The UK Public Sector Ombudsmen: a doctoral and socio-legal analysis on the possibility of transplanting an ombudsman into Saudi Arabia inspired by the UK model

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Abstract

This doctoral thesis analyses the operation of the public sector ombudsman schemes in the UK, with a particular emphasis on three ombudsmen: the PHSO, LGSCO and SPSO. The primary objective of this thesis is to examine the rationality of the idea of transplanting into Saudi Arabia an ombudsman that is mainly modelled on the UK schemes. Based on this aim, the work of the UK ombudsmen has been analysed from three perspectives: normative, legal and descriptive. The research method adopted in this thesis involves doctrinal and socio-legal methods, along with a comparative approach.

The UK ombudsmen have been adopted as a mechanism that provides citizens with an accessible route to justice and helps to improve the quality of public administration's practices. The theoretical analysis conducted in this thesis indicates that the ombudsman has the necessary powers and the ability to achieve the goals of administrative justice. However, in practice, there is no full knowledge of the extent of ombudsmen' outputs and contributions in achieving the goals of administrative justice. The lack of detailed evidence, as well as the changes and developments that have occurred in the ombudsman enterprise itself, and in public administration and public policy in general, make it difficult or even impossible to track the full contribution of the UK's public sector ombudsmen to administrative justice.

In Saudi Arabia, the redress mechanisms in the public sector are only concerned with the legality of administrative decisions and actions. Therefore, there is an absence of an institution that handles individuals' complaints against unfair decisions made by government organisations. Another issue in Saudi Arabia is that public administration suffers from several administrative deficiencies that can be considered as manifestations of maladministration. Therefore, the contribution of the thesis is to propose a way of addressing the problems existing in Saudi Arabia's judicial and administrative systems. Transplanting an ombudsman to Saudi Arabia seems a rational solution to fill these gaps. Hence, this thesis constructs a proposal for a Saudi Arabian ombudsman that is mainly patterned on the UK ombudsmen, with a number of appropriate adjustments to suit the legal system in Saudi Arabia. However, to ensure the success of this institutional transplant, there should be a plan to change the social and administrative cultures in Saudi Arabia, as they are more likely to resist the introduction of the ombudsman and limit its effectiveness. Another key factor for the success of an ombudsman in Saudi Arabia is the availability of the Council of Ministers' support.

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Author's declaration

"I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution."

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Abbreviations

AJTC	Administrative Justice and Tribunals Council
CLGC	Communities and Local Government Committee
CSA	Complaints Standards Authority
ECHR	European Convention on Human Rights
HSO	Health Service Ombudsman
ICCR	Independent Customer Complaints Reviewer
IOA	International Ombudsman Association
IOI	International Ombudsman Institute
LGSCO	Local Government and Social Care Ombudsman
MCHP	Model Complaints Handling Procedure
MOD	Ministry of Defence
NIPSO	Northern Ireland Public Services Ombudsman
ODPM	Office of the Deputy Prime Minister
PACAC	Public Administration and Constitutional Affairs Committee
PASC	Public Administration Select Committee
PCA	Parliamentary Commissioner for Administration
PCASC	Parliamentary Commissioner for Administration Select Committee
PHSO	Parliamentary and Health Service Ombudsman
PO	Parliamentary Ombudsman
PSOW	Public Services Ombudsman for Wales
SPSO	Scottish Public Services Ombudsman

Chapter 1: Introduction

1.1 Introduction

This doctoral thesis is intended to provide an analysis of the public sector ombudsmen in the UK, and to examine whether the institution of ombudsman can be transplanted into Saudi Arabia. This thesis attempts to understand ombudsman schemes in the UK, by studying the main functions and roles of the office, as well as the features of this institution. Furthermore, it will examine the performance of the public sector ombudsmen in the UK; it will additionally explain how this differs from the performance of other redress mechanisms in the UK administrative justice system, such as courts and tribunals. The thesis also makes some suggestions for the development of the ombudsman approach in the UK.

Moreover, the thesis will explain how the ombudsman can provide redress for individuals against the state, in a way that may be unusual in the Middle East especially in Saudi Arabia. Ombudsmen have been adopted in many countries around the world, but they are still less popular in the Middle Eastern countries. In Saudi Arabia, there is no ombudsman institution; the redress mechanisms that allow citizens to seek justice against public authorities are the administrative courts (called the Board of Grievances), and a number of quasi-judicial committees. Thus, the main objective of this thesis is to examine if there is a need for an ombudsman in Saudi Arabia, and whether the ombudsman institution could be introduced into the Saudi system. The thesis also aims to explain the existing mechanisms available for citizens who seek remedies against public authorities in Saudi Arabia, and to evaluate the actual performance of these institutions. In addition, the thesis evaluates the administrative justice system in Saudi Arabia and suggests further amendments and reforms to the system, to achieve a high level of justice.

'Ombudsman' is originally a Swedish term, meaning 'a representative or agent of the people or a group of people' (Rowat, 1985, p.3). More recently, the term has been defined as 'independent complaints handlers for disputes involving citizens and the administration' (Seneviratne, 1994, p.1). Seneviratne (2002) also describes the ombudsman as a phenomenon in public administration, whose purpose is to hold central government and local government bodies to account by providing redress for citizens against these bodies where maladministration has been found.

The first modern ombudsman was established in Sweden in 1713, when the king of Sweden appointed the Chancellor of Justice as an officer to handle disputes against royal officials. The new constitution of 1809 created the office of Justitieombudsman, a parliamentary institution for handling citizens' complaints (Stacey, 1978). Since then, the idea of the ombudsman has spread throughout Scandinavian countries, other European countries, and more recently to Latin American and Asian countries. The reasons for this development include the expanded bureaucracy in the modern democratic countries, and the need for extra protection of citizens' rights against administrative arbitrariness. In the United Kingdom, the first ombudsman was the Parliamentary Commissioner for Administration (PCA),[1] created by the Parliamentary Commissioner Act 1967. This institution is linked to the legislature and was designed to be completely independent from the influence of the executive power, so that it could conduct impartial investigation and achieve the goals of administrative justice. Subsequently, a number of other public sector ombudsmen were created to cover different areas of public administration: these include the Local Government and Social Care Ombudsman (LGSCO), the Health Service Ombudsman (HSO), and ombudsmen covering the devolved level of government.

During the 53 years of the ombudsman's existence in the UK, it has enhanced administrative justice, and giving citizens a cheap and easy way to make complaints against public authorities. As well as providing redress for individuals' complaints, the public sector ombudsmen in the UK have, on a number of occasions, highlighted systemic failures by handling group complaints – or, as Harlow and Rawlings (2009) describe it, conducting a 'Big Inquiry'. In this type of situation, the ombudsman groups together a number of similar complaints and runs one investigation for them, in a way that it would be difficult for other remedial mechanisms to do.

Saudi Arabia has adopted a different approach for handing citizens' grievances and achieving the goals of administrative justice. It is one of the largest Islamic countries that follows Sharia law; thus, the Saudi constitution is based on the Quran and the Sunna, which are the main sources of Saudi laws. However, legal disputes are decided by two systems of courts: (i) ordinary courts and (ii) the Board of Grievances. The ordinary courts operate under the supervision of the Ministry of Justice and have jurisdiction over all criminal and civil cases, except for those that fall within the jurisdiction of the administrative courts. The

[1] The term Parliamentary Ombudsman (PO) is used in this thesis, instead of the Parliamentary Commissioner for Administration.

Board of Grievances is an independent body directly connected to the king; it deals with citizens' legal grievances against public authorities. We must also note that there are quasi-judicial committees, which are established by specific laws that determine their supervisory authority and their jurisdiction.

A number of reforms have recently been applied to the judicial system in Saudi Arabia, to promote the development and improvement of the system. In 2007, King Abdullah launched the biggest and most comprehensive reform in the history of Saudi Arabia; this involved reorganising and restructuring the judicial system in both the ordinary courts and the Board of Grievances. Under the 2007 reform, £1.3 billion has been allocated to developing the judicial system and simplifying legal procedures for citizens.

Thus, individuals in Saudi Arabia have two available mechanisms for obtaining a remedy against public authorities: the Board of Grievances and the quasi-judicial committees. The actual performances of these two institutions demonstrate a number of issues and weaknesses, which will be highlighted in this thesis. The mechanisms available in the administrative justice system in Saudi Arabia are only concerned with the illegality of the public departments' actions; they essentially examine if there has been any violation of Sharia law or any other regulations. There is no equivalent to the concept of maladministration, which is used as a criterion for the work of ombudsmen in the UK, and is much broader in scope than illegality, in either the jurisdiction of the Board of Grievances or the quasi-judicial committees. Thus, citizens who have suffered from any maladministration which does not also involve illegality may not find an appropriate mechanism for redress. It is, therefore, arguable that there is a gap in the administrative justice system in Saudi Arabia, similar to that which existed in the UK before the establishment of the PO.

1.2 Research contribution

This thesis seeks to explore the work of the UK public sector ombudsmen, from normative, descriptive and empirical perspectives. It aims to provide a comprehensive review of the functions and powers of the UK ombudsmen, and to examine their actual performance. In addition, this thesis will describe the administrative justice mechanisms that exist in Saudi Arabia; it will then assess their performance and compare them with other administrative justice mechanisms (including the public sector ombudsmen in the UK). Accordingly, it will then establish whether there are any gaps in the Saudi system that an ombudsman might fill.

Several sources and scholars have analysed the Board of Grievances and made suggestions for improving the system. They have also examined the performance of the quasi-judicial committees and identified the weaknesses of these committees. However, to the best of the researcher's knowledge, no study has examined the possibility of adopting the ombudsman institution for the purpose of enhancing administrative justice in Saudi Arabia.

In general, the ombudsman concept is an uncommon subject in legal research – not only in Saudi Arabia, but also in other Arab countries. There is a lack of clear and comprehensive legal studies that are concerned with the institution of ombudsman in Arab legal research; most studies focus on the traditional and formal redress mechanisms that handle citizens' grievances against the state. By contrast, legal scholars have paid little attention, at least in the Saudi context, to the benefits of adopting alternative dispute resolution mechanisms – including the ombudsman – to handle citizen vs. state complaints.

1.3 Research questions

The main question of this thesis is: 'Is there a need for a public sector ombudsman in Saudi Arabia and, if so, what can be learned from the experience of operating public sector ombudsman schemes in the United Kingdom?' In order to answer this general question, it is necessary to consider a number of more specific questions, as follows:

- What are the sources of administrative law in Saudi Arabia?
- What are the redress mechanisms available to citizens seeking to challenge public administration decisions in Saudi Arabia?
- How effective in practice are the Board of Grievances or quasi-judicial committees in achieving administrative justice? Is the concept of maladministration used by these institutions?
- Is there a gap in the administrative justice system in Saudi Arabia? Do individuals who have suffered from maladministration have appropriate grievance resolution mechanisms available to them?
- What are the main functions of the public sector ombudsmen in the UK? Are there any additional roles for ombudsmen?
- What are the differences between the ombudsman and other dispute resolution mechanisms existing in the UK's administrative justice system?

- What is the actual performance of the UK public sector ombudsmen? Are these ombudsmen successful in achieving the main goals of the institution?
- Do ombudsmen in the UK need any reforms? Are there any suggestions for further developments?
- Has the ombudsman been a successful innovation in the UK and, if so, what are the main features that contribute to its success?
- Is it appropriate to transplant the ombudsman scheme into the legal system of Saudi Arabia? If it is appropriate, how might this best be done?

1.4 Research structure

This thesis is divided into nine chapters. Chapter 1 is the introductory chapter, which provides a brief statement of the aims and contribution of this thesis. Chapter 2 gives an overview of Saudi Arabia's legal and judicial system by outlining the sources of laws and analysing the judicial institutions in the country. It also provides a historical overview of the development of the Board of Grievances, from its establishment to the recent reforms, and describes the work of the quasi-judicial committees. Chapter 3 identifies the methodology used to answer the main questions of the study. Chapter 4 provides an overview of the public sector ombudsmen in the UK. Chapter 5 analyses the main functions of the office and explores any other functions that an ombudsman might handle. Chapter 6 maps out the concept of administrative justice, with particular emphasis on the differences between ombudsmen and other redress mechanisms, especially courts and tribunals. Chapter 7 provides an evaluation of the performance of the UK's public sector ombudsmen, particularly the Parliamentary and Health Services Ombudsman (PHSO), the LGSCO and the Scottish Public Services Ombudsman (SPSO), in terms of performing their functions and achieving the goals of the institution. Chapter 8 analyses the potential impact of the ombudsman idea if transplanted into Saudi Arabia. Chapter 9 summarises all the lessons learned from reviewing the UK's public sector ombudsmen, and constructs a proposal for a Saudi Arabian ombudsman.

Chapter 2: An overview of the legal and judicial system in Saudi Arabia

2.1 Introduction

Part of the aim of this thesis is to examine if there is a need for an ombudsman to be introduced into the Saudi Arabian system. In other words, this thesis attempts to identify whether there is a gap in the legal and judicial system in Saudi Arabia that an ombudsman could usefully fill. This aim requires a full analysis of the legal, judicial and administrative system in Saudi Arabia, which this chapter attempts to provide.

Saudi Arabia has a distinctive model of governance, as the country follows Sharia law in all aspects of its governance. The Kingdom is one of the largest Islamic countries in the world; it has also been considered as a 'highly influential country in the Islamic world' (Esmaeili, 2009, p.4). Indeed, Saudi Arabia has a unique status for Muslims, for two reasons. First, Saudi Arabia is the birthplace of Islam. Second, the two holy mosques and a number of holy sites are located in Saudi Arabia. Sharia law is not only the constitution of Saudi Arabia and the basis of its political legitimacy; it is also the religion that is followed by all Saudi citizens. Islam represents the faith, values, morals and guide to the activities and behaviours of Saudi society. Hence, Sharia law is the basis and the centre of the Saudi culture.

In addition, the legal, judicial and administrative infrastructure of Saudi Arabia derives its authority from Sharia law and its values. Several factors and elements have affected the development of the Saudi legal system; therefore, this chapter will provide a historical analysis and a description of the sources of Saudi law. It will also analyse the influence of religious scholars on the legal and judicial system in the country. The chapter will also identify the powers of the state and describe the mechanisms available for citizens to complain against public authorities' decisions and actions.

2.2 Historical and ideological analysis of the legal system in Saudi Arabia

Analysing the legal system of Saudi Arabia from a historical perspective is essential, as its history has had a considerable impact on the current structure of the country's legal and judicial system. The history of the establishment of the Saudi state can be divided into three periods; the first is 1744–1818, which represents the establishment of the first Saudi state. In the 18th century, a religious and political association was created between Mohammed Ibn Saud (the ruler of Dirayah, which is a city in the region of Najad) and a religious scholar,

Mohammed Ibn Abdulwahab. The purpose of this alliance was to establish a state that derived its authority from Sharia law based on its main sources: the Quran and the Sunnah (Van Eijk, 2010). This alliance can be considered as the foundation stone of the establishment of the first Saudi state. However, the First Saudi state ended in 1818, when the Arabian Peninsula became part of the Ottoman empire.

The second period represents the establishment of the second Saudi state, which began in 1824 when Turki Ibn Abdullah succeeded in returning the Arabia Peninsula to the control of the Al-Saud family. Like the first Saudi state, this state adhered to the principles of Sharia law and its main sources. The era of the second Saudi state ended in 1891, due to disputes and disagreements within the Al-Saud family.

The third period represents the era of the Kingdom of Saudi Arabia; this began in 1902, with the founder of the modern Saudi state, King Abdulaziz, seeking to restore the Al-Saud family's control over the Arabian Peninsula. By 1932, the King had succeeded in unifying most of the regions of the Arabian Peninsula under one state, officially called the Kingdom of Saudi Arabia. King Abdulaziz continued to follow the same goals of the alliance between Mohammed Ibn Saud and Mohammed Ibn Abdulwahab that had existed in the 18th century. The King governed the country based on the principles of Sharia law and its main sources, the Quran and the Sunnah.

Unlike other Islamic countries, Saudi Arabia has not been subject to colonisation by any Western countries; therefore, its legal system has not been affected by any external factors or pressures (Vogel, 2000). During the era of the first and second Saudi states, and in the early years of the establishment of the modern Saudi state, there were no codified laws in the Saudi legal system. Any legal questions about Sharia law were referred to religious scholars, who interpreted the texts of the Quran and the Sunnah based on the concept of *Ijtihad* (independent reasoning). Religious scholars at that time had a role which was to some extent comparable to that of a legislator, in relation to any new matters or situations which arose (Zubaida, 2003).

It is important to note that the legitimacy of the King's activities in the early years of the establishment of the Kingdom was derived from the rules of Sharia law. The point of view of religious scholars was that Sharia law must exclusively dominate in all the aspects of the country's governance. On the other hand, King Abdulaziz's goals were to maintain the supremacy of Sharia law and simultaneously modernise the country's legal system through

the codification of law. Sfeir (1988) noted that the move towards modernising the legal system involved two competing goals: (i) meeting the demands of economic and social developments, and (ii) protecting the Islamic identity of the society and the values of Sharia law.

Due to the discovery of oil in the Kingdom in the 1930s and the King's desire to modernise and develop the legal system in the country, several laws were enacted in different areas, such as commercial and administrative matters. A number of legal organisations and judicial mechanisms were created to support the growth of the economy and to attract foreign investment. This can be considered as a shift from exclusively applying Sharia rules, towards applying both Sharia law and man-made law. It has been noted that these developments have led to 'the creation of a parallel modern system of law in matters not subject to specific Shari'ah rules' (Esmaeili, 2009, p.46).

This shift created a tension between Sharia law and codified law. More specifically, there was a conflict between the approach of modernising the Saudi legal system, and the traditional emphasis on Sharia principles interpreted by religious scholars (Esmaeili, 2009). According to Al-Jarbou (2007), the conflict involved the traditionalists' movement, represented by religious scholars, and the modernists' movement. The latter consisted of:

> 'members of educated elites, technocrats, and legal professionals such as lawyers and law professors. Most of these intellectuals have studied in Western countries that have been influencing their ideas and approaches toward the development of the country, including its legal system' (Al-Jarbou, 2007, p.197).

It is worth noting that the religious scholars in the 20th century had a great influence on both the King and the ordinary citizens in Saudi Arabia. The inconsistency and conflict of interests between the traditionalist movement and the modernist movement has had a considerable impact on the Saudi legal and judicial system.

The above analysis represents the historical roots of the duality of the Saudi legal system. This duality can be explained by the existence of Sharia law on one hand, and regulations and legislation on the other hand. The duality of the legal system as a concept can be defined as 'the existence of opposed and contrasted aspects, norms, principles and substantive laws within the same legal system' (Marar, 2004, p.107). However, as indicated earlier, Sharia law is the core and fundamental part of the Saudi legal system, and at the top of the hierarchy

of rules. On the other hand, regulations can be considered as subordinate law (Vogel, 2000). This duality might in practice lead to some ambiguity about the role of law, especially in commercial, business and finance affairs.

More broadly, Saudi Arabia has proved over the years its ability to fill the gaps in its legal system by enacting codified law that is consistent with the principles of Sharia law; this has the overall aim of modernising the legal, political, judicial and social system of the state, while simultaneously safeguarding its Islamic identity. In other words, all the reforms and developments in the Saudi legal and judicial system have been implemented through piecemeal schemes, to avoid any conflicts between the two main priorities, which are establishing a modern state and enhancing Sharia principles.

2.3 Sources of law in the Saudi legal system

Based on the duality of the Saudi legal system, the sources of law in Saudi Arabia can be divided into two sources. The first source of law is the supreme Sharia law, with its primary and secondary sources. The second source is codified laws, issued by the competent authorities to govern several matters in the state.

2.3.1 Sharia law

Article 1 of the Basic Law of Governance 1992 states that 'the Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam. Its constitution is Almighty God's Book, The Holy Qur'an, and the Sunna (Traditions) of the Prophet'. Based on Article 7 of this law, 'Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunna of the Prophet … which are the ultimate sources of reference for this Law and the other laws of the State'. This means that Sharia law is the supreme law and the constitution of Saudi Arabia.

The main sources of Sharia law are the holy book of Quran and the Sunnah of Prophet Mohammed. The Quran is the word of Allah (the God) which was transmitted to the Prophet Mohammed over a period of 23 years (Abdal-Haqq, 2002). The Quran contains 114 chapters and 6,342 verses, which involve Islamic principles, values, morals, prohibitions, orders and guidance. Approximately 190 verses[2] of these contain legal content in relation to family law,

[2] There is no full agreement amongst Islamic Scholars regarding the number of verses that have legal content.

contracts, obligation, judicial procedures and inheritance law (Bassiouni, 2014). From the above description, it can be said that the Quran cannot be considered a comprehensive legal code (Alarefi, 2009).

The Sunnah is the second primary source of Sharia law, which refers to the traditions, practices and sayings of the Prophet Mohammed. The primary sources of Sharia law – the Quran and the Sunnah – contain the general and the basic principles of Islam. However, in some circumstances, a rule for a specific case might not be clearly identified in the Quran or the Sunnah. In this case, two types of secondary sources, named *Ijma* and Q*iyas*, can be used by religious scholars to interpret and clarify the texts of the Quran and the Sunnah. *Ijma* can be defined as the consensus of religious scholars regarding the interpretation of the primary sources of Sharia law regarding a specific matter. *Qiyas* 'refers to reasoning by analogy or by using precedents such as past incidents, events, or cases' (Babgi, 2009, p.120). Religious scholars rely on these two secondary sources in the process of *Fiqh*. Islamic jurisprudence (*Fiqh*) represents the religious scholars' opinions and views regarding specific affairs. The primary sources of Sharia law are from Allah, which means that they are sacred, fixed, constant and immutable. On the other hand, the standards used by religious scholars in the process of *Fiqh* can be changed over the years to meet the public's needs and interests. More specifically, *Fiqh* is responsible for making Sharia law applicable to real cases and circumstances (Abdal-Haqq, 2002). Therefore, *Fiqh* can be defined as 'the science which establishes substantive legality and lawfulness, identifies what is not, and discusses the grey areas in between' (Bassiouni, 2014, p.38).

