderstood, the judge said in *Kelly*:

> "This is not a reasons challenge, but the absence of adequate reasoning is relied on in support of the substantial challenge that there has been a failure to take into account the real complaint. Whether the ombudsman did take account of the real complaint is to be determined on the basis of the reasons he gave for his decision."[91]

In fact, in general most of the case law which was decided on discretionary impropriety (eg failure to take into account relevant considerations) can also be understood as a deconstruction of the reasons provided by the ombud. This included a failure to take into account a pre-existing legal requirement, whether outlined in statute or previous case law, or other relevant considerations that flowed from the facts of the complaint or the ombud's own guidance.[92] A similar observation can be made about the use of the ground of mistake. We found that in six cases the mistake ground reflected a willingness on the part of the court to unpick the reasoning deployed in the decision and/or test the robustness of the ombud's findings back to the evidence used to support the decision.[93]

A final observation is that, in at least sixteen cases the judiciary used dicta to express instructions to an ombud on the reason-giving standards they expect from such an institution, notwithstanding the non-judicial role of the ombud. Such standards apply at various stages of its decision-making process, not just final reports.[94] This is significant, in that legislation constituting ombuds provide no such detail other than to require reasons for determinations made. This approach shows the weight that courts give to the policy framework in question: in the ombud context particular weight is given to the quality of reasons, presumably because the ombud is part of the accountability architecture, and as such should adhere closely to principles of good administration.

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[88] See *Kirkham and O'Loughlin, Online Appendix*, C1.
[89] See Bell, "Reason-Giving in Administrative Law.
[90] *JR55* at [30].
[91] *Kelly v Financial Ombudsman Service Ltd* [2017] EWHC 3581 (Admin) [32].
[92] See *Kirkham and O'Loughlin, Online Appendix*, C2.
[93] *Kirkham and O'Loughlin, Online Appendix*, C2.
[94] See *Kirkham and O'Loughlin, Online Appendix*, C3.

(ii) Judicial expectations of procedural fairness standards

It has been a long standing concern that, through judicial review, the judiciary would develop and impose procedural fairness standards on the ombud sector that would neuter its more flexible method of investigation and decision-making.[95] Our study identified that although common law procedural fairness grounds were raised regularly,[96] in only three cases did this ground cause a court to quash an ombud decision.[97]

Closer scrutiny, however, reveals an impactful role nonetheless being performed by the courts in considering procedural fairness grounds. To begin with, the role judicial review plays through upholding ombud decisions, and thereby helping to legitimise the decision-making processes of the ombud, should not be understated. Multiple cases stand out as providing robust support for the scheme in question's processes.[98] In adopting this approach, the courts are ordinarily strongly influenced by the nature of the statutory scheme concerned,[99] and the deliberate intention to create a dispute resolution service that operates differently to the court. To paraphrase the words of Lord Justice Mummery in a case on the OIA, if the ombud is to:

> "… act as a surrogate of the … court … it is difficult to see what point there would be in having a scheme, which was established … not as another court of law or tribunal, but as a more user friendly and affordable alternative procedure for airing … complaints and grievances. The judicialisation of the [ombudsman] so that it has to perform the same fact-finding functions and to make the same decisions on liability as the ordinary courts and tribunals would not be in the interests of [complainants] generally."[100]

Despite this general support, the courts have also developed a control capacity in ombud case law through obiter and guidance statements. Various statements on the law have led to a fine-tuning of specific procedural standards beyond legislative requirements. For instance, the courts have emphasised the importance of schemes developing internal guidance to describe in more detail their processes, and once in place the courts have expected that guidance to be followed.[101] The courts have also stated that an ombud should normally disclose the material or documentary evidence on which their decisions are going to rely so as to allow each of the parties the opportunity to make comments or rebut.[102] In disclosing such material, the courts have confirmed that an ombud is entitled to request undertakings that any such material will be kept confidential.[103] The courts have also considered the extent to which an ombud can lawfully