There are four main schools of Islamic jurisprudence: Hanafi, Maliki, Hanbali and Shafei. Each of these schools has developed its own interpretations of Sharia law. Overall, all these schools share similar views and opinions regarding the main pillars of Islam, although there are several disagreements regarding particular issues. Saudi Arabia, based on the alliance that existed in the 18th century, follows the Hanbali school to interpret Sharia's rules and principles. The Hanbali school of jurisprudence was developed by the jurist Ahmad Ibn Hanbal. As noted by Alarefi (2009), the Hanbali school places more emphasis on the two primary sources of Sharia law than on *Fiqh*. Unlike other Islamic schools of thought, the Hanbali school uses *Qiyas* only within a narrow scope (Alarefi, 2009). Therefore, the Hanbali school is to some extent more conservative than other schools, because it assumes that there is limited scope for the scholarly interpretation of the primary sources.

To fully understand the role of Sharia law in the Saudi legal system, it might be beneficial to analyse the position of Sharia law in different Islamic countries. There is no doubt that Sharia law's position and role in the legal system is not the same in all Islamic countries. Peters (2002) identified four forms of legal system, based on the position of Sharia law. The first type is the entirely secularised legal system, in which the Sharia law is not a source of law. An example of this type is the legal system of Turkey since Ataturk's reforms (Peters, 2002), although there have recently been signs of a shift towards Islamic law promoted by the current regime. The second type is the legal system that involves both Sharia law and codified law, but in which Sharia law is dominant. Legislation in this legal system can be applied to new matters where Sharia law has no specific rule. This type of legal system is followed in Saudi Arabia (Peters, 2002).

The third type of legal system is followed by most of the Islamic countries in the Middle East. In this legal system, legislation inspired by Western laws has dominated, and Sharia law can only be applied in family and personal status matters. In most of the legal systems of this type, Sharia law is applied via codified law instead of by direct application of the Quran and the Sunnah (Peters, 2002). In the 19th century, the majority of Arab countries enacted personal status codes which were based on the Sharia rules (Brown, 1997).

The last type is called the 're-Islamisation' legal system, which can be found in Iran and Sudan. This type of legal system is developed when power is gained by a regime with specific ideological thoughts that concentrate exclusively on Sharia law. Therefore, the existing legal system in these countries has been changed by the introduction of Sharia law codes in several areas (Peters, 2002, p.91). Although the intention of this legal system is to apply Sharia norms, this has to some extent been achieved by the codification of Sharia law.

From a practical standpoint, most of the Islamic countries in the 19th century modernised their legal system by adopting and transplanting legal codes inspired by European countries. By contrast, Saudi Arabia is one of the few countries that continued to apply Sharia law by direct application of the primary sources of Islam: the Quran and the Sunnah. In practice, this means that Sharia law is the law applied in three main areas: criminal, civil, and family affairs.

2.3.2 Codified law

As indicated earlier, there are two types of law in the Saudi legal system. First, there is Sharia law, which is an uncodified law interpreted solely by the religious scholars. Sharia law is located at the top of the hierarchy of rules in Saudi Arabia. Second, there is codified law enacted by the King and the Council of Ministers, which in principle should not contradict the values and principles of Sharia law.

Codified law in Saudi Arabia can be divided into three categories: (i) legislation of a constitutional nature issued by Royal Order; (ii) primary legislation issued by Royal Decree or Royal Order; and (iii) secondary legislation issued by a decision of the Council of Ministers, the competent minister or government organisation.

Although the Quran and the Sunnah form the constitution of the country, there are a number of instruments of a constitutional nature. In 1992, King Fahad issued the first constitution of Saudi Arabia, along with other constitutional legislation, which included the Basic Law of Governance 1992, the Council of Ministers Law 1992, the Consultative Council Law 1992, and the Provinces Law 1992. In 2007, another constitutional instrument was enacted by King Abdullah: namely, the Succession Commission Law 2007.

The laws enacted in 1992 by King Fahad aimed to codify the constitutional principles of the country, which are essentially derived from the values and rules of Sharia law. From the establishment of Saudi Arabia until 1992, there was no written constitution for the country. The Basic Law of Governance is the first written constitution of Saudi Arabia. This law has been enacted based on the existing system already in place, which means that this law has not created a new constitutional system (Al-Mehaimeed, 1993). The aim of this law is to codify the constitutional principles of the Kingdom in a way that meets international standards (GHAZI, 2010). It is worth noting that the term ‘constitution’ has not been used, either by the Saudi government or by the public, to describe the laws enacted in 1992 (Aba-Namay, 1993); this is mainly because the Quran and the Sunnah are the constitution of the state.

Taking into account the position of Sharia law, regulation is the second source of Saudi law. In Islam as a religion, the God is the legislator; therefore, the term ‘legislation’ is not used in Saudi Arabia to describe enactments. Since the establishment of Saudi Arabia, the term ‘regulation’ has been officially used to describe any legislation enacted by the ruler in the

country. Nonetheless, in practice, there are no differences between these two terms, as they both have the same features, powers and enforcement (Amin, 1985).

Regulations have been enacted in relation to a variety of matters, including commercial, labour, administrative, nationality, banking, corporation and immigration law. However, a number of matters, such as family law, criminal law, trust and property are exclusively governed by Sharia law. Thus, to resolve disputes in relation to these matters, the judges use their own interpretation of Sharia law and its primary sources.

Despite the importance of orthodox Sharia norms, the codified law in Saudi Arabia is to some extent indirectly inspired by French law (Hanson, 1987). In the early years of the establishment of the country, there was a lack of Saudi legal experts and professionals, which led the government to hire foreign legal experts from Egypt to develop the Saudi legal system. These Egyptian experts, along with a number of Saudi legal experts who had graduated from foreign universities, promoted the enactment of legislation that governed several aspects of the modern state; these laws were inspired by legislation in Egypt. The link between the Saudi and French systems is due to the fact that the legal system in Egypt was affected by the French system, due to colonisation in the 18th and 19th centuries, thus, several legal codes and legal institutions in Egypt were inspired by France (Hanson, 1987). It is necessary to stress here that although several enactments in Saudi Arabia were modelled on the French and Egyptian systems, these laws are not in conflict with Sharia rules. In fact, these codified laws have been enacted to complement the Sharia law.

2.4 The influence of religious scholars on the Saudi legal system

The political and religious coalition that existed in the 18th century continues to have an influence on the current political, legal, judicial and social system in Saudi Arabia (Walker, 2018). Based on this coalition, the Al-Saud royal family has the power to govern the state, while the religious scholars represent the religious authority that legitimises the King's powers. Therefore, it is essential to analyse the role of the religious scholars in the country, and the nature of their relationship with the head of the state. It is also important to analyse the factors that affected this relationship, and the position of the religious scholars in the legal system over the years.

Sharia law, as the law of the land and the constitution of Saudi Arabia, is applied via *Fiqh*, which means the opinions of religious scholars based on the interpretation of the Quran and

the Sunnah. Religious scholars are at the top of the hierarchy of the religious authority. However, religious scholars have no official remit in relation to state governance or in the political sphere.

As indicated earlier, the urgent demands for social and legal development, and the oil boom, have led to considerable changes in the Saudi legal system. The shift from applying only Sharia law in all aspects of state governance, to applying both Sharia law and codified law, has strained the relationship between the King and the religious scholars. Indeed, this might to some extent have created a conflict of interests between them (Walker, 2018).

From a historical perspective, the first enterprise of codifying Sharia law in Islamic history was in 1876, when the Ottoman Empire enacted the *Majella*; which is a set of codes based on the principles of Sharia law. This approach to codifying Sharia law was implemented despite the prevailing view at that time, that Sharia law was 'an uncodified divine law which was an authority in itself for all Muslims' (Hanson, 1987, p.279).

With the purpose of unifying the legal and judicial system in Saudi Arabia and enhancing its consistency, in 1926, King Abdulaziz made the decision that judges in Sharia courts should rely on the Hanbali school of jurisprudence as the basis of the legal and the judicial system in Saudi Arabia (Amin, 1985). With the same purpose, in 1927, King Abdulaziz announced his plan to codify Sharia rules, similarly to the *Majella* that was published in the Ottoman era. However, due to the religious scholars' opposition, this plan was not implemented. Religious scholars believed that the rules and provisions of Sharia law should be kept in their pure shape (Hanson, 1987). The opinion of religious scholars regarding this plan was that:

> 'the Hanbali… identity and corpus would be diluted in a larger corpus of this type, which constituted an imitation of the infidels and a roundabout path for introducing… positive laws' (Mouline & Rundell, 2014, p.13).

For the purpose of organising the work of the religious scholars, the Council of Senior *Ulama* was established by the Royal Order No. A/137, issued by King Faisal in 1971. This institution is the supreme religious institution in the country. King Faisal also recognised the importance of the project of codify of Sharia norms, in terms of a tool to develop and build the legal and institutional infrastructure of the modern state. In 1973, he took the initiative and asked the Council of Senior *Ulama* for their opinion regarding the idea of codifying

Sharia law. The Council's decision approved by the majority of members, was opposed to this project. [3]

The same innovation was suggested by King Abdullah, as a part of his overhaul project to develop the judiciary. This time, the Council of Senior *Ulama* made their decision No. 236 in 2010, in which a majority approved the idea of codifying Sharia law. Based on this decision, King Abdullah in 2014 issued Royal Order No. A/20; this created a Sharia committee to prepare a 'Compendium of Judicial Rulings' on Sharia subjects, which should be organised in codes based on the chapters of Islamic jurisprudence. This committee consisted of 12 members, the majority of whom belonged to the Council of Senior *Ulama*. According to this Royal Order, the Committee should complete the Compendium within a period which should not exceed 180 days. However, despite this decision, to date, the project has not been completed.

At present, the uncodified nature of Sharia law represents one of major obstacles to the overhaul and development of the judiciary and the legal system in general. A high percentage of the religious scholars in Saudi Arabia work as judges in the ordinary courts. As indicated earlier, judges in ordinary courts use their own interpretation of Sharia law based on the Hanbali School. Unlike the position in common law legal systems, judges in Saudi Arabia are not bound to follow judicial precedent. Indeed, until recently, courts' judgements were not available to the public (Vogel, 2012).

Religious scholars, as the religious authority in the country, have had a great influence on the structure of the judicial system. For instance, when King Abdulaziz started to enact a number of regulations as a result of the oil boom in the 1930s, religious scholars who also worked as judges in ordinary courts showed their opposition to these codified laws by refusing to implement them.

According to Al-Jarbou (2004), the reasons for the religious scholars' rejection of codified law might be related to their view that these enactments contradicted the principles of Sharia law. It might also be linked to their fears that the acceptance of codified law might encourage further steps towards secularism. Another argument made by the religious scholars against codifying Sharia provisions was that this would limit the judges' discretion to use *Ijtihad*,

[3] The Council of Senior Ulama decision No. 8, dated 18-05-1973.

and would prevent them from relying on the Quran and the Sunnah in their judgments (Al-Jarbou, 2007).

As several areas of law required for the functioning of a modern state and a modern economy are not covered by Sharia law and its main sources, codified law became an essential source of law in Saudi Arabia. However, the refusal of judges in ordinary courts to apply codified law has created a significant gap in the Saudi judicial system. For the purpose of filling this gap, several quasi-judicial committees (specialised tribunals) have been created to settle disputes arising from new matters governed by codified law. According to Al-Fahad (2005), the existence of these committees as adjudicative mechanisms can be considered as a violation of Article 49 of the Basic Law of Governance 1992, which grants the ordinary courts a general jurisdiction over all types of disputes except those falling under the jurisdiction of the Board of Grievances. Moreover, several types of complaints – which from the traditional legal perspective ought to be under the remit of the ordinary courts, on the basis of their general jurisdiction – have been transferred to the remit of the Board of Grievances,[4] these include commercial and labour disputes.

One of the notable examples of the religious scholars' influence is related to the Commercial Court. In 1931, the Commercial Court Law was issued. Article 432 of this law created a commercial court in Jeddah, to handle cases arising from the application of this law. This court consisted of six members who were experts in commercial matters, and only one member who was an expert in Sharia law. Due to the strong influence of the religious scholars, this court was abolished in 1954 (Al-Jarbou, 2004). The religious scholars' influence on the legal system went beyond this, as it also led to the revocation of the Civil Procedures law enacted by the Council of Ministers in 1989; only a year later, as this law was cancelled in 1990 by a decision of the Council of Ministers (Al-Jarbou, 2007). There is insufficient space in this thesis to analyse all the forms of the religious scholars' impact on the legal and judicial system in Saudi Arabia. However, there is no doubt that the attitude of

[4] The reason for this decision is that judges on the Board of Grievances were well-equipped to deal with these types of complaints, as they had taken a specialised legal course after finishing their degree in Sharia law. Thus, it can be said that unlike judges in Sharia law, judges on the Board of Grievances at that period were experts in both Sharia law and codified law (Al-Jarbou, 2004). In this regard, the qualifications of judges in Sharia courts, which was a Sharia law degree, might to some extent have explained their opposition to apply codified law, which is a field that they were not familiar with. This situation has changed, as judges in both ordinary courts and the Board of Grievances are now required to study a legal programme, either in the Public Administration Institute or the Higher Judicial Institute.

religious scholars has led to the inconsistency and confusion of the Saudi Arabia's legal and judicial system, due to their opposition to modernising measures.

It is important to mention that this influence of the religious scholars seems to have waned in recent decades. In 2016, the Crown Prince Mohammed Ibn Salman launched the innovation of 2030 Vision, which aims to achieve comprehensive reforms and development in Saudi Arabia. In the official website of 2030 Vision, the Crown Prince Mohamed Ibn Salman states that 'Our Vision is a tolerant country with Islam as its constitution and moderation as its method'. The Crown Prince's plan is to fight radical Islam and its extreme interpretation of Islamic law. More broadly, the Crown Prince's plan is to promote a moderate Islam.

Such innovation will undoubtedly reinforce and enhance both the legal and judicial systems in Saudi Arabia. It also might encourage the codification of Sharia rules in relation to criminal, civil and family matters, which is a project that has been withdrawn several times in Saudi history due to the religious scholars' opposition.

It is clear that Saudi Arabia, from its establishment to the present, has experienced a complex process of socio-political transition (Quamar, 2015). According to Quamar (2015, p.72):

> 'the coexistence of Islam and modernity in the Saudi context has juxtaposed ontological and epistemological aspects to create a situation whereby a modernized Islamic or Islamized modern state has become plausible'.

The researcher's point of view is that Sharia law as a legal doctrine does not conflict with the idea of codification. In fact, the codification of Sharia law can have enormous benefits for both the citizens and the state. Several Islamic principles, such as justice, equality, fairness and common good, can be achieved by the codification of Sharia rules.

All the analysis provided in this section has outlined the difficulties that have faced the Al-Saud Royal family, in their project of establishing a modern state with a developed legal system that is mainly derived from the principles of Sharia law. It has also aimed to identify the ideological and political factors that led to the existence of a *sui generis* and sophisticated legal system in Saudi Arabia. Although there are some legal areas that require reforms and development, it seems that Saudi Arabia is on the right path towards a developed legal and judicial system.

2.5 Powers of the state in Saudi Arabia

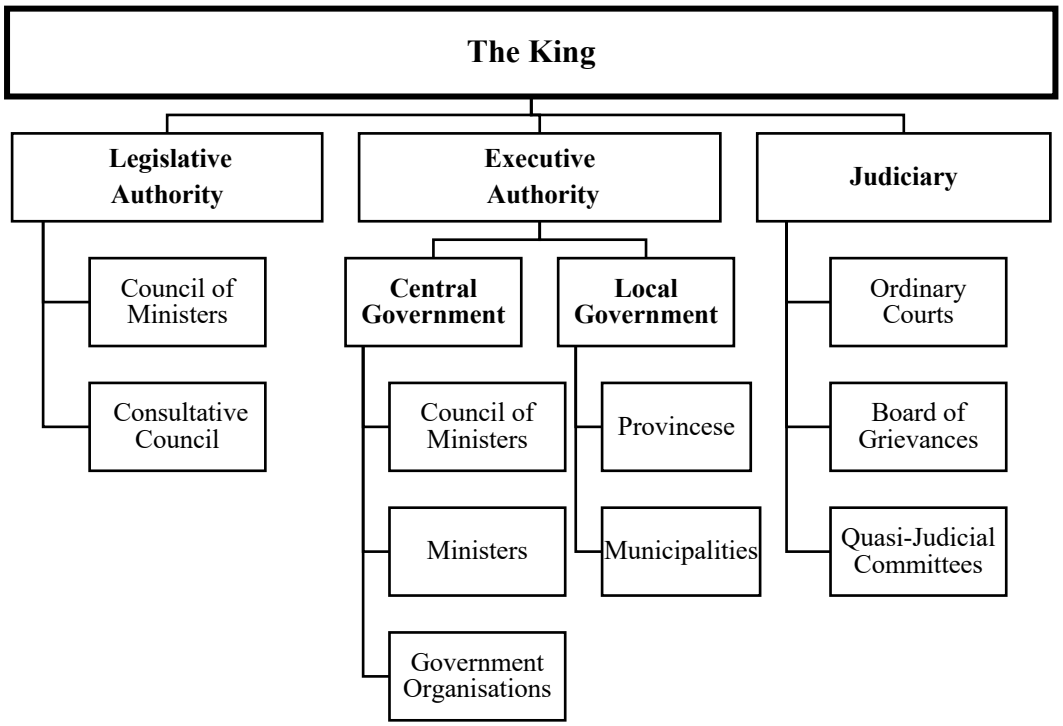
In order to understand the structure of the state's powers in Saudi Arabia, it is essential to analyse the stance of Islam regarding the doctrine of separation of powers. In other words, it is necessary to identify whether Islamic theory recognises the separation of powers as a basic principle of the political system.

The separation of powers is a constitutional principle enshrined in the constitution of democratic states, for the purpose of preventing tyranny and safeguarding the rule of law. Although the doctrine of the separation of powers is not recognised in Islamic political theory, Islam includes a number of principles, such as consultation, justice and equality, which can be implemented to achieve similar goals to those of the separation of powers (Salameh, 2017).

In the early years of Islam, the Prophet Mohammed was the leader of the three powers, which means that the separation of powers did not exist in that period. In the period after the death of the Prophet, there is no agreement among scholars regarding the existence of the principle of separation of powers (Salameh, 2017).

In Saudi Arabia, from a legal perspective, the Basic Law of Governance 1992 (as the highest constitutional document) does not precisely clarify the relationship between the powers of the state. Article 44 of this law confirms that the authorities of the state consist of the judiciary, the executive and the regulative (legislative); and that these authorities should collaborate in handling their functions; and that the King is final authority for these powers. Article 46 of this law states clearly that the judiciary is an independent authority. According to these two articles, there is a separation of powers between the judiciary and the other two powers. However, there is no clear view in the Basic Law of Governance 1992 regarding the relationship between the executive branch and the legislative branch. In practice, the Council of Ministers carries out both the executive and the legislative authorities. Hence, there is an explicit overlap between the executive branch and the legislative branch in Saudi Arabia. More specifically, there is no separation of powers between the executive and the legislative branches. The following paragraphs provide a descriptive analysis of the powers of the state in Saudi Arabia.

Figure 2.1: Branches of Government in Saudi Arabia.



2.5.1 The King as the final authority

As shown in figure 2.1, the political system in Saudi Arabia is an absolute monarchy, with two main pillars: (i) Sharia law as the constitution of the state, and (ii) the King as the head of the state and the highest authority in relation to the three branches of the Saudi government. According to Article 44 of the Basic Law of Governance 1992, the King is 'the ultimate arbiter' of the three branches of the state: legislative, executive and judiciary.

The King as the head of the state and the prime minister governs the country based on the provisions of Islam; he is also responsible for supervising the implementations of Sharia law, regulations and the policies of the state. The King also has the power to appoint the vice presidents of the Council of Ministers, and has the responsibility of appointing and dismissing those with the rank of ministers and deputy ministers. The King is also responsible for the appointment and the removal of judges, based on the suggestion of the Supreme Judicial Council (Articles 52, 55, 57 and 58 of the Basic Law of Governance 1992). Furthermore, the King is the Supreme Commander-in-Chief of all armed forces, and he can declare a state of emergency or war. In cases where there is a danger which threatens the safety and security of Saudi Arabia or the safety of its citizens, the King can take the

necessary measures to tackle this danger (Articles 60, 61 and 62 of the Basic Law of Governance 1992).

The King has two means of enacting regulations: the Royal Order and the Royal Decree. Regulation in Saudi Arabia can be enacted by a Royal Order by the King as the head of the state; this can be considered as the highest form of legislation in Saudi Arabia. Regulations can also be promulgated by a Royal Decree issued by the King as the prime minister. In this case, the Royal Decree is issued as a final approval of bills or international agreements and treaties which have been discussed in the Council of Ministers and the Consultative Council (Shura Council). Therefore, the difference between these two means is that the Royal Order is issued by the King as the head of the state, with no requirement for the laws enacted in this tool to be first discussed by the Council of Ministers and the Consultative Council.

The Royal Decree and the Royal Order are essential instruments for supplementing Sharia law in relation to new matters. The aim of these tools is to 'achieve a balance between the traditional Islamic legal and morals concepts on the one hand and the needs and requirements of the modern Saudi Arabia on the other' (Amin, 1985, p.315).

2.5.2 The Council of Ministers as part of the executive and legislative authority

The Council of Ministers consists of the King as the prime minister, the Crown Prince as the deputy prime minister, ministers with portfolio, ministers of state, and advisers of the King who are appointed as members of the Council of Ministers. According to Article 19 of the Council of Ministers Law 1992:

> 'the cabinet shall draw up the internal, external, financial, economic, educational and defense policies as well as general affairs of the State and shall supervise their implementation. It shall also review the resolutions of the Shura Council. It has the executive power and is the final authority in financial and administrative affairs of all ministries and other government institutions'.

Article 24 of the Council of Ministers Law 1992 confirms that the Council of Ministers as the executive authority has a full remit in relation to implementation and administration. According to this article, the Council of Ministers has the following executive jurisdiction:

> ‘1. Monitoring the implementation of laws, regulations, and resolutions; 2. Establishing and organizing public institutions; 3. Overseeing the implementation of the general development plan; and 4. Forming committees to review the performance of ministers and other government agencies or in relation to any specific case. Such committees shall submit their findings at a time set by the Council. The Council shall review such findings and may accordingly form investigative committees to decide on such findings, in accordance with laws and regulations’.

Taking into account the limited legislative function of the Consultative Council, regulations, treaties and international conventions are enacted by Royal Decrees after consultation by the Council of Ministers, where the latter study draft laws and vote on them based on the process stated in the internal regulation of the Council of Ministers (Articles 20–21 of the Council of Ministers Law 1992).

From Articles 19, 20, 21 and 24 of the Council of Ministers Law 1992, it can be noted that the Council of Ministers has both legislative and executive powers. To clarify this, and as shown in Figure 2.1, the executive branch in Saudi Arabi consists of the King, the Council of Ministers (the Cabinet), local government, and other public bodies. The legislative branch (officially called the regulative branch) consists of the King, the Council of Ministers and the Consultative Council. In fact, the legislative role of the Consultative Council, according to Article 15 of the Consultative Council Law 1992, is limited to merely expressing opinions on law projects (draft bills). Therefore, any suggestions and recommendations made by the Consultative Council in relation to law projects are not compulsory for the Council of Ministers (Alhudaithy, 2002).

The minister is the direct president and the final authority for the works of his ministry. Each minister has the right to propose a law or regulation project connected to the works of his ministry (Articles 10–22 of the Council of Ministers law 1992). The minister can also issue ministerial orders and circulars in order to perform his functions. Similarly, the presidents of the government organisations can also issue secondary legislation for the purpose of performing their main functions and tasks (Alhudaithy, 2002). These types of enactments are less powerful than legislation issued by Royal Order or Royal Decree; hence, they must not conflict with them.

Therefore, Royal Decree, Royal Order, Council of Ministers’ decisions, ministerial orders and circulars – all of these tools have been used over the years to issue administrative rules and government policies that govern public administration in relation to a wide range of

matters. These tools have been applied in a fragmentary manner, as a response to several needs. Alrashidi (2017) noted that there is not an Administrative Law Code, as Saudi government depends on a cluster of Royal Decrees, Royal Orders, ministerial regulations and decisions. This situation gives rise to several concerns regarding the consistency of the administrative justice system in Saudi Arabia, in the aspects of both decision-making and redress mechanisms.

2.5.3 Public administration

The role of an ombudsman is concerned with public administration; particularly the activities and decisions made by government organisations as a part of their role of delivering public services. Thus, the term 'public administration' will be used in this section to describe the set of government organisations that provide public services for citizens, where the decisions and activities of these organisations are challengeable via the Board of Grievances or the quasi-judicial committees.

The activities of public administration can take two main forms. Firstly, they include the decisions made by public administrators as a part of their task of implementing laws. Secondly, they can involve the policy-making function, where government organisations can be responsible for issuing subordinate legislation and by-laws in order to add more detail to the primary legislation (Peters & Pierre, 2003).

Public administration and bureaucracy in Saudi Arabia follow a combination of two approaches: the centralised approach, under which functions are carried out by central government; and the decentralised approach, where functions are fulfilled by local government. Central government in Saudi Arabia consists of the King, the Council of Ministers, the ministers, and a number of independent government organisations. As indicated earlier, the King is the final authority in relation to the three branches of government. The Council of Ministers combines the executive and legislative powers. Similarly, the ministers perform both executive and legislative functions. The independent government organisations are an additional part of the central government in Saudi Arabia. By the term 'independent' we mean that these bodies are not part of any ministry, although the Council of Ministers has a supervisory function in relation to their performance. Each government organisation has a president, appointed by the King. These organisations have been established to carry out specific tasks in a variety of areas, including administrative,

regulatory, commercial, economic and social matters. Example of these organisations include the regulatory bodies and government-owned industry.

Local government is the second level of public administration in Saudi Arabia, and it consists of two levels: provinces and municipalities. Saudi Arabia is divided into 13 provinces. According to Article 1 of the Provinces Law 1992, the aims of this law are to enhance the level of administrative works and the development in the Kingdom's provinces, and to maintain security and protect the rights and freedoms of citizens within the framework of Sharia law. Each province should have a Prince at the rank of a minister, who is appointed by Royal Order based on the recommendation of the Interior Minister (Article 4 of the Provinces Law 1992). The Prince of a province is accountable to the Interior Minister. The functions of the province's Prince are listed in Article 7 of the Provinces Law 1992, which generally focuses on the role of the Prince in governing the province in accordance with the public policy of the state. The Prince is responsible for the general development of the province and the improvement of public services within the province. Among the Prince's tasks is the supervision of government departments and their employees within the province, to ensure their effectiveness. The Prince is also responsible for the implementation of final judicial decisions made by judges.

The second level of local government in Saudi Arabia is the municipalities. Article 1 of the Municipalities and Villages Law 1977 confirms that a municipality is an institution with financial and administrative independence. Taking into consideration the remits of other public authorities, the municipality has remit over all the matters related to organising and improving the area within its jurisdiction, and maintaining public health and public safety. The municipality has the remit to issue licences for construction, buildings and opening shops. Another remit is maintaining the cleanliness of the town. It is also responsible for establishing and organising parks, public swimming pools and gardens. Part of the municipal role in maintaining security and peace is taking all the necessary measures to prevent and stop fires, and to remove dilapidated buildings. Organising local transport is another function of the municipality. It is worth adding here that several public services, including education, schools and health institutions, are not part of the municipalities' remit (Abdulaal, 2008).

Despite the existence of local government, most of the public services in Saudi Arabia are delivered by the central government, whose function is to provide public services to the citizens. The Basic Law of Governance, in Articles 27, 30, and 31, indicates that education,

health care and social security are fundamental rights of citizens that should be provided by the state. In practice, these three public services are financed directly from the state's general budget. For example, education in its both parts – schools and higher education facilities – is governed by the Ministry of Education. Universities in Saudi Arabia can be considered as independent government organisations, as they have financial and administrative independence. However, the universities' status might change in the future, as the Saudi government plans to privatise this sector.

The health sector includes a number of public institutions financed by the state's general budget. These institutions provide free health care to citizens under the supervision of the Ministry of Health. The health sector also includes private health care institutions that also operate under the supervision and regulation of the Ministry of Health. Similar to the education and health sectors, the social services sector is governed through the central government. Social security and social services are provided to the citizens through the Ministry of Human Resources and Social Development. It is clear that the Saudi government provides most of the public services, as privatisation has only been implemented to a limited degree. However, the Saudi government in recent decades, has paid more attention to privatisation; it aims to extend its privatisation plans to cover several areas of public services.

In practice, there are several deficiencies in the public sector in Saudi Arabia. According to Assad (2002), the inadequacies existing in Saudi Arabia's public administration have to some extent obstructed the development of this sector. These defects can be divided into two categories: structural defects and practical defects. The structural defects are related to the structure of the public sector in Saudi Arabia and the mode of governance followed in the country. Although Saudi government follows both centralisation and decentralisation as methods of governance, in practice, most of the powers in relation to decision-making and policy-making are within the remit of central government. Local government in practice, has a limited role in controlling the region within its jurisdiction. In effect, the role of local government is limited to implementing policies made by central government. Notwithstanding, that local government has occasionally been granted some authority in relation to the planning and organisation of the region, these granted powers were subject to the supervision and control of central government (Alkadry, 2015). The decentralised approach, in the context of public administration in Saudi Arabia, has been described as a 'mirage', due to the over-centralisation approach existing in the public sector (Alkadry,

2015). In his analysis of the management of the public sector in Saudi Arabia, Garba (2004, p.605) found that:

> 'decision-making and policy guidance is centralized at the national level while local management is restricted to implementation. The centralized structure burdens the central administration and its agencies with decision-making on issues that are of limited national importance. This leads to delays in formulating policies, carrying out necessary reform and in general decision-making. The situation limits local initiative in management and has also resulted in resistance to change in administration'.

The practical defects in public administration in Saudi Arabia take a variety of forms. First, there are jurisdictional overlaps, in addition to poor communication between government organisations (Assad, 2002). Moreover, several practical defects in the public sector have been noted by Assad (2002), such as delay, insufficient responses to citizens, managerial favouritism and poor performance. Similarly, Rahman (2020) noticed that health care in the public sector suffers from inadequacies, medical errors, low-quality services, consumer dissatisfaction, and constraints in accessing the services.

Administrative corruption is another deficiency in the public sector in Saudi Arabia. According to Alshalan (2017, p.86), 'corruption in Saudi Arabia can be found at the highest levels of the government, which, however, does not imply that there is no corruption at the middle and lower levels'. One of the most common forms of corruption in the Saudi public sector is favouritism, which includes both nepotism and cronyism. The existence of favouritism can be connected to the lack of an effective mechanism of accountability that can ensure transparency in the public sector. It also can be connected to some extent to the tribal culture that exists in Saudi society (Alshalan, 2017).

The Crown Prince Mohammed Ibn Salman, in an official statement in November 2020, declared that in the last decades, corruption was widespread in Saudi Arabia, and cost between 5% to 15% of the total budget of the country. The Crown Prince also indicated that corruption has prevented development and improvement in the country (Saudi Press Agency, 2020). This statement can reflect the size and extent of this problem in previous years.

The above evaluation of the quality of public administration in Saudi Arabia is based on research conducted in the field of public administration as a separate discipline. There is a lack of legal research and studies that evaluate the quality of public administration and public

services from legal perspective. More broadly, there is an absence of legal research concerned with the quality of initial decision-making within government organisations as a part of the administrative law discipline; or more specifically, as part of the concept of administrative justice. Therefore, while we can be reasonably certain that there is a substantial amount of defective decision-making and other forms of maladministration in Saudi Arabian public administration, it is not possible to estimate the extent of such deficiencies.

2.5.4 The judiciary

The judicial system in Saudi Arabia is a dual system, consisting of the system of ordinary courts under the supervision of the Ministry of Justice, and the Board of Grievances (Administrative courts system) as an independent body connected directly to the King. There are also a number of quasi-judicial committees that have jurisdiction over specific types of disputes. Article 46 of the Basic Law of Governance confirms that the judiciary is an independent authority, so that there should be no influence upon the judges in their judgements other than Sharia law. Article 48 of the Basic Law of Governance indicates that courts should make their judgments based on the provisions of Sharia law and its main sources, the Quran and the Sunnah, as well as regulations that do not conflict with the Quran or the Sunnah.

The Basic Law of Governance 1992, as the primary constitutional document, affirms that the right to litigate should be equally provided to all the citizens and residents in the country. The judiciary in Saudi Arabia, including both systems, is fully financed from public funds. There are no court fees required for using the ordinary courts or the Board of Grievances. This means that to date, Saudi Arabia has provided its citizens with access to justice free of charge. Unlike in other countries, court fees cannot be considered as a barrier to accessing justice in Saudi Arabia. The cost of employing a lawyer for litigation is a possible barrier to accessing courts, but there is an absence of evidence on this issue.

However, in June 2020, the Consultative Council approved a draft bill for introducing court fees. This draft bill needs to be approved by the Council of Ministers to be a final and enforceable law. There is no doubt that court fees have been introduced in several countries around the world, to organise access to justice. Fees have also been used as an additional resource to finance the justice sector, with an overall aim of increasing the effectiveness of the courts and the administration of justice. Judicial fees also play a role in encouraging the

use of other forms of dispute resolution, and therefore, decrease the caseload of courts (Mery Nieto, 2015). However, it is difficult to predict how courts' fees will affect access to justice in Saudi Arabia.

The ordinary courts in Saudi Arabia have a wide jurisdiction over all types of complaints that are not handled by the Board of Grievances. The structure of the system of ordinary courts, according to the Judiciary Law 2007, consists of the Supreme Court, the Courts of Appeal and the Courts of First Instance. The latter include general, criminal, family, commercial and labour courts. In practice, judges in ordinary courts rely on Sharia law based on the views of the Hanbali school (or other schools of jurisprudence in cases for which there is no provision in Hanbali jurisprudence) to make their decisions. The judges have discretion to use their own interpretation of Sharia rules in the circumstances of the case. This means that in practice, cases with similar facts might receive different decisions. Moreover, there is no system of judicial precedent, such as those operated in the common law countries. It can, therefore, be argued that codification of Sharia rules would enhance the transparency and credibility of courts. The Board of Grievances and the quasi-judicial committees, as parts of the judiciary, will be analysed in the following sections.

2.6 Overview of the Board of Grievances

Given the fact that Saudi Arabia follows Sharia law and adheres to its principles in all aspects of state governance, the Board of Grievances is an example of this practice. The origin of the Board of Grievances as a means of resolving disputes against the administration is rooted in the Islamic rules (Al-Ghadyan, 1998). In the period of Islam's foundation, the Prophet Mohammed was responsible for the three powers of the state, including the judiciary. After his death, and due to the expansion of the Islamic Empire in that period, an institution called the Board of Grievances was established to handle disputes against the ruler.

In addition, as noted by Vogel (2000), the Broad of Grievances did not only originate in Islamic historical practice, it has also been influenced by the model of '*Conseil d'État*' in France and Egypt. However, unlike the *Conseil d'État*, the Board of Grievances has no advisory role in relation to drafting legislation. The sole role of the Board is handling disputes to which public administration is a party.

In the early years of the establishment of the Kingdom of Saudi Arabia, the King was responsible for settling disputes between citizens and public administration. In 1926, the

King announced in the official newspaper *Um Alqurra* that any individual who had a complaint against the state should put a written complaint in the 'complaints box' located in a particular governmental building (Al-Jarbou, 2011). It is important to note that in this period, there was no modern public administration or complex bureaucracy.

The following paragraphs provide a descriptive analysis of the development of the Board of Grievances in Saudi Arabia, based on three timeframes: (i) the period between 1954 and1982; (ii) the period of 1982–2007, and (iii) the period from 2007 to the present.

2.6.1 The Board of Grievances 1954–1982

Due to social and economic developments and the discovery of oil in the state, it was necessary to develop and modernise the legal and institutional infrastructure of the country (Al-Ghadyan, 1998). Therefore, many government organisations have been established in recent decades, which has in turn increased the number of complaints submitted to the King against government departments. In order to tackle this issue, in 1954 an administrative department called the Grievances Department was created within the structure of the Council of Ministers. The remit of this department was to investigate all cases referred to it by the King.

The function of the Grievances Department was to investigate a complaint and submit a report to the King about its decision, but it was for the King to make the final decision in the case. Therefore, the nature of this department was administrative rather than judicial. This department has also been considered as a consultative body, as its decision was not final unless approved by the King. During this period, the jurisdiction of the Grievances Department in practice was to some extent vague, as the department had the power to handle all types of complaints referred by the King.

In 1955, King Abdulaziz issued Royal Decree No. 2/13/8759, which established an independent body called the Board of Grievances. According to Article 1 of the Board of Grievances Law 1955 enacted by this Royal Decree, the Board of Grievances is an independent body with a president appointed by the King, with the rank of a minister.

In accordance with Article 2 of this law, the Board of Grievances had the power to submit its report directly to the minister concerned in the complaint. The minister was required to implement the Board's decision within two weeks of receiving the report. In cases where the

minister disagreed with the opinion of the Board, he was required to notify the Board within the same period. The Board would then submit a report to the King, who would make the final decision. Furthermore, in 1959, the King issued Royal Decree No. 357011, which declared the internal regulation of the Board of Grievances. Based on this regulation, the Board consisted of three departments: the case examination committee, the consultative council and the investigatory council (Hanson, 1987).

It seems that in this period, the Board of Grievances did not enjoy full independence and that its role was still consultative. Hence, the Board of Grievances under the 1955 law cannot be considered as a judicial mechanism as its decisions were not binding and enforceable unless they were approved by the King. There also was an absence of appellate procedures in the Board of Grievances system.

In 1967, the ordinary court handled a case against the Ministry of Health, which had been submitted by a contractor. Part of the proceedings of this case was the judge's decision for the General Administrator of the Ministry of Health to appear before the ordinary court. As a result of this occasion, the King in 1968 wrote an official letter (No. 20941) to the Chief Judge, declaring that ordinary courts have no power to handle cases in which a government organisation is a party, without a permission from the King (Al-Qahtani, 2008).

Also, in 1967, the Council of Ministers issued a number of decisions that granted the Board of Grievances a new remit in relation to handling forgery disputes and cases submitted by electricity companies (Al-Qahtani, 2008). In the same year, the Council of Ministers issued decision No. 818, which granted the Board of Grievances the power to make final decisions in disputes between contractors and public authorities in cases where default of the administration caused a damage or loss to the contractors (Hanson, 1987).

Briefly, the Board of Grievances in this period was not an independent body. Furthermore, the nature of the Board was administrative and consultative rather than adjudicative. The remit and the scope of the Board were not defined precisely, which means that the Board's jurisdiction during this period was ambiguous. It also seems that there was a clear overlap between the jurisdiction of the Board of Grievances and that of the ordinary courts.

2.6.2 The Board of Grievances 1982–2007

In 1982, the Board of Grievances Law was enacted, which replaced the Board of Grievances Law 1955. This law represented a major development of the Board of Grievances, as it stated in Article 1 that 'the Board of Grievances is an independent administrative judicial commission'. This law changed the nature of the Board from an administrative body with a power of investigation, to a judicial body with full independence and adjudicative power.

This was the first time that the term 'judicial' had been used to describe the Board of Grievances. This law can be considered as the cornerstone of the administrative judiciary system in Saudi Arabia and the basis of the duality of the country's judicial system. It is essential to note here that the term 'administrative' in Article 1 was used to clarify the core jurisdiction of the Board: namely, handling disputes in which the administration is a party. It has also been used to distinguish the Board of Grievances from the ordinary courts. It has been noted that the establishment of the Board of Grievances as a judicial body 'is a recognition of its changed role in the administration of justice' (Sfeir, 1988, p.131).

Although the Board of Grievances Law 1982 did not specify the procedures of the Board, it seems that unlike the previous procedures adopted in 1954, the Board of Grievances could now perform its jurisdiction directly without the need for a referral from the King to start a case (Mahassni & Grenley, 1987). It is worth adding that the Board of Grievances Law 1982 did not precisely define the structure of the Board.

The Board of Grievances under this law had wide jurisdiction that was intended to cover all the cases in which the public administration is a party. Article 8 of the 1982 law[5] identified

[5] According to Article 8 of the Board of Grievances Law 1982: '1. The Board of Grievances shall have jurisdiction to decide the following: (a) Cases related to the rights provided for in the Civil Service and Pension Laws for government employees and hired hands, and independent public entities and their heirs and claimants. (b) Cases of objection filed by parties concerned against administrative decisions where the reason of such objection is lack of jurisdiction, a deficiency in the form, a violation or erroneous application or interpretation of laws and regulations, or abuse of authority. It is considered as an administrative decision the rejection or refusal of an administrative authority to take a decision that it should have taken pursuant to laws and regulations. (c) Cases of compensation filed by parties concerned against the government and independent public corporate entities resulting from their actions. (d) Cases filed by parties concerned regarding contract-related disputes where the government or an independent public corporate entity is a party thereto. (e) Disciplinary cases filed by the Bureau of Control and Investigation. (f) Penal cases filed against suspects who have committed crimes of forgery as provided for by law, crimes provided for by the Law of Combating Bribery, crimes provided for by Royal Decree no. 43 dated 29/11/77 H, and crimes provided for by the Law of Handling Public Funds issued by Royal Decree No. 77 dated 23/10/95 H and penal cases filed against persons accused of committing crimes and offenses provided for by law, where an order to hear such cases has been issued by the President of the Council of Ministers to the Board. (g) Requests for implementation of foreign judgments. (h) Cases within the jurisdiction of the Board in accordance with special legal provisions. (i) Requests of foreign courts to carry out precautionary seizure on properties or funds inside the Kingdom. 2.

the scope and the remit of the Board of Grievances, which included civil servants' disputes, cases resulted from administrative contracts, penal cases, disciplinary cases, and cases against administrative decisions.

In practice, in this period, the Board of Grievances also handled commercial, labour and some criminal cases, which clearly conflicts with the idea of the Board as an administrative judiciary system. The legal basis of this situation was Article 8 (1/H) of the Board of Grievances Law 1982, which stated that the Board shall have jurisdiction over cases in accordance with specific legal provisions. Another legal cause of this situation was Article 8(2) of this law, which granted the Council of Ministers the power to extend the jurisdiction of the Board of Grievances. Thus, the remit of the Board was extended during this period, to cover areas that from a theoretical perspective should not be part of an administrative court's remit.

2.6.3 The Board of Grievances 2007 to the present

One of the most significant reforms to the Saudi judicial system was made by King Abdullah in 2007, which involved restructuring both the ordinary courts and the administrative courts. Although the reform was not fully implemented until recently, it has created a significant shift towards the consistency and streamlining of the judicial system.

The Judiciary Law 2007 affirms the general remit of the ordinary courts to handle all types of disputes, unless they fall under the jurisdiction of the Board of Grievances. It is necessary to note that before this reform, several types of non-administrative cases – such as commercial, labour, and some criminal cases – were within the remit of the Board of Grievances. The 2007 reform restructured the ordinary courts system by establishing specialised courts, which can be considered as one of the major developments in the judicial system. According to Article 9 of the Judiciary Law 2007, First Instance Courts consist of General Courts, Penal Courts, Family courts, Commercial Courts and Labour Courts.