[95] *Harlow and Rawlings, Law and Administration*, 482.
[96] *Kirkham and O'Loughlin, Online Appendix*, C2, A5-A64.
[97] *Siborurema v Office of the Independent Adjudicator* [2007] EWCA Civ 1365; *Stenhouse v The Legal Ombudsman & Anor* [2016] EWHC 612 (Admin); *Miller*.
[98] See *Morrison v The Independent Police Complaints Commission and Ors* [2009] EWHC 2589 (Admin); *Sandhar v Office of the Independent Adjudicator for Higher Education* [2011] EWCA Civ 1614; *Miah v Independent Police Complaints Commission* [2017] EWCA Civ 2108; *Heather Moor & Edgecomb Ltd v Financial Ombudsman Service* [2008] EWCA Civ 642; *Calland v Financial Ombudsman Service* [2013] EWHC 1327 (Admin).
[99] Eg *Kerman & Co Llp v Legal Ombudsman* [2014] EWHC 3726 at [61].
[100] *Maxwell* at [37]-[38].
[101] *Miah* [2017] EWCA Civ 2108.
[102] *Turpin v Commissioner for Local Administration* [2002] JPL 326; *Miller*.
[103] *Kay v Health Service Commissioner* [2008] EWHC 2063 (Admin).

extend a complaint mid-investigation once more information has been obtained.[104] An ombud is now required to follow a consultation process with the affected parties, including the provision of explanatory information, before making such an extension to the complaint.[105] Most recently the courts have provided guidance on the importance of not being seen to predetermine a decision when issuing a preliminary finding of fact.[106] In addition, several cases which turned upon statutory interpretation can be seen to provide additional guidance on procedural fairness standards. For instance, *Cavanagh* and *JR55*, discussed earlier in this piece, were concerned with the due process owed to individual medical practitioners where their reputation was at stake.

iii) Use of precedent

Our coding scheme also captured the ways in which judicial precedent was used. Although throughout the study judgments showed loyalty to precedent,[107] they only rarely relied upon, or engaged meaningfully with, leading judicial review cases outside the ombud context. Notable exceptions are in some OIAHE cases, where for example the court relied upon *Smith*[108] in finding that a lack of hearing before the OIA did not render its process unfair[109], and upon *Magill*[110] in dismissing an allegation that the OIAHE was biased towards HEIs because it is funded by HEIs.[111] In general, however, the dominant approach was an analysis of the arguments placed before the court, viewed in context of the statutory scheme in question.

By contrast, there was some evidence of the development of a bespoke body of case law both around individual schemes and across schemes, with judgments regularly confirming a consistent account of the underlying principles of law that can be discerned from legislation and case law in the sector. The pattern with most case law has been that early pioneering cases have both established the principle that the ombud can be judicially reviewed and laid out the fundamentals of the position that should be adopted when reviewing a particular scheme.[112] This case is thereafter regularly cited as authority for the judicial approach, as more focused judicial input is built up around the specific features of ombud practice. OIAHE cases, for instance, referred regularly to *Siborurema*[113], and *Maxwell*[114], whilst for Financial Ombudsman Services (FOS) cases, *Heather*[115], and *IFG Financial*[116] were important starting points. There is also evidence of a cross-fertilisation of principles in case law across different schemes, with for example leading statements on the definition of maladministration cited across the study.[117]

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[104] *Hession*; *Cavanagh*; *Miller*; *JR55*.
[105] *Miller* at [42]-[47].
[106] *Miller* at [57]-[66].
[107] In only three cases did the court reject or disregard previous rulings, and in none of these instances was the ombudsman's decision overridden, or their discretionary power reduced: *Kirkham and O'Loughlin, Online Appendix*, C4.
[108] *Smith v Parole Board* [2003] EWCA Civ 1268.
[109] *Budd v Office of the Independent Adjudicator for Higher Education* [2010] EWHC 1056 (Admin) at [92].
[110] *Magill v Porter* [2002] AC 357.
[111] *Sandhar* at [23].
[112] *R v Parliamentary Commissioner for Administration ex p Dyer* [1994] 1 WLR 621; *R v Local Commissioner for Administration, Ex parte Eastleigh Borough Council* [1988] 1 QB 855; *Siborurema*; *Crawford v The Legal Ombudsman & Anor* [2014] EWHC 182; *Muldoon v IPCC* [2009] EWHC 3633.
[113] *Siborurema* [2007] EWCA Civ 1365.
[114] *Miah* [2017] EWCA Civ 2108.
[115] *Heather* [2008] EWCA Civ 642.
[116] *IFG* [2005] EWHC 1153 (Admin).
[117] See *Liverpool* [2000] EWCA Civ 54 at [3]*; R v Local Commissioner for Administration for the North and East of England ex parte Bradford Metropolitan CC* [1979] QB 287 at [311]-[312].