One of the important elements of the 2007 reform is the establishment of the Administrative Supreme Court, which is located at the top of hierarchy of the Board of Grievances system. The structure of the Board of Grievances, based on the 2007 reform, is as follows: (i) the

With Consideration to the rules of jurisdiction set forth by law, the Council of Ministers may, at its discretion, refer any matters and cases to the Board of Grievances for hearing'.

Supreme Administrative Court, (ii) the Administrative Courts of Appeal, and (iii) the Administrative Courts.

It is important to add here that the 2007 reform has taken more than ten years to be fully implemented. In practice, the jurisdiction of the Board of Grievances in handling criminal disputes was transferred to the ordinary judiciary system in 2016. In addition, the remit of the Board of Grievances in handling commercial cases has been transferred to the ordinary judiciary by the establishment of the Commercial Courts in September 2017. The Board of Grievances Law 2007 has been fully implemented on 31 October 2017, by the official establishment of the Supreme Administrative Court in Riyadh.

The role of the Supreme Administrative Court is to 'to review appeals against judgments of administrative courts of appeals' (Article 11 of the Board of Grievances Law 2007). The grounds of appeal to the Supreme administrative Court, as stated in article 11 include:

a. The violation of Sharia law or other codified laws that are not in conflict with it, or an error in implementation or interpretation of these laws; this includes the violation of a judicial principle established in a judgment made by the Supreme Administrative Court.
b. In cases where the judgement has been made by an incompetent court.
c. In cases where the judgement has been issued by a court constituted contrary to the law.
d. An error in describing the case.
e. If the decision that has been made in the dispute conflicts with another previous judgment issued between the two parties.
f. Conflict of jurisdiction between the Board of Grievances courts.

The jurisdiction of the administrative courts of appeal is to review administrative courts' judgements after hearing the parties (Article 12 of the Board of Grievances Law 2007). Administrative courts have wider jurisdiction over administrative disputes. According to article 13 of the Board of Grievances Law 2007, the administrative courts have jurisdiction to settle the following:

a. Disputes related to the rights granted in the laws concerning the civil service, military and retirement of government employees.

b. Disputes related to revocation of final administrative decisions submitted by the individuals concerned on the grounds of lack of jurisdiction, the existence of a defect either in relation to the cause or the form, the violation of laws and regulations or errors in their application or interpretation or the abuse of power, including disciplinary decisions, decisions issued by quasi-judicial committees and disciplinary councils, and decisions made by public benefit associations. The refusal of a public body to issue a particular decision is considered to be an administrative decision.
c. Compensation cases against public administration decisions and activities.
d. Disputes related to contracts in which public administration is a party.
e. Disciplinary cases submitted by the competent organisation.
f. Other administrative disputes.
g. Orders to implement foreign judgments and arbitral awards.

From Article 13(f) of the Board of Grievances Law 2007, it can be concluded that the Board has a wide remit that covers all types of administrative disputes, and that all the remits listed in Article 13 are merely examples of the Board's jurisdiction.

There is no doubt that the judiciary reform in 2007 represents a significant step towards modernising and streamlining the judiciary. However, it has been noted that citizens v. government complaints in practice:

> 'were time consuming and problematic, not because they were heard by special administrative tribunals such as … the Board of Grievances, but because these institutions were burdened by a dense bureaucracy' (Kéchichian, 2009, p.47).

It also has been observed that the Board of Grievances has been burdened with a heavy caseload, which means that in practice a case might take one or two years for the First Instance Court's decision; and this might take even longer when considering the appeal (Alkahtani, 2010). However, according to the Board of Grievances official website, the Board received 215,463 cases in the year 2018 (1440H), it succeeded in settling 213,759 of these, through 377,144 judicial sessions. According to the Board's statement, in that year it issued a total of 193,785 judgements, which represent approximately 99% of the cases received and 75% of the actual workload (Board of Grievances, 2019). Different data have been reported by the General Authority for Statistics, regarding the number of cases received and settled by the Board of Grievances in 2018 (1439–1440H). According to the General

Authority for Statistics, the Board received 145,594 cases and completed 115,638 cases in 2018; and the Board's actual caseload in 2018 was 186,791 cases (General Authority of Statistics, 2018).

However, both the Board of Grievances' official statement and the statistics provided by the General Authority of Statistics lack detailed information, as there is no clear description of the methodology used to collect and report this data. Furthermore, there is no information about the types of cases received and the percentage of upheld complaints. There are no data regarding the number of cases in relation to the public authority complained about, nor is there any available information on the types of remedies provided to citizens.

Another issue in relation to the Board of Grievances' performance is the lack of a systematic approach to remedies. In practice, different procedures might be used to provide remedies for complainants. It is the task of the judge to provide the appropriate remedy for the complaint (Alhudaithy, 2006). Compared to other countries, it has been noted that Saudi Arabia 'has less consistency, predictability, and transparency in how it may rule in cases or which ones it chooses to adjudicate' (Alrashidi, 2017, p.79). Alrashidi (2017, p.83) also noted that the Board of Grievances:

> 'have tended to adopt a highly discretionary approach to matters of justice, while failing to subject the exercise of administrative power to the requirements of legality or constitutional constraints'.

The main causes of this inconsistency and uncertainty might to some extent relate to the lack of clarity regarding the grounds and standards used by judges as the basis of their decisions, as well as the absence of a compulsory judicial precedent system, and the uncodified nature of Sharia law. Briefly, since the establishment of the Board of Grievances as an administrative courts system in 1982 to 2017, the Board was burdened with handling different types of disputes that contrasted with its core function as an administrative court. This situation makes it difficult to evaluate the performance of the Board in handling citizen v. state complaints.

The legal literature that focuses on the Board of Grievances provides merely a descriptive analysis of the structure and the jurisdiction of the Board. There has been no empirical research evaluating the actual performance of the Board of Grievances. Nor has any empirical research aimed to identify citizens' experiences in using the Board, or to examine the potential barriers that prevent individuals from using the Board of Grievances. In short,

empirical research as a methodology to conduct legal research is not popular in Saudi Arabia, due to the difficulties of conducting this type of research – especially the difficulty of accessing official data. Therefore, it is not possible to conclude whether and to what extent the Board of Grievances provides an effective remedy for citizens' grievances.

2.7 The Quasi-Judicial Committees

The quasi-judicial committees can be considered as the third means of redress in the Saudi legal system, which operate in parallel with the dual judicial system. These committees are established by Royal Decree to settle a specific area of disputes. Unlike the ordinary courts, which perform under the supervision of the Ministry of Justice, each committee is operating under the oversight of a particular ministry, based on its specific subject.

Several legal scholars have connected the establishment of the quasi-judicial committees directly to the religious scholars' attitude to codified laws (Al-Ghadyan, 1998; Al-Jarbou, 2004). It is true that the opposition of religious scholars played a role in the creation of these committees; however, this was not the sole cause. Other reasons might have to some extent led to the establishment of these committees; for instance, it has been noted that the quasi-judicial committees have been introduced to the Saudi legal system as a solution to ease the heavy workload of the Sharia courts (Faraj, 2016).

Furthermore, judges in Sharia courts were only experts in Sharia law, and they had no knowledge of the law and legal studies as a separate discipline. Therefore, from a normative perspective, the creation of the committees as specialised tribunals to handle disputes arising from codified laws seems to be the correct solution, instead of inexpert adjudication made by ordinary courts. Most of the codified laws are generally concerned with modern policies and legislation that are far removed from the subject traditionally dealt with by ordinary courts, and include issues such as commercial, labour and administrative matters. In order to ensure the quality of justice provided to the citizens, it is appropriate for any disputes arising from these laws to be handled by a specialised tribunal, consisting of members who are experts in the specific field concerned.

The quasi-judicial committees in Saudi Arabia can be categorised into two types, based on the nature of their decisions. First, a number of committees have no adjudicative nature, which means that their decisions can be considered as administrative decisions. In this case, the parties can appeal the committee's decisions before the Board of Grievances. Secondly,

the regulations that created some committees stated explicitly that the decision of the committee is final, and there is no route of appeal against its decision. Therefore, the nature of the second type of committees is semi-judicial (Al-Ghadyan, 1998).

It is important to note that there is no clear and unified procedure for the appointment of committee members. Most of the regulations establishing these committees lack detailed provisions regarding the required membership qualifications, and the authority that is competent to appoint the members of the committees. In practice, the members are appointed by the minister within whose remit the committee's work falls; this minister has wide discretion in relation to the appointment and removal of the committee's members (Al-Jarbou, 2007). This form of recruitment can certainly affect the independence of the committees and raises several concerns about their fairness and impartiality. Another concern regarding the independence of the committee is that the decisions of a number of committees are not enforceable without ratification by the minister concerned (Al-Eshaikh, 2005). A further issue in relation to the performance of these committees is that there are no clear procedures that should be followed by the committees in handling citizens' disputes, such as those that are applicable in the ordinary and administrative courts.

One of the fundamental elements of the committees' performance is the issue of conflicts of jurisdiction. In circumstances where there is a jurisdictional conflict between a committee and an ordinary court, Article 27 of the Judiciary Law 2007 states that a special committee within the Supreme Judicial Council is responsible for settling any jurisdiction conflict between the ordinary courts and the Board of Grievances, or between the ordinary courts and other dispute resolution mechanisms, including quasi-judicial committees. However, in circumstances where there is a jurisdictional conflict between a committee and the Board of Grievances, or between two committees, there are no rules that govern this conflict.

To the best of the researcher's knowledge, there is no empirical research that studies citizens' experiences in using the committees, and whether there are practical obstacles faced in doing so. However, we can identify some possible obstacles or barriers. Firstly, there are approximately 104 quasi-judicial committees in the Saudi judicial system, which operate in parallel with the administrative courts and ordinary courts. These committees are concerned with many types of disputes, including commercial, financial, labour, criminal and administrative matters. Additionally, there might be an overlap or conflict of jurisdiction between these committees. Therefore, it might be difficult for the ordinary citizens to

identify to which mechanism they should submit their complaints. Indeed, due to the fragmentary nature of the establishment of these committees, it might be also confusing for legal experts to determine the exact jurisdiction of each committee. Secondly, a number of committees have been only created in specific regions, or only in one city (Al-Eshaikh, 2005). This situation can affect the accessibility of the committees and prevent the citizens from having recourse to these committees.

As stated earlier, the 2007 judiciary reform established by King Abdullah has led to an overhaul and development of the Saudi judicial system. The implementation mechanisms of the Judiciary Law and the Board of Grievances Law stated in para. 1.9.1 that the jurisdiction of all quasi-judicial committees – except that of three particular committees – should transfer to the jurisdiction of the ordinary courts. However, in practice, this provision has not been implemented.

Moreover, the ideological conflict regarding the ordinary courts judges' opposition to applying codified laws, as one of the main reasons for the committees' establishment, has faded in the current decade (Alghamdi, 2015). Despite this fact, the use of quasi-judicial committees as a form of dispute resolution is a trend in Saudi Arabia, and the number of committees seems to be increasing dramatically. In recent years, several laws that were enacted by Royal Decrees have assigned judicial functions to *ad hoc* committees, to adjudicate disputes that resulted from the application of these laws.

There is also a lack of clarity regarding the constitutional status of these committees, and whether they are administrative or judicial in nature. There is no doubt that these committees have been established in the Saudi legal system in a *ad hoc*, unsystematic, incomplete manner. There is an absence of a unified law and a unified institution with the responsibility for organising aspects of these committees as a unified system. Therefore, major reforms and restructuring are needed to enhance the fairness, transparency, impartiality, credibility and effectiveness of these committees.

The quasi-judicial committees are an essential part of the judicial system in Saudi Arabia. Similarly, the specialised tribunal is a typical means of redress in many countries around the world, which handles specific types of disputes in a more satisfactory manner than courts. The committees in Saudi Arabia can to some extent be compared to the specialised tribunals in the UK, especially during their first stage in the 20th century. Several lessons can be learned from the development of the tribunals in the UK, from their first establishment as

administrative creatures to the current unified and developed tribunals system that operates within the administrative justice system. Similar reforms to those applied to the tribunals in the UK might be transplanted to the Saudi judicial system, to enhance the effectiveness of the committees. However, this issue is beyond the scope of this thesis.

2.8 Conclusion

This chapter has provided an analysis of the legal, judicial and administrative systems in Saudi Arabia. The country was officially established in 1932, which means that Saudi Arabia can to some extent be considered as a young country. Despite this fact, Saudi Arabia has made enormous achievements, developments and improvements in a variety of the state sectors, including the judicial and legal system. These developments can be attributed to several socio-economic factors, including the oil boom, economic growth, and the desire to establish a modern state. However, the legal and judicial system in Saudi Arabia has been developed in an unsystematic and piecemeal manner, as a response to specific needs or pressures.

The Saudi legal system is a dual system consisting of two main sources of law: Sharia law and codified law. Sharia law and its main sources, the Quran and the Sunnah, form the constitution of the country, which means that any codified law must not conflict with them. The judiciary in Saudi Arabia relies on both Sharia law and legislation in its judgements. The concern in this regard is that Sharia law is uncodified, which means that the judges may use their own interpretations. Codification of Sharia law is still one of the main legal issues in the Saudi legal system that have not been resolved to date. The sensitivity of this issue and the opposition of religious scholars has obstructed the implementation of this project.

The judicial system in Saudi Arabia consists of the ordinary courts, the Board of Grievances, and a number of quasi-judicial committees. This system has undergone several reforms and developments, the most notable of which was the 2007 reform, which greatly improved the Saudi judicial system by clarifying the core jurisdictions of the ordinary courts and the Board of Grievances. However, one of the significant weaknesses of the Saudi judicial system is the unorganised and unsystematic structure of the quasi-judicial committees. There is no doubt that these committees require an overhaul and systematic reform, to enhance their performance and effectiveness.

In relation to the performance of the dispute resolution mechanisms that handle citizen v. state cases, there are no available data to evaluate their performance. Nor are there any available data about the number of complaints, appeals or other manifestations of grievance by citizens against public bodies, which have been handled either by the Board of Grievances or the quasi-judicial committees. There is no available evidence on the contribution of either the Board or the committees in improving the quality of public services. Unfortunately, there are no statistical data on litigation in the public sector, which makes it difficult to evaluate the effectiveness of legal remedies in practice.

From a legal perspective, the Board of Grievances and the quasi-judicial committees are the two mechanisms that handle citizens' grievances against the government. These two mechanisms are the main means of delivering justice in the administrative law context in Saudi Arabia. Both the Board of Grievances and the committees are concerned with the legality of administrative decisions or actions. As indicated in this chapter, courts in Saudi Arabia apply both Sharia law and codified law in their judgement. On the other hand, quasi-judicial committees are established by a particular law to handle disputes arising from the violation of the provisions of this law. This means that the concept of maladministration is not one of the standards used by either the Board of Grievances or the quasi-judicial committees.

It also seems that the idea of alternative dispute resolution, with its potential benefits in delivering justice, has not been adopted in the public sector in Saudi Arabia. What is available to citizens in this sector is only the traditional judicial and quasi-judicial means of redress. There is also no official recognition of a system of administrative justice that encompasses two main elements: initial decision-making by public administration, and a system of remedies available in the public sector. We also found in this chapter that the system of public administration in Saudi Arabia suffers from several defects that affect the quality of the public sector. Thus, an effective and proactive accountability institution is needed, due to the existence of several administrative defects in the governance landscape in Saudi Arabia. An ombudsman might help to fill certain gaps in the Saudi justice system and to promote good administration.

Chapter 3: Methodology

3.1 Introduction

In order to focus on ombudsman institutions in the UK, and to examine the idea of transplanting an ombudsman into Saudi Arabia, this study employs a variety of methods: specifically, the doctrinal method, the socio-legal method, and the comparative approach. This chapter will analyse these methods, and identify the limitations of using them, especially in the context of the Saudi legal and judicial systems.

3.2 Doctrinal method

The doctrinal method is employed in the thesis in order to describe the legal framework that governs ombudsman schemes in the UK and the administrative redress mechanisms in Saudi Arabia, and to assist in developing a number of recommendations for reforming the existing laws in the UK and Saudi Arabia. The term 'doctrine' has been defined as: 'a synthesis of various rules, principles, norms, interpretive guidelines and values. It explains, makes coherent or justifies a segment of the law as part of a larger system of law' (Mann, 2010, cited in Hutchinson & Duncan, 2012, p.84).

The doctrinal method aims to establish a coherent account of the law that governs a particular aspect of social life. The researcher's objective is to produce a coherent account of the law by critically examining the relevant primary and secondary sources. The primary sources are (according to the circumstances) legislation, case law, and other sources recognised as authoritative in the relevant legal system, such as the Quran and the Sunna in the Islamic context. It is also generally helpful to examine and analyse scholarly publications discussing the primary sources. According to Van Gestel and Micklitz (2011, p.12), the arguments in doctrinal research 'are derived from authoritative sources, such as existing rules, principles, precedents, and scholarly publications'. Hence, the purpose of adopting the doctrinal method in this thesis is to establish a correct legal description of ombudsman schemes in the UK, and the existing administrative justice mechanisms in Saudi Arabia, by exploring their natures, jurisdictions, powers, functions and features, as stated in the primary sources and the scholarly publications.

Furthermore, Hutchinson (2018) argues that the doctrinal methodology provides the basis for other methods of legal research. Hutchinson's point of view is that before conducting

any theoretical or empirical legal research, the doctrinal method must first be adopted, in order to determine the specific laws which are to be subject to empirical or theoretical research. In other words, in the majority of the legal research, the researcher first needs to conduct doctrinal research to determine the relevant laws; then, empirical research can be carried out to determine the impact of particular laws on the society in question (Hutchinson, 2018). Accordingly, the doctrinal method has been used in this thesis, as a first step towards conducting a socio-legal study of the ombudsman's effect on the community's experience regarding access to administrative justice.

3.3 Socio-legal method

Another methodology used in this thesis is the socio-legal method. The term 'socio-legal' refers to a broadly sociological approach to law. The sociology of law means 'the study of law in social context' (Butler & Kudriavtsev, 1985, p.13). Thus, studying legal phenomena sociologically requires a deep understanding of the social effects and the social sources of the law (Butler & Kudriavtsev, 1985).

The socio-legal approach takes a broader view of law than does the purely doctrinal research method, because this type of research is a combination of the analysis of a particular law and of its causes or its impact on the society. Applying the above statement to this research, this means that the concern is to understand the reasons for the existence of the institutions of the public sector ombudsmen in the UK, and the Board of Grievances and quasi-judicial committees in Saudi Arabia, and to explore the effects and the effectiveness of these mechanisms.

The use of the socio-legal method in this thesis is appropriate both for identifying how citizens' grievances against public administration are resolved in practice, and for considering how to improve citizens' grievances mechanisms for the future – in particular, for considering how an ombudsman might help to improve the community experience regarding dispute resolution mechanisms in Saudi Arabia. It is also suitable for considering how to restructure the administrative justice system in Saudi Arabia more generally.

From the perspective of the sociology of law, law as a discipline is not only a combination of a number of legal norms or legal doctrines; it also contains social factors. Thus, studying the law as a separate field, without any examination of its impact on society, may not tell us how the law is working in practice. Consequently, identifying the gaps or differences

between the law in book and the law in action is an essential element of this thesis. Although this thesis is not empirical in that it does not seek or collect any new empirical data, it does attempt to build a picture of how public sector ombudsmen in the UK work in practice, based on existing published sources, including a number of empirical researches that have been conducted in the field of ombudsman studies.

This thesis focuses on institutions that provide redress for citizens' grievances in two different legal systems. First, in Saudi Arabia, the study examines how the Board of Grievances and quasi-judicial committees work as remedy handling mechanisms. Second, in the UK, the research is concerned with the actual performance of the public sector ombudsman, and how the institution has been constructed within the administrative justice system. The primary sources used in the Saudi part include laws and regulations; as well as secondary sources, such as books, articles, newspapers, and official websites of public bodies. Sources in the UK part will include relevant statutes, cases, ombudsmen's annual reports, other public authorities' reports, and ombudsman-related statistics. The secondary sources will include articles by ombudsmen, and academic articles and books written in the field of ombudsmen and administrative justice. These types of sources give a full picture of ombudsmen and their jurisdiction, functions and features, both in law and in practice.

It has been noted that in a number of socio-legal studies, 'legal texts can be studied as empirical indicators of the way law organises itself internally, interacts with its social environment and constructs its images of social relations' (Banakar & Travers, 2005, p.137). The purpose of analysing legal documents in this study is to determine the meaning of these texts and investigate to what extent they enable or limit the way in which ombudsmen can investigate citizens' grievances; this in turn can help to answers the study's questions. Legal texts are also fundamental for analysing the Saudi system, as they are historically one of the tools that led to the comprehensive development of Saudi society.

3.4 The comparative approach

As one of the conclusions of this thesis will be to introduce the ombudsman into the Saudi system based on the UK schemes, a comparative approach appears as a necessary part of the study. Accordingly, the current study compares the UK's public sector ombudsmen and their functions and features, and the functions of the Board of Grievances and quasi-judicial committees in Saudi Arabia. Such a comparison helps to identify any gaps in each system,

and to understand whether the office of ombudsman may contribute to filling any gaps or needs in the Saudi Arabian administrative justice system.

In the following paragraphs, we will first analyse the comparative law tools used in this thesis and then explain the basis of the selection of the UK ombudsman as a comparator in this study and, finally examine the rationality of the idea of legal transplant.

3.4.1 Comparative law's tools

Comparative law studies can differ based on the aim of the research, the method used, or the countries and societies involved in the study. They can be categorised based on the method adopted into five types: classificatory, historical, normative, functional and contextual studies (Jackson, 2012). As indicated by Jackson (2012) the above forms are not exclusive, and a comparative research may involve mix elements of them.

The functional approach is the dominant method in comparative law (Jackson, 2012). This method focuses on a specific social problem existed in the countries subject to comparison, with the aim of identifying how this problem has been tackled in different societies (Jackson, 2012). This approach is connected to a greater extent to the idea of universalism. In a way of explanation, legal and justice issues that face countries and societies (despite the differences in their legal, socio-political, economic, cultural and religious systems) are similar, therefore, similar solutions and tools might be adopted to tackle them (Zweigert & Kötz, 1998). However, this approach has been largely criticized by several comparatists such as Van Hoecke (2015) because societal issues cannot be isolated from their historical and socio-economic environment. Therefore, Van Hoecke (2015) suggests that to overcome this limitation of the functional approach, and to focus more on the broader culture in which law operates, other methods such as historical and contextual methods can be used as complementary tools to have a good understanding of the legal rule examined (Van Hoecke, 2015). Indeed, as noted by Jackson (2012) the functional approach in the comparative law context can be conducted through 'detailed case study' to analyse how a particular institution or doctrine carries out its functions in practice. Thus, a comparative study of a foreign rule or institution can be conducted through a number of methods with the aim of having a deeper understanding of how this rule/institution works in practice and its historical origin.

This thesis will adopt three comparative tools: namely, historical, contextual and functional approaches. In relation to the functional approach, the social problem that thesis aims to

resolve is how to balance the relationship between citizens and state, with a particular emphasis on unfair treatment and maladministration occurred in public administration. The core focus of the thesis is to analyse how the ombudsman might be a plausible solution to overcome this problem and promote good administration.

The historical approach is considered to provide a good understanding of particular legal rules and legal institutions, by exploring their history and observing their origins, improvement, and (where relevant) their transplantation into other systems (Watson, 1978). The historical approach is a crucial tool to adopt as it will help to explore the reason of the introduction of ombudsman in the UK and the development of the ombudsman sector over the years. It is also essential to evaluate the success of the UK ombudsman from a historical perspective. Another objective of the comparative-historical method is to examine the relationship between law and society in a historical context (Mousourakis, 2013). Accordingly, the analysis of the interface between Sharia law and the history of the legal and judicial system in Saudi Arabia is an essential aspect of this study. In chapter 2, we conducted a historical comparative study of the impact of Sharia law and religious scholars on the development of the administrative law aspect of the Saudi judicial system. Similarly, the thesis considered the reasons for the establishment of the quasi-judicial committees in Saudi Arabia and how this might be related to the influence of religious scholars.

As mentioned in section 3.3, the socio-legal methodology is one of the methods used in this thesis. The sociological approach has been considered as an essential method in a cross-cultural comparison (Van Hoecke & Warrington, 1998). This approach is also important because part of the process of legal transplant is a socio-legal evaluation of the UK ombudsmen work in practice, and their impact on both society and public administration. It might be argued in the context of legal transplant that the empirical study on the effectiveness of the institution or law concerned in the donor country has no value, in term of predicting the success of the transplanted law/institution in the hosting country (Harding, 2019). However, such an analysis is essential to determine any gaps between law in book and law in action in relation to the UK ombudsman sector. It also helps to identify the strengths and weaknesses of the UK ombudsmen; therefore, we can be aware of such limitations when proposing a Saudi Arabian ombudsman.

Furthermore, it has been noted that to have a good understanding of a foreign institution, it is essential to analyse the broader context in which this institution operates (Jackson, 2012).

Therefore, in order to have a comprehensive view of the ombudsman's functions and contributions, in this thesis we will analyse the UK administrative justice system and its mechanisms and explore the position of the ombudsman in this system.

Thus, based on the analysis provided in this section; the process of legal transplant requires a full knowledge of the institution in the country of origin both in book and in practice and an understanding of the wider environment in which this institution exists. The study of the UK ombudsmen in this thesis will analyse the work of the ombudsman from three dimensions: (i) analysing the powers and roles of the ombudsman as stated in legislation and in practice, (ii) analysing the administrative justice system in the UK, and (iii) evaluating the actual performance of the ombudsman. This comprehensive analysis of the UK ombudsmen will provide a set of valuable ideas for transplanting an ombudsman into Saudi Arabia.

3.4.2 The selection of the UK ombudsman as a comparator

There is no comprehensive guidance or consensus among comparative law scholars on the criteria that should be adopted to select the comparators in the comparative studies. However, the basis of legal systems' selection in the comparative research can be divided into three categories; the notion of legal families, topic/aims of the study and practical/personal factors (Oderkerk, 2001).

Some scholars are with the view that the notion of legal families is a good standard for selecting the comparators in the comparative legal research (Oderkerk, 2001). De Cruz (1993, p.37) sees that although it is vital to choose similar legal systems for comparison as 'this can ensure a baseline of similarity', this rule should not be used in all comparative research as 'the choice of legal systems must ultimately depend on the main aims and objectives of the particular comparative investigation'. Similarly, Zweigert & Kötz (1998) argue that it is difficult to establish a general rule on how to select legal systems for comparison, as this is directly connected to the specific topic of the study. Although, it is true that the comparison between two similar legal systems can increase the opportunity for a successful legal or institutional transplant, this should not be considered as 'an absolute barrier' (Siems, 2018, p.240).

Applying 'legal families' criterion for selection in this thesis is problematic; because it is difficult to classify the legal system in Saudi Arabia and to which legal family is belong. It

is well known that the conception of 'legal families', as a Western innovation, tends to focus on law as 'State law' and pays less attention to the societal context of law (Van Hoecke, 2016). This legal positivism ignores the fact that a legal system can involve not only state law but also other elements such as religion, history and traditions, which in reality have a considerable influence on the characteristics of a legal system (Van Hoecke, 2016). The concept of legal families has also been subject to several critiques because of its ignorance of other non-Western legal systems in Asia and Middle East (Kischel, 2019).

As the functional method is dominant in comparative law; a wider concept connected to the anthropology and sociology of law has been developed: namely, the concept of legal culture. This concept has a vital role in comparative law and has been used as a typology to classify legal families. By conceptualizing 'law as culture', Van Hoeck e& Warrington (1998) identify four cultural families; Western, Islamic, African and Asian.

As mentioned in the previous chapter, the Saudi legal system is a dual system combing both Sharia law and codified law, which means that in Saudi Arabi there is no separation between law and religion. Therefore, because of the *sui generis* nature of the Saudi legal system, we cannot classify it to one of the well-known legal families. Although it can be regarded as an Islamic culture, other non-ideological factors have their influence on the Saudi legal system such as legal borrowing, and intranational conventions and treaties.

Because of the unique nature of the Saudi legal system, and the fact that 'legal families have become less important for contemporary legal transplants' (Siems, 2018, p.260), we will focus on the key topic of this thesis; the ombudsman. The office has been transplanted to several countries around the world. Some of these countries might have a similar legal culture (more specifically, similar Islamic norms and social culture) to Saudi Arabia, which on the basis of 'legal culture' might be seen as a good choice for the comparator in this thesis, because it will help to predict the success of ombudsman in Saudi Arabia. However, the ombudsmen in these countries seem to be under-developed. There might be also no clear view about the success of these ombudsmen in achieving the goals of their establishment. For example, the ombudsman in Turkey established in 2012, therefore, the ombudsman in this country is young and a long period of time is required to evaluate its effectiveness and success.

Practical and personal factors can also influence the selection of legal systems in comparative study (Oderkerk, 2001). As noted by Jackson (2012, p.64) the choice of the

comparator countries is connected to 'the utility of the effort' in relation to the researcher's knowledge of languages as well as the availability of official information that enable the researcher to conduct a reliable study. A practical factor which tends to rule out ombudsmen in countries with a similar culture to Saudi Arabia as useful comparators is the lack of sufficient documents and official information to examine the performance of these ombudsman, where the available documents and academic literature might be in different languages of which the researcher has no knowledge.

Therefore, we decided to choose a developed ombudsman model that operates with apparent success and with minimum concern, instead of an ombudsman which operates in a similar legal culture with a similar level of legal development to Saudi Arabia. The justification of this choice is that the main purpose of this thesis is to provide analysis which will encourage developments in the Saudi administrative justice system, and this purpose cannot be attained by comparing the Saudi system with a country with the same level of legal development. Instead, we aim to compare the Saudi legal system with a country with a high level of development with the key aim of boosting the Saudi justice system.

The basis of the choice of the UK as comparator is that the UK ombudsman is a mature and sophisticated model for analysis and has performed its functions with high standards. The UK public sector ombudsmen have also operated for long time, and the majority of the principal public sector ombudsmen – except the PHSO – have been kept up to date with ombudsman practices worldwide. Even in the case of the PHSO, where it might be argued that the legislation of this ombudsman is outdated, the wider latitude given to the holders of this office has help them to expand their roles and contributions. In addition, the diversity in design, structure, powers and roles of the UK ombudsmen, will help the researcher to gain a wider view of ombudsman practices and the implications of this diversity on their effectiveness, which in turn will offer valuable ideas for a Saudi Arabian ombudsman.

Furthermore, most of the shortcomings identified in the administrative and judicial systems in Saudi Arabia are mainly related to administrative justice. Therefore, the focus of the UK ombudsmen on achieving the goals and values of administrative justice is one of the fundamental reasons for the selection of the UK as a comparator. Despite the different political and constitutional systems between Saudi Arabia and the UK, the study of the UK ombudsmen schemes and the techniques they used to boost administrative justice will offers good ideas for the issues of Saudi Arabian administrative justice.

One of the practical factors for this selection is related to the high level of transparency in the UK public sector. The accessibility to a variety of official documents about ombudsmen performance over the years will help to examine how the ombudsman works in practice and, thus, have a deeper understanding of ombudsman operation. Other practical factors include the rich literature about the ombudsman and administrative justice in the UK, and the engagement of legal scholars and academics with the holders of the ombudsmen and the legislator in the UK, which in turn have its influence on the development of the ombudsman sector in this country. Furthermore, the accessibility to 'ombudsman-prudence' developed by the UK ombudsmen will provide a valuable insight of ombudsman practices and how an ombudsman and government organisations ought to work.

One might doubt that the choice of the UK as a comparator is problematic because the differences between the UK and Saudi Arabia. It is important to stress here that we are aware of the differences between the socio-political and legal systems in Saudi Arabia and the UK, and these will be kept in account when constructing a proposal for a Saudi Arabian ombudsman.

3.4.3 The idea of legal transplant

The transplantation of legal ideas, doctrines and institutions from one country to another, despite the existence of political, social and economic differences, is a growing worldwide trend. The aim of such transplanting is to benefit from foreign legal ideas and institutions where they might better meet a society's needs or fill a gap in the legal and/or judicial system (Fedtke, 2012; Mousourakis, 2013).

However, there is a debate among comparative law scholars on the circumstances under which transplantation is likely to be effective. There are two conflicting points of view regarding the effectiveness of legal transplants and how this is related to the relationship between law and society. The first perspective that of Alan Watson, states that there is no strong link between legal rules, laws, legal institutions and legal structure on one side, and the political, economic and social conditions of the society in which they operate, on the other. If such a strong relationship existed, it would be extremely difficult to transplant legal ideas or institutions, and their longevity would be short (Watson, 1978). In other words, Watson considers that the borrowing of legal rules between different legal systems is 'socially easy' (Watson, 1993, p.95). Furthermore, the concept of legal transplant has been considered a 'fertile source' of legal improvement (Watson, 1993). Watson (1978) also

argued that transplantation is one of the main tools to develop and improve the law, as this tool is an effective and a cheap approach to legal reforms.

The opposite viewpoint is that of Kahn-Freund, which indicates that legal ideas and legal institutions may not be 'transplantable'. He argues that borrowing legal rules from a country with a different environment might lead to the refusal and the rejection of these rules in the host country (Kahn-Freund, 1974). Factors such as economics, politics, social cultures, religions and geography have basic and essential roles in the successful absorption of the transplanted law or institution (Kahn-Freund, 1974). Thus, Kahn-Freund's view is that there is a close relationship between law and its society, and the process of legal transplantation can only be successful if the above-mentioned factors are the same in the original and host countries (Kahn-Freund, 1974). Legrand (1997) has similar view as he argued that law is connected to society and its history and culture, therefore, legal transplant between different societies is impossible.

Similarly, Berkowitz, Pistor and Richard (2003a) state that the transplantation of legal ideas may help the host country to achieve a high level of justice and legality, similar to that achieved in the country of origin. However, two factors contribute to the effectiveness of the transplanted law: (i) the transplant country should adapt this law to the local culture; and (ii) the society in the transplant country should be familiar with the general legal principles of the transplanted law (Berkowitz, Pistor & Richard, 2003b).

We agree with Mousourakis (2019) that a foreign rule can be isolated from its own environment and utilise as model to derive legal improvements in a different social context. Mousourakis (2019) also stresses that the process of transplanting can involve certain adaptations to the imported rule and that might in some circumstances change the meaning and nature of the transplanted rule. However, Mousourakis (2019, p.194) argues that 'the view that legal transplants are impossible is too extreme and betrays an exaggeration of cultural diversity'.

It seems that the debate on legal transplant is not tied to legal history only as this subject is connected to other fields and can be analysed from other perspectives such as economics and sociology (Dorsett, 2014). Thus, the core of the debate about legal transplant lays on the question whether there is a strong relationship between the law and the society in which it operates or not.

In this regard, Harding (2019) argues that in practice, the purpose of acting new legislation is to change a societal issue. Thus, law does not necessarily reflect the society in which it operates (Harding, 2019). This is particularly applied in laws related to new issues such as commercial or administrative matters. Harding (2019) also indicates that there are no agreed criteria to examine whether a legal transplant is successful or not. He also notes that there is an absence of empirical research that examines the success or failure of legal transplant in practice, which in turn make it difficult to reach an inclusive judgment regarding the effect of legal transplant (Harding, 2019).

Most of the traditional analysis of comparative law and legal transplants tend to focus on private law and its transition to different legal families from historical perspective. Little attention has been paid to the utility of legal transplant in administrative law field, although there is recently a focus on constitutional comparative law and the viability of legal transplant in this area of law.

There is no doubt that administrative law's values and subjects are connected to the politics field. Administrative law plays a key role in organising the relationship between politics and law, which in some circumstances might involve a sort of confrontations with political agendas (Rose-Ackerman & Lindseth, 2010). Thus, compared to private law, administrative law has more connection and links with politics, history and society. The intense and complex role of administrative law might mean that using legal transplant to achieve improvements and reform in this area can be difficult and less successful compared to private law (Prado, 2020). In his article about the misuse of legal transplant, Kahn-Freund (1974) indicated that the transplantation of legal rules or institutions in the field of public law and administrative law are more likely to be rejected in the hosting country.

Moreover, Asimow (2020) argues that institutional transplant in administrative law context is difficult. Asimow (2020) also indicates that an incremental and gradual changes might be preferable in the public sector to ensure their success, rather than introducing a new institution borrowed from another country. He also notes that constitutional structure and legal culture as fundamental parts of administrative law can clearly differ between countries (Asimow, 2020). Furthermore, government organisations might be reluctant and concern about institutional reform in the public sector as this might potentially limit their authorities or might in some events raise a high-profile problem within this sector Asimow (2020). There is also the fear that institutional changes might incur more cost and funding.

As mentioned above, comparative law specially the idea of legal transplant tends to be analysed from historical perspectives that concentrate mainly on private law. However, this is not true in developing countries as constitutional and administrative comparative law have been regarded as contemporary (Harding & Örücü, 2002). Moreover, despite the traditional view that doubt the value and usefulness of comparative studies in administrative law especially those with functional purposes, there is recently an expansion in this type of legal research. This can be attributed to the global focus on democracy, human rights protections, good governance, accountability and fairness (Harding & Örücü, 2002; Boughey, 2013). Therefore, Boughey (2013, p. 94) argues that 'areas of public law are capable of achieving the traditional functionalist aims of comparative law--such as transplantation and harmonization'. Boughey (2013) also indicates that as administrative law's principles in different countries are similar, legal comparison in this area can provide plausible solutions to several issues that occurring in their administrative systems. In practice, the transplanting of administrative law's institutions from one country to another is not only connected to colonization, as there are recently several instances of 'deliberate borrowing of foreign best-practice models in administrative law' such as the ombudsman (Boughey, 2013, p.74). Indeed, several scholars who analyse the administrative comparative law tend to use the ombudsman as the obvious and notable example of institutional transplant in this discipline (Bell, 2019; Boughey, 2013). Therefore, it seems that despite the strong concerns about the value of the idea of legal transplant in administrative law areas, legal and institutional transplant is a common tool to achieve improvements in public law especially in developing countries.

Generally, transplantation, whether in the field of law and legal reform or other social fields, can (at least in some circumstances) be a means of achieving beneficial developments in a legal system. Although political, social, religious and economic elements are important aspects of the context for legal transplants, they should not be seen as insurmountable obstacles to transplanting foreign laws and institutions. Nonetheless, where legal transplantation is applied, if the transplanted law in the host country is exactly the same as in the country of origin, it may well not achieve its purpose. Therefore, adapting the borrowed laws or institutions to fit with the legal system and the needs of the host country is likely to play a vital role in successful transplantation.

A good example to support this point of view is the institution of ombudsman, which was first established in Sweden and then transplanted in different countries around the world. It

seems that each country has introduced the ombudsman institution with adaptations that fit the local, legal, social and political context. Consequently, a number of different models of the public sector ombudsman have emerged; these can be categorised as the classical ombudsman, the single-purpose ombudsman, and the hybrid or human rights ombudsman (Gregory & Giddings, 2000). The flexibility of the ombudsman institution is one of the features that has contributed to its successful introduction by many countries (Buck, Kirkham & Thompson, 2016). Thus, it seems that the differences that exist between the social, legal and political systems of different countries have not prevented the transplantation of the ombudsman, and the ways in which it can benefit different societies. This is because the law is not only a part of the social structure; it also can be considered as an idea which has several benefits for the society (Watson, 1978). In this case, what has been transplanted is the idea of an ombudsman, and not the precise form the institution takes in any particular country.

However, it is essential to mention here that the effect and effectiveness of the ombudsman are not the same in all countries in which this institution exists. Certainly, some ombudsmen operate with a greater success while others operate with less success. Several factors can either increase or reduce the effectiveness of the ombudsman. Politics, economy, society and culture play a role in shaping the work of the ombudsman and thus affect its level of success. In rare circumstances, these factors might lead to the failure or even abolishment of the transplanted ombudsman. Therefore, it is impossible to make an inclusive statement about the nature and level of effectiveness of the ombudsman model in different countries, as this is linked directly to the unique legal culture in each country. The general basis that might be used to measure the success of the transplanted ombudsman is its 'survival' and longevity. Based on this standard, only few ombudsmen have been subject to abolishment (Kirkham, forthcoming). This point will be analysed in more depth in chapter 8.

Therefore, an ombudsman transplant into Saudi Arabia could be possible as the focus of the concept of ombudsman is on substantial values related to the operation of the modern welfare state and on achieving the goals of administrative justice, which might be far away from any specific cultural, social and religious values that might exist in the hosting country. However, in this thesis, we did not suggest that the transplanted ombudsman in Saudi Arabia will be identical to the UK ombudsmen. Indeed, adapting the ombudsman to fit with the environment and local culture in which it will embed is a key element for its successful transplant.

3.5 Limitations of the research methods

Certain factors might make it more difficult to use these research methods to examine the redress of grievances for citizens in the context of Saudi Arabia, as compared to the UK. The first factor relates to the jurisdiction of redress mechanisms. The Board of Grievances was designed primarily as an administrative judiciary, but its jurisdiction was not limited to administrative law matters. According to Article (1) of the Board Act 1982, the Board is an independent administrative judiciary; however, Article (8) of this law states that the Board has jurisdiction over criminal complaints related to forgery and bribery crimes. Moreover, the prime minister, according to Article (F/8) of the Board of Grievances Act 1982, can issue an order to the Board of Grievances to handle any criminal complaints that have been promulgated in regulations. The Board also had jurisdiction over commercial cases, based on the Council of Ministers' decision No. 421, dated 27 June 1987. Thus, the Board of Grievances initially had jurisdiction over administrative, criminals and commercial complaints (Al-Jarbou, 2011).

The Board of Grievances reform of 2007 removed and transferred the commercial and criminal jurisdiction of the Board to the jurisdiction of the ordinary courts, via specialised courts under the supervision of Ministry of Justice. In fact, this reform was not fully implemented until recently, when the commercial courts were officially established on 15 October 2017 in three cities in the country: Riyadh, Jeddah and Dammam – alongside a number of specialised commercial circuits in the other cities, under the system of the ordinary courts. It is, therefore, extremely difficult to evaluate the performance of the Board of Grievances as the administrative judiciary of the state. Hence, it is difficult to distinguish clearly between its performance in handling civil law disputes between citizens and the state, and its performance in handling commercial disputes and criminal cases.

A more important difficulty is that there was no published case law, whether from the Board of Grievances or ordinary courts. Before the 2007 reforms, case reports were not available to the public, which makes it difficult to track the Board's performance during this period. In fact, according to Article (21) of the Board Act 2007, the office of technical affairs in the Board of Grievances should at the end of each year classify judgements issued by the Board, and then print and publish them. The Board of Grievances has started to publish some of its rulings on its official website; these rulings are categorised by the complaint type (administrative, commercial or criminal), and also by year. However, the available

information is still limited to specific years, and contains details about commercial and criminal cases as well as administrative cases. Hence, only a relatively small number of case reports are available for the purpose of analysing the work of the Board of Grievances.

The Bureau of Experts at the Council of Ministers has issued a paper explaining the implementation of the judiciary reform of 2007. This paper states that the jurisdiction of all the quasi-judicial committees in the Saudi system, except for three committees (the Banking Committee, Capital Market Committee and Customs Committees), should be transferred to the jurisdiction of the ordinary courts. However, what occurs in reality is completely different from what this paper has stated, as the number of committees is increasing. At present, whenever the Council of Ministers issues new laws, these tend to include an article establishing a committee for handling any disputes arising from such laws. Thus, the range of citizens vs. state disputes dealt with by such committees is increasing. Moreover, there are no published documents regarding the work and the decisions of these committees, which constitutes a significant difficulty in examining how they work in practice.