This indicates a willingness of the judiciary to develop a coherent body of law appropriate to the needs of the sector, where appropriate. Such an approach has however been backed up by a requirement to pay close attention to the schemes particular context. Indeed, it is commonly asserted that the "degree and manner of supervision to be exercised by the court will vary from institution to institution and from statutory scheme to statutory scheme".[118]

Approaches to judicial review: lessons from ombud case law

Our study has focused narrowly on ombud case law to understand empirically the work that judges do in administrative law. From this study, we draw three broad conclusions.

Most ombud case law is entirely orthodox

Sometimes the strongest findings are the least interesting, but they need to be reiterated nevertheless. If the purpose of administrative law is to establish and apply a consistent model of principles, then in two respects ombud case law measures up strongly.

First, the principle of ultra vires lies right at the heart of ombud case law, implicitly dictating how almost all judgments were arrived at, with the technique of statutory interpretation central to the vast majority of judgments. This is consistent with traditional accounts on the role of judges in judicial review: construing statutes to determine the parameters of the administrative power in question.[119] It is also in keeping with other empirical studies which find that most judicial review cases turn upon statutory interpretation.[120] Notably, we identified only two judgments that could be said to depart from narrow interpretations of legislation in an unorthodox fashion.

Second, most literature on administrative law recognises that judicial review both operates as a remedy of last resort and a safeguard to ensure that public authority is exercised within the boundaries of the law.[121] Our findings are entirely consistent with this prescription, with ombud case law providing more a 'safety valve' function for managing dissatisfied users of ombud services than a route to individual redress. In deciding which cases are to be heard, the courts are loyal to a strong filtering system that focuses attention on the underlying relevance of the legal question before the court. Most applications for judicial review do not satisfy this test. It is not possible for us to verify that all cases on the ombud have been captured in our study given the vagaries of online reporting but it is telling that we found more rejected oral permission hearings than cases heard by way of full hearing, with a lack of arguable grounds the most common reason for refusal.[122] Additionally, ombuds report high levels of applications failing at the written stage or being withdrawn even before they get that far.[123] Ultimately, in our sample only 29 out of 109 fully heard cases resulted in an ombud decision being

[118] *Siborurema* [2007] EWCA Civ 1365 at [51].
[119] See e.g. *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 at 813-814.
[120] *Nason, Reconstructing Judicial Review*, 159.
[121] See *Wade, Administrative Law*.
[122] *Kirkham and O'Loughlin, Online Appendix*, D1.
[123] See Felicity Mitchell, *The OIA and Judicial Review: Ten Principles from Ten Years of Challenges* (2015), 11 <https://www.oiahe.org.uk/media/1885/oia-and-judicial-review-fm.pdf> accessed 22 January 2020.

overturned.[124] This compares to an annual turnover of over 500,000 complaints in the sector. Nor is there any evidence to suggest that litigation is settled out of court on a regular basis.[125]

The judiciary perform a structuring role in ombud case law

This case study suggests that the courts routinely approach ombud judicial review in a way which chimes with general accounts of administrative law. However, our study reveals some marked consistencies across the ombud case law which are difficult to account for other than due to the specialized context of the ombud's work. A number of commentators have observed that the judiciary has the potential to perform a 'structuring'[126] or 'hortatory'[127] function. Here the purpose of judicial input is to detail and expand upon expected standards of good administration or even allocating powers and responsibilities between different constitutional actors. Our findings suggest that this latter set of functions best explains the variance from general administrative law that we detected in ombud case law. Three generic patterns support this conclusion.