To sum up, there are major differences between official statements of the law and what actually occurs in practice, both in the jurisdiction of the Board of Grievances and that of the quasi-judicial committees. In respect of both, there is very little published information on their work. This limits the extent to which is possible to provide a coherent description of the actual performance of the Board of Grievance and the quasi-judicial committees, even though they are the main mechanisms of the administrative justice system in Saudi Arabia.

Chapter 4: An overview of public sector ombudsmen in the UK

4.1 Introduction

One of the most important roles of the state is to regulate, promote and protect the lives of its citizens. The increasing number of public authorities that carry out these tasks, and their impact on individuals' lives, have required states to control and monitor the activities of their administrative authorities (Gregory & Hutchesson, 1975). As the state's intervention in the lives of its citizens has increased, the need for controls over the administration has thus become greater.

The need to provide additional protection for individuals against the power of the executive is one of the main reasons for the establishment of the ombudsman in various countries around the world. According to Rowat (1985), individuals' rights in the past were protected mainly by courts. However, courts are not always the most effective means of righting wrongs in the modern welfare state. This is especially the case in the field of administrative law, because their roles are generally limited to assessing the legality of public administration decisions; they generally cannot give redress where the administration has acted lawfully but unfairly. Courts also tend to take a long time to process cases, and can be too expensive for the average citizen, although the extent of these issues varies from one country to another.

Although a number of new judicial institutions which are separate from the ordinary courts have been created to handle and review citizens' grievances against the state – such as the specialised tribunals in the common law countries, and administrative courts in some other Western countries – these institutions have tended not to cover all the activities of public authorities in the modern state (Rowat, 1985), and have not provided remedies against all forms of administrative unfairness. As a result, the ombudsman institution has increasingly been used to hold government to account, and to help protect citizens from the abuse of power by public authorities. The institution of ombudsman has spread to over 100 countries around the world, with more than 200 ombudsman offices in existence (IOI, 2020). In the UK, there are approximately 20 ombudsmen in the public and private sectors, dealing with different categories of complaints (Ombudsman Association, 2017).

The main aim of this chapter is to provide an overview of the public sector ombudsmen in the UK. The chapter is divided into 7 sections, together with the introductory section and the

conclusion. The second section addresses the definition of the institution of ombudsman, and the different forms that the office takes around the world. Section three provides a historical overview of the introduction of the ombudsman in the UK. Section four describes the current structure of the public sector ombudsmen in England, and the unified public service ombudsmen in Scotland, Wales and Northern Ireland; it also explains why the proposal for a single public service ombudsman has not been adopted in England. Section five provides an overview of the powers and methods of investigation used by public sector ombudsmen. Section six explains the different types of remedies that are recommended by the ombudsman, and the absence of enforcement powers.

4.2 Definitions and models of ombudsman

A number of terms have been used to describe ombudsman-type institutions in different countries: for example, the 'People's Defender', 'Public Protector' and 'Parliamentary Commissioner for Human Rights'. However, the word 'ombudsman' is the most commonly used term for institutions of this type, and has been employed by many countries around the world. In the UK, the first ombudsman to be created was given the title 'the Parliamentary Commissioner for Administration', but 'Parliamentary Ombudsman' is the term popularly used to describe the office (Gregory & Giddings, 2000b). Some of the more recently created offices include the term 'ombudsman' in their title, such as the SPSO and the Public Services Ombudsman for Wales (PSOW). The variety of denotations for such institutions in different countries reflects at least in part their special functions and tasks (Kucsko-Stadlmayer, 2008). Gregory and Giddings (2000a, p.2) define an ombudsman as:

> 'an official appointed to investigate complaints against public bodies, government departments or their servants and employees, who acts as an independent referee, without the power of sanction or appeal, between individual citizens and their governments and its administration'.

Although the ombudsman institution has been established in several countries, each country has adopted a particular model of the office, due to the different political systems and legal structures in those countries (Kucsko-Stadlmayer, 2008). Moreover, Marshall and Reif (1995) suggest that the general idea of an ombudsman is an office to resolve complaints between citizens and public administration, arising from maladministration. Different countries' attempts to address their own issues and problems with bureaucracy, and their effect on citizens in such countries, is the main reason for the variety of ombudsman models that exist around the world. These problems and concerns are generally related to

democracy, accountability, good governance, corruption, human rights protection and administrative justice.

Some scholars have attempted to classify ombudsman institutions into different types based on their main characteristics (Kucsko-Stadlmayer, 2008; Gregory & Hutchesson, 1975; Marshall & Reif, 1995). The traditional typology of ombudsmen starts from analysing the features of the 'classical' ombudsmen, as they operate in Sweden and other Scandinavian countries, and then tracks any different features or characteristics which appear when ombudsmen have been created in other countries (Ayeni, 1985).

The first type of ombudsman is the classical ombudsman based on the Swedish model, which deals with citizens' grievances against the actions and decisions of government departments. An ombudsman of this type is a public body with a general remit over public administration's activities and decisions (Marshall & Reif, 1995). This category can operate at the national level of the state, such as the PO in the UK, or at the local government level, such as the LGSCO in England. Most of the main public sector ombudsmen in the UK conform closely to the classical model.

The governmental single-purpose ombudsman or specialist ombudsman is the second model of the office, and essentially deals with a specific and limited type of complaint (Ayeni, 2009). This model differs from the classical ombudsman in that it has jurisdiction over only one area of public administration or one type of complaint (Gregory & Giddings, 2000a). A single-purpose ombudsman can cover a variety of subjects, such as health care, housing, children's protection, police services and information access. Examples include the HSO and the Prisons and Probation Ombudsman in England.

The third type is the hybrid ombudsman, which combines the basic function of the classical ombudsman – namely redressing maladministration – with the additional function of human rights protection (Ayeni, 2009). A high percentage of ombudsmen worldwide are of this type, including those in some European countries, Latin American countries and Pacific East Asia. Although all ombudsmen with a human rights mandate can be put into the same category, the extent of their role of protecting human rights varies (Marshall & Reif, 1995). It is worth adding that in some circumstances, a classical ombudsman itself may deal with human rights elements as a part of its investigation of maladministration. The promotion of human rights can also be considered as a part of the principle of good administration.

The fourth category of ombudsman is 'in-house complaints mechanisms' (Gregory & Giddings, 2000a, p.10). Such institutions are established by public authorities and government bodies as internal mechanisms for resolving disputes between individuals and public authorities which are part of the public authority in question. However, this mechanism lacks the independence from the administration that the other models have (Gregory & Giddings, 2000a). For this reason, it is arguable that that this type of institution should not be classified as an ombudsman because it lacks one of the basic features of the office: independence from the executive power.

Fifthly, the idea of the ombudsman has also spread to the private sector, and there are many ombudsmen dealing with consumer complaints in the commercial and industrial sector. Private sector ombudsman can be divided into two forms: (i) ombudsmen created by individual commercial corporations to investigate complaints against them (this form of private sector ombudsman lacks the independence from the commercial corporation), and (ii) ombudsmen established as 'self-regulating monitors', which cover an entire industrial or commercial field (Marshall & Reif, 1995). An example of the latter form is the Financial Ombudsman Service in the UK, which deals with complaints between consumers and businesses that provide financial services in the UK.

Finally, the last model is the international ombudsman. This form has the same general function of handling individuals' complaints of against bureaucracy, and has the characteristic of independence; however, unlike the above models which operate at the national or the regional level of the country, the international model operates at the international level in international organisations. The development of this model is due to the increasing number of international organisations that are concerned with a variety of legal and social issues. An example of this model is the European Union Ombudsman, created in 1995, which has jurisdiction over complaints of maladministration against the departments and bodies of the European Union (European Union, 2019).

Other typologies can also be adopted to categorise ombudsman models. Based on its jurisdiction, the ombudsman can be classified as a unified ombudsman or a specialist ombudsman. The unified public sector ombudsman has a wide jurisdiction, which cover different public services, and the specialist ombudsman concentrates on a particular type of dispute. The public sector ombudsman can also be classified based on its position, whether

it is a part of the executive or legislative branch, into a legislative ombudsman and an executive ombudsman.

All the different models of the ombudsman analysed above are an evidence of the flexibility and adaptability of the institution. They also show how this mechanism can be used to tackle certain issues in both the public and private sectors, and also in the local, national and international levels. This diversity of ombudsman models has helped each country to introduce an ombudsman that fits with its legal system with the purpose of resolving its local problems.

4.3 The emergence of ombudsmen in the UK

Before the establishment of the PO in the UK, the existing grievances mechanisms and the process of claiming remedies against public authorities were limited. There were three ways in which a person could pursue a grievance against a public authority: raising an action in court, appealing to a tribunal, or referring a complaint to a minister (Wheare, 1978). Citizens at that time were not often able to submit an application for judicial review of an administrative decision, 'with the relevant procedural rules in the High Court incoherent and the administrative law applied there underdeveloped' (Kirkham, 2007, p.5). Although the statutory tribunals were in general more accessible grievance mechanisms than the ordinary courts, their jurisdictions were limited to defined topics, and several activities of public administration were outside their jurisdictions. Moreover, not all forms of administrative unfairness were able to be challenged in courts or tribunals. Thus, in practice, individuals were in many cases either left without a remedy, or were forced to pursue their grievances via parliamentary or political means (Kirkham, 2007). There was no formal mechanism to handle complaints regarding what we would today call 'maladministration' by public sector bodies.

The growth of government's intervention in the lives of ordinary citizens during and after the World War II raised the issue of how to control the power of the state, and the question of the appropriate approach to achieve a balance between citizens' entitlements and government duties. The increased interaction between public authorities and the citizens might have resulted in more grievances and complaints. In this period, there were some concerns in the UK about how to provide remedies for citizens against central departments' decisions – especially in circumstances where government bodies had acted lawfully, but

their activities were not the appropriate treatments for citizens in accordance with standards of good administration.

The Crichel Down Affair in the 1950s was a manifestation of this problem. The affair concerned land that the Ministry of Air had acquired before the World War II, as a bombing range. In 1941, Winston Churchill promised in Parliament that the land would be returned to its owner after the war, once it was no longer required for the purpose for which it had been bought. The Ministry of Air then transferred the land to the Ministry of Agriculture, which later decided to rent the land and refused to return it to the owner of the estate of which it had been part. A complaint by the owner of the estate led to a public inquiry, the report of which included scathing criticisms of the Ministry and led to the resignation of the minister in charge of the department (Stacey, 1971). The affair revealed there was no appropriate institution for obtaining redress for certain types of administrative unfairness.

Thus, the Crichel Down Affairs highlighted the difficulties that sometimes faced citizens in obtaining redress. In this case, maladministration had been found in the work of the Ministry of Agriculture; the affair also resulted in more public attention being given to how public bodies were operating, and the possibility of maladministration and injustice in the work of the executive authority. For some people, one of the lessons of Crichel Down was that it revealed the necessity to improve grievance-redress mechanisms in the public sector (Kirkham, 2007).

The Frank Inquiry was launched in 1955 as a result of the Crichel Down Affair. However, Frank's remit did not include the type of situation that had occurred in Crichel Down. Instead, it covered the work of administrative tribunals and inquiries, and the resultant *Report of the Committee of Administrative Tribunals and Enquiries* made recommendations regarding only those institutions. Also, it did not contain any suggestions for establishing a new mechanism for handling complaints against public authorities in areas outside the jurisdiction of tribunals and inquiries (Stacey, 1971).

The above situation led some legal scholars, such as Professor F. H. Lawson, to argue that the institution of ombudsman could be an appropriate means of improving the handling of individuals' grievances and providing remedies against public administration (Stacey, 1971). Professor Lawson's idea was to establish an 'Inspector General of Administration', which was similar to the Swedish Ombudsman, but with a number of modifications to fit the UK's political and constitutional system (Gregory & Hutchesson, 1975).

In the light of Professor Lawson's proposal, a pressure group called Justice appointed the Whyatt Committee, which produced the report entitled *The Citizen and the Administration: The Redress of Grievances* in 1961. The report found that the existing mechanisms for oversight of bureaucracy's effects on citizens did not cover all aspects of bad administration. In particular, there was no mechanism to handle complaints about maladministration in taking discretionary decisions. It concluded that there was a gap in the British system which could be filled by inserting the institution of ombudsman (Justice, 1961).

There were several obstacles to the creation of an ombudsman institution in the UK that was similar to those existing in Sweden and New Zealand. First, Britain was a state with a much larger population than those of the countries where ombudsmen existed at that time. Moreover, the political and constitutional system was significantly different from that of the Scandinavian countries – for example, regarding the importance of the UK concept of ministerial responsibility (Gregory & Giddings, 2002). Applying the Swedish model of ombudsman to the UK without adjustment might have resulted in the office being overwhelmed by a huge number of complaints, and the MPs' role in pursuing grievances on behalf of constituents could have been diminished (Kirkham, 2007).

In 1967, the PO was established in the UK as its first public sector ombudsman. According to Seneviratne (2002), the Justice report had a great influence on the Parliamentary Commissioner Act 1967. The remit given to the PO in the 1967 Act was limited to central government departments and a small number of other public authorities, while the health services and local government departments in England were excluded from the PO's remit. Within a few years, two additional ombudsmen were created to cover complaints in these two areas. The HSO was established in 1973 by the National Health Service Reorganisation Act (later amended by the Health Service Commissioner Act 1993) as a single-purpose ombudsman to deal with one area of public services: the national health services. The LGSCO was created by the Local Government Act 1974 to investigate complaints against local authorities in England. A similar office was created for Scottish local government by the Local Government (Scotland) Act 1975. After the creation of schemes of devolved government in 1999, new public sector ombudsmen were created for Scotland, Wales and Northern Ireland, to investigate complaints at the devolved level of government. Currently, in the UK there are a variety of ombudsman schemes in the public sector, at both the national and the local level of government. There are also various of ombudsman schemes in the private sector.

4.4 The structure of the public sector ombudsmen in the UK

The public sector ombudsmen in the UK consist of a number of ombudsmen at the national and local level. According to Harlow (2018, p.73), the UK has 'accumulated a plethora of public ombudsmen, who operate in rather different fashion under different statutory regimes'. The current complex structure of ombudsman in the UK is a result of (i) the *ad-hoc* development of ombudsmen in the UK, and (ii) constitutional change in recent decades, notably devolution. Thus, the aim of this section is to explore the current structure of the public sector ombudsmen in the UK.

Firstly, there is the PHSO, whose function to investigate complaints about UK central government departments, non-departmental bodies and NHS services in England, in terms of the Parliamentary Commissioner Act 1967 and the Health Commissioner Act 1993. It is essential to mention here that although the PO and the HSO are distinct offices, the two offices are held by the same person, and they in practice operate as a single organisation. Therefore, it has been thought appropriate to have a title for the combined offices.

Secondly, complaints against local government bodies, councils and adult social care providers in England are dealt with by the LGSCO. Thirdly, there is a Housing Ombudsman, which was created by the Housing Act 1996 to handle complaints about housing bodies that are registered with the Housing Ombudsman scheme in England.

At the devolved level of government, there are several ombudsmen. The SPSO has jurisdiction to consider complaints about devolved public services in Scotland (including health services, local government services and social housing). Similarly, the PSOW, which was established by the Public Services Ombudsman (Wales) Act 2005, considers complaints about devolved public services in Wales (including health services, local government services and social housing). The Northern Ireland Public Services Ombudsman (NIPSO), established by Public Services Ombudsman Act (Northern Ireland) 2016, considers complaints about devolved public services in Northern Ireland. Thus, in Scotland, Wales and Northern Ireland each has a unified ombudsman which deals with complaints against devolved government bodies, local government departments and health service institutions.

Hence, the approach to citizens' complaints about devolved government has been to create unified ombudsmen whose remit covers all devolved public services in Scotland, Wales and Northern Ireland as part of the three devolution settlements. According to the Law

Commission (2010, p.4), this was 'a logical course of action to take as part of the devolution process'. By contrast, there is no unified public services ombudsman for England.

In 2000, the review of the public sector ombudsman in England by the Cabinet Office suggested a unified public service ombudsman for England (Collcutt & Hourihan, 2000). Moreover, several recommendations have been submitted to the Public Administration Select Committee (PASC) by a number of public sector ombudsmen in the UK, suggesting that a single English Public Service Ombudsman comparable to those operating in devolved governments should be considered. [6] According to Kirkham and Martin (2014), the structure and functions of the ombudsman should be redesigned to fit with the current and future situation of public services. However, the reform of the public sector ombudsmen in England 'has proved elusive' (Kirkham & Martin, 2014, p.3).

The explanation for the difference is historical and constitutional. The system of ombudsmen in the UK was not designed as a whole but has evolved incrementally. Moreover, the UK system, particularly the PO, was originally designed to enhance the constitutional role of Parliament in providing redress of grievances, rather than as a free-standing mechanism for achieving administrative justice.

As the ombudsmen and the government are aware of the limitations of the structure of the public sector ombudsmen in England, there was a suggestion of creating a 'temporary coordinated initiative' with the main aim of reforming the ombudsmen in England. However, there are limits to how much change can be achieved in this way, as ombudsman institutions 'are generally legislative creatures' (Kirkham & Martin, 2014, p.333). Therefore, it would be difficult to achieve substantial change without legislation (Kirkham & Martin, 2014). Furthermore, the PO was created before devolution, so that at the time of its creation, most central government functions were carried out by UK departments. Devolution meant that many legislative and executive functions that concerned Scotland, Wales and Northern Ireland were transferred to devolved institutions. However, legislation specifically for England continued to be passed by the UK Parliament, and specifically English functions continued to be carried out by UK departments.

[6] For full details see PASC, 2014. *Time for a People's Ombudsman Service. Fourteenth Report of the Public Administration Select Committee*. House of Commons, HC 655. Available at: https://publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/655/655.pdf [Accessed 13 March 2019].

One of the difficulties in promoting ombudsman reform in England has been that there is no single government department with responsibility for all aspects of the administrative justice system, or even for all ombudsmen. In theory, responsibility for all the mechanisms of the administrative justice system should be the responsibility of the Ministry of Justice (Kirkham & Martin, 2014). However, although it has responsibility for courts and tribunals, it is not responsible for policy on ombudsmen. The Cabinet Office is responsible for policy regarding the PO, the Department for Communities and Local Government for LGSCO policy, and the Department of Health and Social Care for HSO policy (Law Commission, 2011). If a single government department had responsibility for all public sector ombudsmen, it might be easier to bring forward a reform of the ombudsman structures in England (Kirkham & Martin, 2014).

It is worth mentioning that the PASC, in its report[7] *More Complaints Please!*, suggested that a minister should be appointed to examine 'government policy on complaints handling'. Moreover, the PASC, in its report, [8] *Time for a People's Ombudsman Service*, recommended that this minister should be responsible for reviewing policy on the PO, and should work to introduce new legislation that can give citizens a simpler ombudsman system that meets their needs and expectations.

In its written evidence to the Committee, the LGSCO stated that such a recommendation is necessary because in the current situation citizens can be confused as to which ombudsman they should submit their complaints to (LGSCO, no date). In addition, the way in which public services are provided has changed in recent decades. Delivering public services may be the responsibility of different organisations within the public sector, or organisations in the private sector, or a combination of both. Therefore, having a single Public Service Ombudsman for England could provide several benefits. Firstly, it would furnish citizens with a simpler and less confusing ombudsman service. Secondly, it would also make it easier to spread good administrative practice widely across the public sector. Although the large population of England may be considered as a challenge to the office of ombudsman, this

[7] PASC, 2014a. *More complaints please!. Twelfth Report of Session 2013-14*. HC 229. House of Commons. Available at: https://publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/229/229.pdf [Accessed 14 March 2019].
[8] PASC, 2014b. *Time for a People's Ombudsman Service. Fourteenth Report of the Public Administration Select Committee*. HC 655. House of Commons, Available at: https://publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/655/655.pdf [Accessed 13 March 2019].

issue might be resolved by establishing several branch offices in different regions (PASC, 2014b). This proposal might also give the taxpayer better value for money (Gordon, 2014).

Although creating a unified Public Service Ombudsman for England is a rational proposal, the distinction between reserved and devolved public administration should be taken into account when considering such a proposal, as the PO currently has jurisdiction over both UK matters and specifically English matters. The Cabinet Office's suggestion to create an English Public Service Ombudsman means that this office could have jurisdiction over complaints regarding the non-devolved roles of the UK's central government that can be related to Wales, Scotland and Northern Ireland. However, this suggested arrangement has been criticised, as it might conflict with essence of the devolution settlements (Elliott, 2006).

The PASC report (2014b) recommended that to avoid any issues regarding the non-devolved matters, two ombudsmen could be created: one for the non-devolved matters, and the other as a single public services ombudsman dealing with complaints about government bodies, local government departments and health services in England. The report also suggested two ways in which this might work in practice. Either one person could hold the two offices simultaneously (as is the present position of the PHSO), or each office could be held by a different person (PASC, 2014b).

In December 2016, the government published a Draft Public Service Ombudsman Bill, which could have created a unified Public Service Ombudsman for UK reserved matters and public services and government organisations in England. The draft Bill proposed abolition of the existing three ombudsmen – the PO, HSO and LGSCO – and merging their remit into a unified Public Service Ombudsman. The Housing Ombudsman would have continued unaffected. However, the Bill was not introduced, nor was it mentioned in the Queen's speech after the 2019 election; and there seem to be no current plans to introduce such a bill. It is worth adding that several legal scholars have criticised this Bill (Reynolds, 2017; Kirkham, 2019), as it proposed a relatively conservative view of an ombudsman (Kirkham & Thompson, 2016), compared to ombudsman schemes in devolved government.

Although they are separate offices, the PHSO and the LGSCO are able to work jointly on investigations in cases where the complaints are under the jurisdiction of both ombudsmen, in accordance with the Regulatory Reform (Collaboration etc. between Ombudsmen) Order 2007. This collaboration is an attempt to overcome the shortcomings of the legislation in this area and strengthen their performance (PHSO, 2016). Recently, the LGSCO has found

that the majority of public services' failures are related to health care and social care, which raises the issue of overlapping jurisdiction between the HSO and the LGSCO. To overcome this issue, a joint team has been established, so that this type of complaint is passed directly to the joint team (LGSCO, 2018a). However, it is worth noting that with the proposal of integrated ombudsman enshrined in the Draft Public Service ombudsman Bill, this cooperative initiative seems to come to an end.

4.5 Powers and methods of ombudsmen

The powers of all the UK's principal public sector ombudsmen are similar. Therefore, in this section we will use the PO and the 1967 Act as an example. The PO's and other public sector ombudsmen's investigations are carried out in private, and the public body concerned in such an investigation has the right to comment on the allegations. For the purpose of the investigation, the ombudsman has the power to obtain any relevant information about the complaint. The ombudsman can also seek information or documents from ministers, public servants or members of the public authority complained about, or any person who may have information about the complaint. However, one restriction applies here: the PO is not allowed to obtain information related to the Cabinet Office and its Committees (The Parliamentary Commissioner Act 1967, s.8(3)(4)). For example, in the 'Court Line' case, Cabinet Office papers were relevant to an investigation. Although the PO was not allowed to access the Cabinet Office papers themselves, a compromise was accepted whereby the 'gist' of the papers was given to the PO, and this enabled the investigation to be completed (PO, 1975, cited in Law Commission, 2010). Another restriction regarding the ombudsman's power to access information is that:

> 'no person shall be compelled for the purposes of an investigation under this Act to give any evidence or produce any document which he could not be compelled to give or produce in civil proceedings before the Court' (s.8(5) of the Parliamentary Commissioner Act 1967).

The investigations of ombudsmen are not judicial in nature; thus, ombudsmen's investigations are not adversarial, as are proceedings in the courts, and there is no right of intervention for the complainants. The process of ombudsmen's investigations is not formal, and the complainant and the government body concerned in the investigation can be invited by the ombudsman to submit information (Law Commission, 2010).

However, the ombudsman has discretion as to whether to accept legal representation for either the complainant or the public authority concerned in the investigation. The ombudsman can also pay financial compensation to any person who takes part in an investigation and furnishes information related to the investigation, for any loss of time or expenses incurred (s.7(3) of the Parliamentary Commissioner Act 1967). In practice, any interviews related to the ombudsman's investigation are usually conducted at the person's home or workplace. Thus, in practice, little financial compensation has been paid by the ombudsman (Seneviratne, 2002).

After conducting an investigation, the PO is required to submit a report stating the results of the investigation to the Member of Parliament who requested the investigation. This report should also be sent to the principal officer of the body concerned in the investigation, in addition to any person who was 'alleged in the relevant complaint to have taken or authorised the action complained of' (s.10(1-2) of the Parliamentary Commissioner Act 1967). There is no requirement in the 1967 Act to provide the complainant with a copy of the report. However, in practice, the MP regularly informs the aggrieved person about the report's findings (Gwyn, 1973). Moreover, the PO should submit an annual report before Parliament on the general performance of his/her functions under the Act (s.10(4) of the Parliamentary Commissioner Act 1967).

The findings of an ombudsman's investigations are final; no right of appeal is provided, whether to the complainant or the public authority. However, the ombudsman's findings can be challenged via judicial review (Kirkham, 2006). Judicial review of ombudsman's decisions is not concerned with the merits of these decisions, but it is essentially concerned with the legality of these decisions (Maer & Everett, 2016). The relationship between ombudsmen and the courts will be discussed in Chapter 6.

4.6 Remedies

The 1967 Act and other public sector ombudsmen statutes do not specifically state the remedies that an ombudsman might recommend. However, the core role of the ombudsman is providing remedies for citizens where injustice has occurred because of maladministration. In *Principles for Remedies*, the PHSO states that:

> 'Not all maladministration or poor service results in injustice or hardship, but where it does, our underlying principle is to ensure that the public body

> restores the complainant to the position they would have been in if the maladministration or poor service had not occurred. If that is not possible, the public body should compensate them appropriately' (PHSO, 2009a, p.3).

Generally, the remedies recommended by ombudsmen include that public bodies recognise their failure and apologise to the aggrieved person, improve and review their services and procedures, and/or provide financial redress for the actual loss and for any delay, inconvenience or distress caused (PHSO, 2009a; Seneviratne, 2002). In fact, there are no specific rules determining the amount of the financial compensation; thus, different ombudsmen in the UK have different approaches for determining this amount.

According to the PHSO's paper, *Our Guidance on Financial Remedy*, the office uses a severity of injustice scale to consider the appropriate amount of financial redress. The office also uses a typology of injustice, which means that the ombudsman considers the appropriate compensation by referring to previous similar complaints that have been upheld. The ombudsman also takes into account the amounts of compensation that have been awarded by other mechanisms for redress, such as the ordinary courts and mediation. According to the severity scale, an apology will be recommended instead of financial compensation when the complainant has only suffered from low-impact injustice (such as worry or annoyance) resulting from one action of maladministration, and this has had an effect of short duration on the aggrieved person (PHSO, no date).

It has been noted that ombudsmen recommend financial compensation more frequently than courts award financial redress in proceedings for judicial review. Financial compensation is rarely awarded in judicial review cases and, if awarded, might not include compensation for inconvenience and distress (Seneviratne, 2002). In practice, according to the Cabinet Office's paper *Handling of Parliamentary Ombudsman Cases*, a 'consolatory' financial redress for distress, annoyance or inconvenience is recommended by ombudsmen only in exceptional occasions (Cabinet Office, 2010).

One of the key features of the public sector ombudsman schemes in the UK – except in the case of the NIPSO – is that the ombudsmen can only make recommendations, which are not legally enforceable. As a matter of law, the public body concerned with an ombudsman's investigation is free to ignore a recommendation (Maer & Everett, 2016). This may be contrasted with courts, which can award injunctions/interdicts, quash decisions, or provide decisive interpretation of the relevant law (Buck, Kirkham & Thompson, 2016; Kirkham,

Thompson & Buck, 2009). As a result of this feature, several terms such as 'ombudsflop', 'ombudsmouse' and 'toothless tiger' were used to criticise the PO in the early years after its introduction (Gwyn, 1973). In fact, experience shows that the PO has generally been successful in persuading public authorities to implement its recommendations (Kirkham, 2008a).

In Northern Ireland, a different approach has been taken. Following an ombudsman investigation which has found that the complainant has suffered an injustice, he/she can apply to the county court for an award of damages against the public authority concerned, or an order directing the public authority to take, or refrain from taking, any particular action (ss.52-53 of the Public Services Ombudsman Act (Northern Ireland) 2016).

Generally, introducing court enforcement into an ombudsman scheme would conflict with the nature of the classical ombudsmen, as they have operated on the assumption that persuasion and conciliation are preferable to formal enforcement powers. Thus, relying on courts as a way of enforcing an ombudsman's recommendations appears to be an approach which is contrary to the nature and essence of the ombudsman institution (White, 1994). This point will be discussed in more depth in chapter 7.

4.7 Conclusion

This chapter has given an overview of the public sector ombudsmen in the UK. It has explored different definitions of the institution of ombudsman, and has found that it is difficult to find a comprehensive definition that covers all the features, models and functions of the different versions of the institution around the world. This is because each country has adapted the institution of ombudsman to fit local circumstances, including the particular features of their political and legal systems. However, there are many common features, and a classical ombudsman can generally be defined as an independent officer who handles complaints of maladministration in public administration, and who issues non-binding recommendations where complaints are upheld, with the aims of providing remedies for individual complainants and improving the quality of public administration.

In the UK, the first ombudsman was created by the Parliamentary Commissioner Act 1967, and since then a number of other public sector ombudsmen have been established. Taken together, they cover most areas of public administration across the UK. The trend in the public sector ombudsmen schemes has been towards creating a one-stop-shop ombudsman.

In Scotland, Wales and Northern Ireland, all devolved public services are covered by a single unified ombudsman for each region. The same is not true for England; and although the one-stop-shop approach has been recommended for England, no steps have yet been taken by the UK government to implement this proposal.

In this chapter, we also found that the ombudsman can recommend several types of remedies, including apology and financial compensation. Although ombudsmen's recommendations cannot be enforced, there is a widely held view that this helps the ombudsman to establish a cooperative relationship with public authorities.

Chapter 5: The functions of the UK public sector ombudsmen

5.1 Introduction

As the primary objective of this thesis is to examine the idea of transplanting an ombudsman into Saudi Arabia that is inspired by the UK ombudsman, it is essential to analyse the different functions that the UK model is capable to perform. This analysis can show how the ombudsman is an appropriate tool to tackle the deficiencies that exist in the administrative justice system in Saudi Arabia.

The general idea of the ombudsman, based on the Scandinavian model, was 'the Citizen's Defender' or 'Complaints Man'. However, there were modest attempts to define the exact functions of the ombudsman when the office was first adopted in the common law countries (Harlow, 1978). The notion of the ombudsman, based on its operation in a variety of models, places a fundamental emphasis on operating as a mechanism of accountability between citizens and the state. All the ombudsmen around the world are mainly concerned with the manifestations of bureaucracy and their potential negative effects on the citizens. Thus, bureaucracy as a phenomenon presents similar issues for all countries, despite differences in their legal and political structure, or regarding the particular model of ombudsman they have adopted (Owen, 1999). In other words, the ombudsman contributes to the implementation of a societal desire to have well-organised public authorities and appropriate treatment for the users of public organisations. This desire is inspired by a belief in human dignity and the equitable balance between citizens and the state.

The International Ombudsman Association (IOA) developed a Standards of Practice and Code of Ethics, which established general rules about the functions of ombudsmen (IOA, 2009). Although there are several similarities among ombudsmen's functions worldwide, each country might define the roles of the ombudsman differently. Thus, its functions could be different when comparing two ombudsmen in different countries, or even two ombudsmen within a single country (Myers & Witzler, 2014). Furthermore, the functions of an ombudsman might differ not only between different ombudsmen, but also within one specific ombudsman over the years; this can be due to several factors, such as the wide latitude given to the holders of that office, and changes in the public policy governing public administration.

Compared to other alternative dispute resolution mechanisms, the role of the ombudsman is still to some extent not well understood by individuals. Citizens have an uncertain idea about the actual roles of the ombudsman and how the ombudsman performs these roles. The reason, as noted above, is that there are a variety of approaches to defining of the role(s) of an ombudsman, and some roles differ from the original functions of the ombudsman that existed in the 19th century (Gadlin, 2000).

When the office was first created, the core role of the ombudsman was handling redress of grievances between citizens and public authorities. Performing this role could also reveal and highlight failures and weaknesses in the practice of public administration. Settling and resolving these weaknesses means that such wrongdoing can be prevented in the future. Hence, the ombudsman has a dual role: (i) providing redress for citizens against the executive, and (ii) preventing further maladministration and injustice by improving administrative practices (Seneviratne, 1994). Furthermore, the scope of ombudsmen's roles has also been expanded to include new functions, such as monitoring and auditing, with the overall aim of enhancing the quality of public services to meet consumers' expectations (Gill, 2014; Stuhmcke, 2012). The ombudsman can also be analysed in the context of human rights protection. The ombudsman's role in promoting human rights has been a trend in a number of countries around the world. Such a role can be the result of establishing a human rights ombudsman, or allowing the classical ombudsman to handle complaints with human rights elements.

In the UK, the public sector ombudsmen legislation does not clearly specify what the exact role of the ombudsmen is; nor is there a clear view regarding the functions and the purposes of the UK's public sector ombudsmen. In addition, as the British constitution is not codified, there is no constitutional requirement for the ombudsmen to be created. Thus, there is a strong debate about the roles of the ombudsman and the balance of these roles (Harlow, 1978; Kirkham, 2016; Gill, 2011).

This chapter aims to analyse the constitutional role of the UK ombudsman, and to discuss the normative, legal and descriptive debate about the conceptions of ombudsmen's roles. It sets out all the possible functions of the public sector ombudsmen in the UK, and examines the balance between these roles, and the extent to which the classical ombudsmen in the UK can play a role in human rights disputes.

5.2 The constitutional role of the ombudsman

Generally, the nature of the ombudsman institution worldwide is still to some extent not fully clear (Magnette, 2003). There are different views about the constitutional position of the ombudsman and the nature of its role. Van Acker et al. (2015) consider the ombudsman to be an auxiliary mechanism which helps political agencies – often parliaments – in their roles of supervising the activities of public administration. Magnette (2003) finds that ombudsman schemes can be seen as combining two different elements; the first is the ombudsman as a parliamentary body or an aid of parliament. The second element is that the ombudsman can be seen as similar to a court, as they both aim to resolve citizens' complaints and cases, and to promote the rule of law (Magnette, 2003). The ombudsman's ability to act as both a political and a quasi-judicial institution represents, according to Magnette (2003), the hybrid nature of the institution.

In the UK, a number of scholars have asserted that the PO has been designed and developed as an extension of Parliament to help MPs in their role of redressing constituents' complaints (Giddings, 2008; Drewry & Harlow, 1990). In other words, the PO has been introduced into the British system as a mean of enhancing parliamentary control over administrative decisions (Giddings et al., 1993). Moreover, Abraham (2008d) recognises the strong relationship between the PO and Parliament, and argues that the ombudsman is an adjunct of Parliament.

Along with holding the executive to account, Abraham (2008d, p.540) indicates that the PO plays a constitutional role in 'facilitating the deliberative exercise that underpins … democratic practice'. This view of the ombudsman's constitutional role has two elements: improving citizens' participation via their complaints in the process of deliberative democracy, and strengthening Parliament's ability to oversee government actions (Gill, 2014). It has been noted by Gill (2014) that according to this view, the basis of such a role is the relationship between the ombudsman and Parliament, and its potential contribution to the political system.

Similar to Magnette's (2003) point of view, Lewis and Birkinshaw (1993) argued that the ombudsman should be considered as an alternative mechanism – not only to the traditional means of redress that provide justice to citizens, but also to the unsuccessful political system. A contrasting view sees the PO as a part of the political system which differs from the legal

mechanisms of accountability (Elliott, 2013). The reason, according to this view, is that the ombudsman's findings make a contribution in the political sphere (Elliott, 2013).

Moreover, O'Brien (2018) argues that when determining the exact functions of the ombudsman, s/he should not be seen as a servant of any of other branches of the government of the state. As a consequence, the ombudsman should not be considered as merely an agent of the legislature or as a tool to fill any gaps in the judicial system. Instead, the ombudsman should be seen as a unique mechanism that handles individuals' grievances against the executive (O'Brien, 2018). Thus, according to this view, the ombudsman when handling a complaint does not act as adjudicator or mediator, but as an investigator (O'Brien, 2018).

Buck, Kirkham and Thompson have a more ambitious conception of the institution of ombudsman. They see the ombudsman as part of a new branch of government, which is an 'integrity branch' (Buck, Kirkham & Thompson, 2016; Kirkham, Thompson & Buck, 2009). They argue that as a result of the development of the modern administrative state, a number of unelected institutions have been created to secure the integrity of the executive and hold government to account, such as the public sector ombudsmen and the Parliamentary Commissioner for Standards. According to this view, these accountability institutions are not part of the traditional tripartite structure of the constitution; this reflects the importance of recognising the 'integrity branch' of government (Buck, Kirkham & Thompson, 2016; Kirkham, Thompson & Buck, 2009; McMillan, 2005). The main remits of this branch of government are supervising, controlling and educating public authorities, with a particular emphasis on anticorruption, appropriate decision-making, and preventing opposing interests (Field, 2010). However, this conceptualisation of the ombudsman's constitutional role has been criticised by Gill (2014, p.9), who indicates that:

> 'the constitutionality of the ombudsman institution is not reliant on recognising the existence of an integrity branch of government; and that a more secure and conceptually coherent basis for understanding the ombudsman's constitutionality lies in developing a clear recognition of the constitutional significance of administrative justice'.

Gill's point of view is that the fundamental principles of administrative justice underpin the essential actions of all the tripartite branches of the state. Hence, the administrative justice system, which comprises a number of mechanisms, principles and procedures, operates in all branches of the government, with the aim of enforcing its principles (Gill, 2014). Based on this analysis of the conceptualisation and position of administrative justice, the role of

the ombudsman and the nature of its input can be considered as a part of the administrative justice system. The ombudsman institution can be seen as a link between political and legal control, as the ombudsman aims to enhance political control and provide justice and remedies for citizens, to overcome any limitations of judicial review (Gill, 2014). Thus, we agree with Gill (2014) that the hybrid nature of the ombudsman allows it to achieve administrative justice and promote its constitutional values.

5.3 Normative, legal and descriptive debates regarding the conceptions of ombudsmen's roles

There is a continuing debate about the exact roles of the ombudsman and the balance between them. This debate has been conducted on several levels: normative, legal and descriptive. The following paragraphs discuss the functions of the ombudsman from each of these perspectives, beginning with the normative perspective.

5.3.1 Normative analysis of ombudsman's roles

The normative dispute concerns whether the public sector ombudsmen ought to combine the complains-handling role with that of improving the quality of public administration practices, and/or other roles. In the UK's ombudsman schemes, there is a continuing tension between the two main functions of the ombudsman: securing redress for citizens because of maladministration, and promoting good administration (Lewis & Birkinshaw, 1993); and there is a debate over which of these two functions should have priority.

The most widely used terms in the UK for defining the functions of the ombudsman are the labels 'fire-fighting' and 'fire-watching', which were first used by Harlow and Rawlings (1997). Fire-fighting means the role of the ombudsman in resolving individuals' complaints. In the fire-watching function, the ombudsman is able to identify any systemic failures in public administration, based on the knowledge gained from handling complaints; this role aims to prevent such failures from occurring in the future, and putting things rights (Harlow & Rawlings, 1997).

However, the analogy of 'fire-fighting' and 'fire-watching' has been criticised by Snell (2007), who argues that the metaphor should be expanded to cover an additional type of action, namely 'fire-prevention'. This refers to the proactive role of the ombudsman, in which the institution uses its own initiative power and a variety of techniques that are not

directly connected to the complaints-handling function, to supervise and monitor the quality of public administration's activities (Snell, 2007). Thus, Snell sees the ombudsman as having an important role in preventing maladministration from occurring in the first place, rather than seeking improvements in areas where public administration has already proved to be defective. Therefore, the key difference between the fire-watching role and the fire-prevention role is that the latter seeks improvement in areas where no complaint has been made, by using its own initiative power and other methods.

Lewis and Birkinshaw (1993) argue that one of the fundamental roles of the public sector ombudsmen is to identify the systemic roots of injustice in public administration activities, in a fashion that courts are not able to do. Harlow (2018) also argues that there should be a shift from an emphasis solely on complaints-handling, towards the model of an inspector of public services. Her point of view is 'that complaints-handling is, like the administration of justice or information-gathering and dissemination, simply another dimension of public services' (Harlow, 2018, p.88).

According to Harlow (1978), the PO is well equipped to handle the 'fire-watching' role. She argues that there is no other mechanism comparably suited to this task, as the ombudsman has a right of access to all the information on which the complaint was based. After investigating, the ombudsman issues a report which recommends remedies for the complainant to redress the injustice caused by the public authority; it may also include recommendations that aim to prevent any further occasions of similar administration faults from occurring in the future. More broadly, the report can also recommend that the general procedures followed by the public authority should be reassessed (Buck, Kirkham & Thompson, 2016). It could be argued that giving the ombudsman a role in preventing bad administration might be a more appropriate use of its resources than merely acting as a complaints-handling mechanism (Buck, Kirkham & Thompson, 2016). Nonetheless, some consider that there is no conflict between the different roles of the ombudsman, as they in practice overlap (Seneviratne, 2002; Kirkham, 2016).

5.3.2 Legal analysis of ombudsman's roles

Depending on how it is drafted, the legislation establishing an ombudsman might clearly set out its functions and purposes (Frahm, 2013). The role of the PO in the UK is specified in section 5(1) of the Parliamentary Commissioner Act 1967, which indicates that the

ombudsman can investigate citizens' grievances against government organisations where maladministration and injustice have occurred.

In addition, the PO may not conduct an investigation regarding administrative decisions in any case where the complainant has a right of appeal before a tribunal, or has a legal remedy in a court (s.5(2) of the Parliamentary Commissioner Act 1967), unless the ombudsman is satisfied in the circumstances that it is not reasonable to expect the person to use that remedy. This exclusion is compatible with the reasons for the establishment of the ombudsman in the UK; it was seen as a redress mechanism with the main purpose of investigating maladministration, rather than reviewing the legality of public administration actions (Seneviratne, 2002). Thus, the basic function of the ombudsman, as demonstrated in the legislation, appears to be the investigation of maladministration which causes injustice to the aggrieved person, rather than investigating breaches of law by the administration, or safeguarding the rule of law (Kirkham, Thompson & Buck, 2009). However, according to Kirkham, Thompson and Buck (2009, p.604), 'the approach of the ombudsmen towards legal issues is relatively straightforward'. Hence, when public sector ombudsmen worldwide and in the UK interpret the meaning of maladministration, they might consider a breach of law as being an instance of the broad concept of maladministration (Kirkham, Thompson & Buck, 2009).

The Whyatt report, which had a great influence on the Parliamentary Commissioner Act 1967, focused on one function of the ombudsman: handling citizens' grievances (Justice, 1961). The basic function of the ombudsman was assumed by the Justice report to be 'an administrative small claims court … decisively oriented towards small claims' (Harlow & Rawlings, 2009, p.537). It also has been argued that Whyatt report had a limited and strict view of the role of the ombudsman, as it merely concentrated on the ombudsman's role as complaints-handler, with no consideration to of its possible role in promoting good administration (Seneviratne, 1994). However, it is possible to have different interpretations of the 1967 Act; hence, it is legally possible to interpret the Act as authorising a dual-function approach of both fire-watching and fire-fighting. Moreover, the PHSO has on a number of occasions combined multiple complaints to carry out what is in effect a general inquiry; and no objections have been raised regarding the legality of this approach.