First, the courts often adopted bespoke solutions because the general principles of administrative law simply did not provide the analytical detail, by themselves, required to resolve the problem before the court. On reasons for instance, whilst leading case law such as *South Bucks Council*[128] might offer a basic starting point, judges in our sample tended either to launch directly into an immanent critique of the ombud's decision based on the factual context and arguments placed before the court, or worked towards the development of bespoke criteria relevant to the specific ombud context being dealt with. This led to the kinds of citation patterns described above, where clusters of cases are gathering, and act as tailored precedent in cases related to a particular scheme.

Second, whilst deference to the work of the ombud is built into the judicial approach as a result of the statutory context, an analysis of ombud case law reveals that there is a small but significant strand of case law in which an intensive review of ombud practice has been exercised beyond that required by general administrative law doctrine, particularly on issues related to procedural fairness, and on quality of reasons. Some judgments defended this approach according to the statutory demands of the ombud scheme under scrutiny, suggesting a concern for ensuring that a partner justice institution is operating at the highest standards appropriate given its statutory role.

A third pattern in ombud case law is the degree of institutional design work being performed. In most such cases, the judicial role is one of managing the boundary lines of power between different institutions. Ordinarily this work is undertaken uncontroversially through narrow statutory interpretations, thereby filling gaps in the law created by institutional overlaps with other bodies. However, sometimes it draws the judge into more controversial areas of decision-making. This is illustrated by two new legal remedies that the court has effectively introduced to resolve or head-off disputes between an ombud, public bodies and individual complainants.

[124] *Kirkham and O'Loughlin, Online Appendix*, D2.
[125] Richard Kirkham, "Judicial Review, Litigation Effects and the Ombudsman" (2018) 40(1) JSWFL 110.
[126] David Feldman, 'Judicial Review: A way of controlling government' (1988) 66 Pub Adm 21.
[127] PS Atiyah, 'From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law' (1980) 65 (5) Iowa L Rev 1249.
[128] *South Bucks Council v Porter (No.2)* [2004] 1 WLR 1953.

The first remedy is that upon which most of the case law in this article is based, namely the right to challenge the ombud by way of judicial review. Given that an ombud invariably has no legal power to confer a remedy or create rights for individuals, there is a viable argument that there is no need for the courts to review ombud decisions.[129] Whilst initially hesitant,[130] and despite some resistance,[131] the courts have claimed the jurisdiction of the ombud sector on the premise that ombuds derive their powers from statute. With the second remedy, the courts later repeated this redesign of the ombud landscape in a discrete series of four cases not included in the main study for this article, in which the courts accepted for review challenges to decisions of public authorities not to comply with ombud reports. In three of these cases, this led to the initial response of the public body to the ombud being quashed.[132]

In devising these remedies, the court took advantage of the flexibility inherent in the common law to grant itself a jurisdiction of review that had not been previously confirmed, albeit such a role might have been assumed.[133] Thus the judiciary expanded its remit through reference to the purpose of the legislative scheme, even though it could be argued that the resolution of ombud reports belongs solely in the political domain.[134] From the judgments, it can be discerned that the new solutions were created (a) to enhance oversight of the sector and (b) to lend added bite to the power of ombud reports in scenarios where a public authority fails to pay sufficient respect to the office.[135]

The structuring role is functionally defensible

The variation of the application of general principles of administrative law according to context has raised concerns that the discipline might collapse into a "wilderness of single instances". The performance of a structuring role is potentially even more controversial, as it implies that judges are better placed to develop the integrity of an administrative decision-making process than the administrative body itself or the legislature. Risks here include that judicial guidance can lack precision, be costly to implement, or be expressed in terms so out of line with the needs and perspectives of the administrator that it is of little value in practice.[136] To protect the judiciary against such criticisms, various strategies are available, which we observed in ombud case law.

First, the starting point for incrementally fine-tuning the law according to the administrative context is invariably rooted in either statute or existing common law grounds. For instance with the ombud sector, the Supreme Court stated that although different ombuds bear a "strong family resemblance… some of them have distinctive features which mean that considerable caution is required before principles derived from one legislative scheme can be read across to

[129] *Harlow and Rawlings, Law and Administration*, 562; *Timothy Endicott, Administrative Law* (3rd edn, OUP 2015), 505-508; *Varuhas, Judicial Capture of Political Accountability*, 50.
[130] In 1970 the House of Lords refused permission in *Re Fletcher's Application* [1970] 2 All ER 52.
[131] See the defences presented in *Dyer* [1994] 1 WLR 621.
[132] *Bradley v Secretary of State for Work and Pensions* [2008] EWCA Civ 36; *Equitable Members Action Group v HM Treasury* [2009] EWHC 2495 (Admin); *Gallagher & Anor v Basildon District Council* [2010] EWHC 2824 (Admin). In *R (Nestwood Homes Developments Ltd) v South Holland District Council* [2014] EWHC 863 (Admin), the response was upheld.
[133] Margit Cohn and Mordechai Kremnitzer, "Judicial Activism: A Multidimensional Model" (2005) 18(2) CJLJ 333, 341-2.
[134] *Varuhas, Judicial Capture of Political Accountability,* 50.
[135] *Kirkham, Thompson and Buck, The Ombudsman Enterprise and Administrative Justice*.
[136] HF Rawlings, "Judicial Review and the 'Control of Government'" (1986) 64 Pub Adm 135.

another."[137] This statement reflects a refinement of general administrative law to the particular context of the scheme. The constitutive statute is the starting point of adjudication, and drives the shaping of the parameters of judicial review. This entails that any case law derived from this approach may only have very limited or highly generalised applicability beyond the public body or sector concerned.

Second, the structuring role should be performed as much, if not more, through methods that aim to influence the development of standards, as opposed to coercion.[138] In this respect, the quantity of bespoke organisational guidance being provided in ombud case law is telling, but so are the different methods deployed, with judicial interventions regularly made not just through ratio and obiter, but through transparent nudges. Multiple examples can be cited of this approach. In *Heather*, Rix LJ's concurring judgment reflected, entirely unprovoked, upon whether FOS had complied with the recommendations of the Hunt review, which had advocated greater transparency and predictability in the work of the FOS. The court also encouraged FOS to meet its requirement under the Financial Services and Management Act 2000 to keep a register of its monetary awards.[139] Similarly, a strong judicial steer occurred in *Bartos*, when the court suggested that "the [SLCC] and the professional bodies may wish to reflect on the validity of the current practice" of the SLCC in dealing with complaints concerning both service and fitness to practise matters.[140] In the same case, the ombud was reminded in a three paragraph ticking-off of the importance of impartiality, and that its staff should have "appropriate background and standing" to perform the function it had been allocated.[141] In *Dickie*, the Court noted shortcomings in the Information Pack provided to prospective judicial applicants.[142] Likewise, in *Stenhouse* the judge made clear his discomfort with the sizeable financial cost incurred in resolving the dispute which was "out of all proportion to the sums at stake".[143] Thus observations on the adequacy of administrative processes are occasionally made on the expectation that they will trigger a response in terms of revised practices, rather than being imposed by the judiciary.[144]

Third, case law is more robust when there is sector-wide and legislative acquiescence of the judicial guidance. Care should be taken not to overstate this defence, as opportunities for legislative amendment may be rare or unrealistic, but in the ombud sector new legislation has been introduced in recent years, and through this process almost none of the judicial guidance identified as such in this case study has been overridden.[145]

Despite occasional scepticism that a structuring function in judicial review can positively influence public administration,[146] there is good reason to be optimistic about its impact in the

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[137] *JR55* [2016] UKSC 22, [1].
[138] See Paul J DiMaggio and Walter W Powell, "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields" (1983) 48 American Sociological Review 147.
[139] See *Heather,* n 98, [87]-[90]. The FOS directly cited Rix LJ's comments on transparency in its decision to consult publicly on how to publish its decisions: Financial Ombudsman Service, 'Publishing ombudsman decisions: next steps' (2011) <https://www.financial-ombudsman.org.uk/publications/policy-statements/publishing-decisions-sep11.pdf> accessed 22 January 2020, 10-11.
[140] *Bartos v SLCC* [2015] ScotCS CSIH 50 at [8].
[141] *Bartos v SLCC* at [87]-[90].
[142] *Dickie v Judicial Appointments and Conduct Ombudsman* [2013] EWHC 2448 (Admin).
[143] *Stenhouse v The Legal Ombudsman* [2016] EWHC 612 (Admin) at [1]-[5].
[144] See Cohn and Kremitzer, "Judicial Activism: A Multidimensional Model", 344-46.
[145] The one exception is the Public Services Ombudsman Act (Northern Ireland) 2016, s 11(b) which overturned the *JR55* ruling on the legality of an ombudsman recommending a financial remedy.
[146] Rawlings, "Judicial Review and the 'Control of Government'".

ombud setting given the closeness in institutional remit and underlying values between the ombud and the judiciary.[147] The influence that judicial review and the law has on public bodies will in part be dependent on a body's overall legal culture,[148] and, an ombud has strong reputational incentives to abide by both the spirit and the substance of judicial rulings. This is because the outward-facing legitimacy of the office is built around achieving classic rule of law objectives, such as justice, independence and procedural justice.[149] The true value of this structuring role in judicial review requires further empirical study, but there is some evidence that the courts have used this in a targeted manner towards issues of relevance to the sector. The OIA has published a report outlining ten lessons learned from case law,[150] and other schemes have also changed their approach in direct response to cases, in matters such as clarifying the standards applied in their decisions[151] and their reporting practice.[152]

Conclusion

Through a systematic content analysis study, this article has provided evidence of several patterns of judicial decision-making behaviour in ombud case law. In particular, our study found that an adherence to generalist administrative law standards was underscored by a marked trend towards structuring the law in order to add detail to good administration standards perceived to be appropriate for the ombud sector. This approach pairs a generally deferential position with a reserve function of shoring up administrative justice standards in the relevant schemes.

The judicial strategies deployed in ombud case law demonstrate an approach to the intensity of its review exercise that is highly cognisant of institutional factors at play in the ombud sector. This insight suggests that the judiciary is capable of working to different judicial strategies and with different intensity in different fields.[153] In some areas of public administration there will be a variety of reasons that may give rise to wider policy concerns about the legitimacy or value of moving beyond general administrative law,[154] but these concerns do not appear to apply to the ombud sector. Public lawyers should invest more time identifying and rationalising these different patterns.

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[147] *Peter Grabosky and John Braithwaite, Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (OUP 1986).
[148] See generally *Simon Halliday, Judicial Review and Compliance with Administrative Law* (Hart 2004).
[149] John Macmillan, 'The Ombudsman and the Rule of Law' (2005) <http://www.austlii.edu.au/au/journals/AIAdminLawF/2005/1.pdf> accessed 22 January 2020, 1.
[150] *Mitchell, The OIA and Judicial Review.*
[151] The Health Service Ombudsman changed its approach to assessing service failure following the decision in *Atwood v The Health Service Commissioner* [2008] EWHC 2315. See Parliamentary and Health Service Ombudsman, "Ombudsman's implementation of 'Bolam test'" (2015) <https://www.ombudsman.org.uk/about-us/corporate-information/freedom-information-disclosure-log/ombudsmans-implementation-bolam-test> accessed 22 January 2020.
[152] *R v The Commission for Local Administration In England & Ors Ex p Adams* [2011] EWHC 2972 at [34].
[153] Elsewhere it has been found that the English courts are willing to temper the intensity of their review exercise taking account of the institutional issues at play: *Dean Knight, Vigilance and Restraint in the Common Law of Judicial Review* (CUP 2018) 148.
[154] Simon James, "The Political and Administrative Consequences of Judicial Review" (1996) 74(4) Pub Adm 613, 623.