Whilst the legislation establishing the principal public sector ombudsmen in the UK appears to emphasise resolving citizens' disputes against government organisations as being their

primary role, the Public Services Reform (Scotland) Act 2010 seems to go beyond the traditional conception of an ombudsman's core role in the UK, towards a broader role in improving the quality of public services. According to the Public Services Reform (Scotland) Act 2010, the SPSO has the power to monitor and standardise the complains-handling process within public authorities in Scotland. Furthermore, both the LGSCO under s.23 of the Local Government Act 1989, and the PSOW under s.34 of the Public Services Ombudsman (Wales) Act 2019, have a statutory mandate to issue guidance about good administration practices; this can be considered a step towards the fire-watching role of the ombudsman.

In practice, the public sector ombudsmen in the UK have a cluster of roles, which include securing remedies for citizens, promoting good administration and supervising the quality of public administration's actions. Surprisingly, most of these functions are not explicitly enshrined in ombudsman legislation. It seems that the ombudsmen in the UK have the flexibility and the discretionary power to perform these multiple roles. What can be concluded regarding this point is that the roles performed in practice by the UK ombudsmen have significantly developed over the years, although there has been no major change in the ombudsman legislation, especially in the PHSO scheme.

5.3.3 Descriptive analysis of ombudsman's roles

In this section, we consider how the public sector ombudsmen in the UK have carried out their roles in practice, and how this has changed over the years. Evidence of how both the public sector ombudsmen themselves and others have perceived their role can be found in various official documents, including the ombudsmen's annual reports and reports of parliamentary committees. The function of the PO was described in a report[9] of the PASC in 1999 as settling citizens' grievances caused by maladministration by public authorities.

Although the primary focus of the first ombudsman in the UK was originally that of resolving citizens' disputes against public authorities, the focus of the public sector ombudsmen has changed over the years due to a number of factors; these include 'the influence of new conceptions of administrative justice, a managerial public administration ethos and some single-minded and determined ombudsmen' (Harlow, 2018, p.74). This shift

[9] PASC, 1999. Report of the Parliamentary Ombudsman for 1997–98, Session 1998–99. HC 136. House of Commons.

can be demonstrated in terms of how successive PO have described their role. For example, the third PO, Sir Idwal Pugh, described his office:

> '... as having two functions. One is the statutory one of investigating individual complaints and, where appropriate, recommending remedies for individual injustices sustained through maladministration. The other is to draw attention to lessons which should be learned from such individual cases and applied to improving administrative practice generally' (PCA, 1978, p.7).

More recently, the PHSO in its paper *Our strategy 2018–21* stated that:

> 'Investigating and resolving individual complaints is a key part of our role as a public services ombudsman, but our powers also allow us to shine a light on complaints across organisations, systems and sectors. Although not a consumer champion or advocacy service, we share the findings from our casework widely to help bring about improvements to public services' (PHSO, 2018a, p.6).

It is clear from such statements that successive holders of the office of PHSO regard improving the quality of public administration as a significant part of their role, along with the complaints-handling function.

In 2014, Robert Gordon was asked by the Minister for Government Policy to conduct a review of the public sector ombudsmen in the UK. In his review, Gordon recommended a number of suggestions which aimed to enhance the complaints-handling role of the ombudsman, as well as to increase the ombudsman's contribution in improving the quality of public services. One of the significant suggestions of this review was to grant the ombudsman the power to start an investigation on its own initiative (Gordon, 2014). Such a power might reinforce the proactive role of the ombudsman in enhancing good administration. However, the government response was opposed to this proposal, as it thought this power might negatively affect or diminish the role of the ombudsman in providing remedies for complainants (Cabinet Office, 2015). The own-motion power has also been recommended by the Parliamentary Commissioner for Administration Select Committee (PCASC) in its 10-year review of the PO in 1977–1978 (PCASC, 1978).

According to Abraham (2012), the ombudsman in practice engages in both the activities of fire-fighting and fire-watching as the core roles of the institution, by investigating citizens' complaints and identifying any systemic maladministration. It seems that the two roles of the ombudsman are connected to each other. In the researcher's view, the success of one role

might contribute to the success of the other. Generally, this is what contribute to the overall success of the ombudsman scheme, compared to other dispute resolution mechanisms existing in the administrative justice system. Based on the theoretical analysis conducted in this section, we can conclude that handling individuals' disputes provides access to justice and might build society's trust in public authorities. Promoting good administration could help to prevent further administrative deficiencies, and might represent an effective tool to achieve administrative justice values and provide high-quality public services to citizens.

5.4 Possible roles of the ombudsman

Having discussed the debates regarding the proper role of the public sector ombudsman, we will now describe each of the roles performed by the UK ombudsmen in a little more detail. Kirkham (2012), in his analysis of the development of ombudsman functions over the years, found that the ombudsman nowadays might still operate with its core role of resolving citizens' grievances arising from maladministration. However, the institution today has 'multi-faceted potential', and aims to have a wider effect on the way in which the executive and civic society operate (Kirkham, 2012). Therefore, the modern conception of ombudsmen's roles is that they can successfully combine several functions. These roles will be analysed in the following sections.

5.4.1 Handling complaints

Historically, the increasing growth of the executive activities has led to increasing contact between citizens and the state. These activities have the potential to produce injustice, errors, dissatisfactions and other manifestations of maladministration, which traditionally have been controlled by a various political and judicial mechanisms. Hence, there has been increasing interest in the potential of the ombudsman institution to provide remedies for citizens' grievances.

Jagerskiold (1960) considers the ombudsman's roles as a part of 'the network of controls', which includes three essential elements: (i) individuals' right to access public information, unless there is a legal exception to accessing to such information; (ii) the right of citizens to complain against public authorities because of their failures in delivering adequate and fair public services; and (iii) public servants' liability for loss, in circumstances where citizens' interests have been undermined as a consequence of misuse of public authorities' powers.

All public sector ombudsmen legislation in the UK indicates that the primary role of the ombudsman is handling citizens' complaints (Buck, Kirkham & Thompson, 2016). In practice, the ombudsman deals with complaints arising from a wide variety of policy areas, including issues such as health services, tax credit, housing, pensions and health care for disabled and elderly people, which are important matters for the citizens. An ombudsman appears as the last resort for the ordinary citizens to pursue their entitlements against public organisations (Buck, Kirkham & Thompson, 2016; Abraham, 2012). In practice, the ombudsman acts as the individuals' defender against the negative consequences of bureaucracy, in a fashion that is primarily designed to provide a remedy when it is impracticable for other mechanisms to do so. Thus, the existence of the ombudsman as a recourse for individuals is 'invaluable' (Abraham, 2012).

Despite the importance of the ombudsman as a dispute resolution mechanism, it has been proposed[10] that the investigation of citizens' complaints should be removed from the remit of ombudsmen in order to increase their capacity for conducting systemic investigations. However, this suggestion has been rejected by the ombudsman community in the UK, as handling individuals' complaints can be considered as the main tool for identifying any administrative deficiencies; thus, to abandon this role would make it less likely that an ombudsman would discover any systemic failures in public administration (Buck, Kirkham & Thompson, 2016; Harlow, 1978). Similarly, in written evidence submitted to the PASC by the PHSO in 2013, the ombudsman stated that:

> 'complaints are treated as critical management information and intelligence about what is happening … insight from complaints plays a critical role in indicating early symptoms of a problem with a public service' (PASC, 2013, para. 5–10).

As a result, handling citizens' complaints is the basic feature of many ombudsman schemes around the world, although there could be a change in ombudsmen's role, in which they concentrate their efforts on promoting good administration. Handling individuals' disputes may provide the ombudsman with all the information that it needs in its systemic work. Furthermore, the position of the ombudsman in a democratic constitutional settlement that aims to consider both citizens' interests and government bodies' legitimacy reflects the

[10] For example, in *the Report of the Independent Review of Regulation, Audit, Inspection and Complaints Handling of Public Services in Scotland* in 2007, Crerar recommended that the SPSO should 'no longer have responsibility for investigating and making final decisions on cases, as these will now be resolved by providers or by relevant scrutiny bodies; but – (h) Retain responsibility to investigate complaints and appeals where providers or scrutiny organisations cannot demonstrate sufficient robustness' (para. 11.18).

importance of the complainants in the ombudsman enterprise (Buck, Kirkham & Thompson, 2016).

5.4.2 Improving the quality of public administration

Grievances redress mechanisms in the administrative law field, might in addition to their role of resolving individuals' disputes, provide feedback to a public authority concerned about its performance. Such feedback could be used to improve the quality of routine administration, or to enhance the internal complaints-handling procedures within the public authority (Seneviratne, 2002). In general, the values of administrative law in recent years have been expanded, to focus not only on providing appropriate mechanisms for citizens to complain against public authorities, but also on improving public administration practices, and ensuring that public organisations learn from their faults (Gill, 2011; Stuhmcke, 2008).

To achieve this role, most of the public sector ombudsmen worldwide have the power to conduct an investigation on their own initiative. When the ombudsman identifies a number of complaints that indicate similar error, this can lead it to conduct a systemic investigation with the aim of finding the root causes of this error. However, not all of the own-initiative investigations are triggered by identifying specific errors (IOI, 2018).

The effective performance of the role of improving public administration might be obstructed in the UK by the fact that all the public sector ombudsmen – except for the NIPSO and the PSOW – lack the own initiative power. This means that these ombudsmen are not able to run an investigation unless there has been a complaint. The norm of ombudsman schemes around the world is that the ombudsman is able to conduct a systemic investigation without waiting for a specific complaint to be made (Kirkham, 2016; Tyndall, Mitchell & Gill, 2018). According to Tyndall, Mitchell and Gill (2018), the absence of own-motion power can limit to some extent the PHSO's ability to promote more systemic improvements in public administration. This statement can also be applied to the SPSO and the LGSCO.

It seems there is a concern that focusing on systemic investigations and systemic improvements might conflict with the historical intention for establishing the ombudsman in the UK. In other words, there is a risk that shifting the ombudsman's primary role as a complaints-handler towards improving the quality of public administration might lead to the ombudsman neglecting its core role (Stuhmcke, 2010). It could also be argued that this power might change the position of the ombudsman as a constitutional arrangement to

handle citizens disputes against the executive. The shift towards the fire-watching role and the use of own-motion power may also politicise the ombudsman scheme and decrease the legitimacy of the institution (Gill, 2018). Although there might not enough research on the extent of the adoption of this power by the ombudsmen, some of them who have own-motion power have tended to use it rarely. For example, in Sweden, only 1% of the ombudsman caseload has consisted of own-initiative investigations (Gordon, 2014).

To get around this restriction, the PO can in practice group together all the complaints that appear to raise similar issues, and choose four complaint samples; it can then publish its findings and recommendations in a special report to Parliament, in accordance with s.10(3) of the Parliamentary Commissioner Act 1967. This type of investigation can be used not only as a solution for the absence of own-motion power, but also to draw public attention to a problem in order to pressurise public authorities to change their attitudes (Harlow & Rawlings, 2009).

Unlike other public sector ombudsmen in the UK, the Public Services Ombudsman Act (Northern Ireland) 2016 has granted the NIPSO the power to conduct an own initiative investigation if there is 'a reasonable suspicion … (a) that there is a systemic maladministration, or … that systemic injustice has been sustained as a result of the exercise of professional judgement', in accordance with s.8 of this Act. Similar power has granted to the PSOW, according to s.4 of the Public Services Ombudsman (Wales) Act 2019. The first own-initiative investigation in the UK was launched by the NIPSO in June 2019; this is concerned with the personal independence payments administrated by the Department for Communities (NIPSO, 2019). More recently, in January 2021, the PSOW launched its first own-initiative investigation, regarding the homelessness process in local authorities in Wales (PSOW, 2021).

One of the ombudsman's activities in promoting good administration is issuing guidance and principles that aim to share and spread learning within government organisations. In 2009, for example, the PHSO published its *Principles of Good Administration*, which is a guidance for both complainants and public authorities. The publication includes the kinds of attitudes that the ombudsman expects the public sector to have when providing public services (PHSO, 2009b). The PHSO applies these principles when investigating the occurrence of service failures and maladministration (Abraham, 2008c). Similarly, the

LGSCO has an effective role in providing guidance and advice to the local authorities, with the aim of improving administrative practices (Kirkham, 2005c).

The role of the ombudsman in improving the quality of public administration has been developed and expanded over the years. Supervising and monitoring complaint-handling procedures within public authorities is a distinct element of the broader role of the ombudsman in improving public services, on the basis that a properly functioning public service ought to have an effective complaints procedure.

The SPSO can be considered a leader in performing this role in the UK. The SPSO has granted the power to standardise and supervise the complaints system in the public sector by the Public Service Reform (Scotland) Act 2010, based on the findings of the Crerar review in 2007. The NIPSO has a similar provision, in accordance with Part 3 of the Public Services Ombudsman Act (Northern Ireland) 2016. However, this provision has not yet been in force. Similarly, the complaints standards authority (CSA) has been created in the PSOW, in accordance with Part 4 of the Public Services Ombudsman (Wales) Act 2019.

In England, the situation is slightly different. Currently, the PHSO has no statutory power to perform as a CSA. However, the Draft Public Service Ombudsman Bill proposed 'a watered down version of the Scottish arrangements' (Gill, Mullen and Vivian, 2020, p.826). According to s.27 of the Bill, the proposed power of the ombudsman in this area is to provide information, advice and training to public bodies, with the aim of encouraging good practices in complaints handling. In this area, public authorities have an obligation to merely take account of such information in their internal complaint procedures. Therefore, the approach proposed in this Bill differs from those applied in the devolved government. The English approach has been considered as 'a promoter of best practice rather than an authority with formal standard-setting, monitoring, and compliance powers' (Gill, 2020, p.97). Thus, it can be said that the English approach in this area involves only the promotion of good practice in complaints handling.

In Scotland, the SPSO has the power to improve and standardise complaints-handling procedures within the public services. A small team called the Complaints Standards Authority (CSA) has been created within the SPSO to carry out this new function (Mullen, Gill & Vivian, 2017). The CSA can be considered as a 'quasi-regulator' of complaints-handling procedures in public services (Gill, 2012). It has also been noted that the changes

of ombudsmen's functions and operations might convert the institution of ombudsman to a 'regulator of complaints-handling' (Harlow, 2018, p.84).

The main roles of the CSA, according to ss.16A–16G of the Scottish Public Services Ombudsman Act 2002, can be summarised as follows: (i) to issue a 'statement of principles' about complaints-handling procedures within public authorities, on topics within ombudsman remits; (ii) to create a model complaints-handling procedure (MCHP) and specify the model that shall be operated by a public authority; and (iii) to issue a declaration of non-compliance when a public authority's complaints procedures do not follow the MCHP. As result, a number of models of complaints-handling procedures have been issued for public bodies across Scotland, including local government. One impact of this new function is that public authorities can learn not only from the findings of ombudsman's investigations, but can also take lessons from their own complaints' procedures (Gill, 2012).

Therefore, the SPSO has a specific role in monitoring and improving the standards of complaints-handling procedures within the Scottish public bodies. As the basic role of the classical ombudsman has been considered to be handling individuals' complaints, the regulatory role of the ombudsman is a significant shift from this classical function (Mullen, Gill & Vivian, 2017). It could be argued that such a regulatory role might conflict with the ombudsman's handling-complaints role. There is also a concern that in this regulatory role, the impartiality of the ombudsman may be compromised, particularly when the ombudsman has the responsibility of considering a complaint that has firstly been resolved by a complaints procedure that is monitored by the ombudsman (Kirkham, 2016). However, Kirkham (2016, p.107) states that:

> 'the current cohort of ombudsman schemes and legislative scrutineers appear to be more willing to dovetail the complaints standards role onto the existing mandate of ombudsman schemes'.

It is important to note that the SPSO considers the CSA role of the institution to be that of a monitor rather than a regulator of the complaints-handling process. As consequence, the SPSO has taken a collaborative approach with public bodies, to improve their complaints procedures (Mullen, Gill & Vivian, 2017). Moreover, it has been recommended that the function of acting as a CSA should be considered by other ombudsman schemes in the UK, with the purpose of improving customers' experience of complaints procedures in the public sector across the UK (Mullen, Gill & Vivian, 2017).

5.4.3 Human rights protection

Thus far, this chapter has considered two roles carried out by public sector ombudsmen: handling individuals' complaints and promoting good administrative practices. This means that the classical ombudsman has been designed to overcome any inefficiency in controlling bureaucracy and to improve the fairness of public administration (Saygin, 2009). This section of the chapter explores a third role: human rights protection.

The adoption of the ombudsman institution in many countries around the world has led to the expansion of its roles: from its traditional functions in the scope of administrative justice, to a wider role related to protecting human rights. Indeed, some consider that protecting human rights should not be seen as an incidental role, but as an essential function of the institution (Ayeni, 2014). Therefore, it is common for the contribution of ombudsmen to be analysed in the field of human rights (Bradley, 1980).

From a general perspective, the role of an ombudsman is essentially that of controlling and overseeing the relationship between the citizens and the state (Ayeni, 2014). Correspondingly, the concept of human rights is a broad notion which includes the protection of citizens' rights against the abuse of power by the executive, and the provision of the appropriate environmental and economic conditions. Hence, human rights frame the relationship between citizens and the state (Ambroz, 2005). As result, the concept of ombudsman and that of human rights meet at a crossroads, as they both aim to achieve a balance between the citizens' interests and rights, and the state's responsibilities.

The notion of human rights has a variety of meanings which depend on the context in which this phrase has been discussed. It might refer to an individual's basic rights that are enshrined in the constitution and protected in courts; or it might denote the social and economic rights of the citizens, which are protected by legislation (Bradley, 1980). In the context of this thesis, one of the essential rights is that of citizens to receive fair, efficient and equitable treatment by public authorities that provide public services – in addition to citizens' right to have access to justice when things go wrong. In short, one of the fundamental rights is the right to administrative justice.

Ombudsmen who have a human rights mandate have been categorised as 'hybrid ombudsmen' or 'human rights ombudsmen'. Human rights ombudsmen have spread throughout many regions and countries; for example, in Latin America and Eastern

European countries. The reasons for this development include 'democratization, public institution-building, comparative law influences, limited state resources, and international human rights law' (Reif, 2011, p.269).

The classical ombudsman and the human rights ombudsman can be considered as human rights institutions at the national level of governance, in a position similar to the human rights commissions and other specialised human rights institutions. Thus, the human rights ombudsman and to some extent the classical ombudsman can be categorised as non-judicial means of human rights protection. Certainly, each model of the ombudsman has a different capacity to implement and promote human rights norms, and this particularly depends on the legal and political system in which the ombudsman is based (Reif, 2004). Although most classical ombudsmen do not have a statutory function of human rights protection, they can play a vital role in this area, as part of their task in overseeing public administration is to investigate public authorities' activities that might breach human rights principles (Reif, 2012). In practice, the investigations of human rights matters which are conducted by the classical ombudsmen represent a small percentage of their overall caseload. There are also some classical ombudsmen that focus only on their traditional functions and do not investigate any human rights cases at all (Reif, 2012).

Ombudsmen with a specific human rights' mandate generally have two primary functions: (i) protection of human rights, and (ii) oversight of the fairness of public administration. By way of clarification, the model of the human rights ombudsman does not cover the same ground as the classical ombudsman, which on some occasions might deal with human rights elements in their role of enhancing administrative justice (Reif, 2004). Those ombudsmen, which are primarily institutions for the protection of human rights, are beyond the scope of this thesis, which mainly focuses on the classical ombudsman as it operates in the United Kingdom.

The public sector ombudsmen in the UK are classical ombudsmen with a core emphasis on the investigation of maladministration and the promotion of good administration. There is no reference to human rights protection in the legislation setting up ombudsmen in the UK; nor is there any reference in the Human Rights Act 1998 to the public sector ombudsmen. There is, therefore, no specific statutory basis for the ombudsman to play a role in this area. It can also be argued that the ombudsman does not satisfy the requirement for an effective remedy, imposed by the European Convention on Human Rights (ECHR) (Kirkham, 2008b).

According to Article 6 of the ECHR, 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. The UK ombudsman might not satisfy the requirements of Article 6 because the ombudsman uses an inquisitorial procedure and thus does not hold a public hearing (Kirkham, 2008b); and also because the remedy recommended by the ombudsman is not enforceable. However, ombudsman do deal with complaints – for examples, regarding health services, housing and social care – which might include issues of human rights respect and indignity (O'Reilly, 2007). Therefore, the ombudsman might have the power to investigate a complaint that involves a significant human rights matter (Kirkham, 2008b); because the complaint is also concerned with maladministration caused by injustice. Moreover, the public sector ombudsmen in the UK have been encouraged to have a role in promoting human rights based on the Court of Appeal ruling in the case *Anufrijeva v. Southwark* in 2003. [11]. It has also been proposed that human rights – in particular, socio-economic rights – should be taken into account by the ombudsmen when they investigate individuals' complaints (O'Reilly, 2007).

At the European level, the Council of Europe Human Rights Commissioner Thomas Hammarberg encouraged national ombudsmen to work collaboratively with their national human rights intuitions. This exhortation reinforces the recommendation of the Assembly of the Council of Europe in 2003, which encouraged ombudsmen to have a role in human rights protection (Assembly of the Council of Europe, 2003).

The PHSO in the UK oversees compliance with social rights as a part of her primary task of overseeing decisions of public administration (Abraham, 2008d). According to Abraham (2008a), the principles of human rights, which include autonomy, proportionality, individual dignity and equality, are exactly the standards that infuse the findings of ombudsmen. As a result, Abraham (2008a, p.377) suggests that the ombudsman should 'make adverse findings when a public authority fails to live up to the expectations laid down by the human rights principle'. Such failure is a manifestation of maladministration, and contributes to its adverse effects on the citizens (Abraham, 2008a).

To date, an express mandate to protect human rights has not been included in any public sector ombudsmen legislation in the UK. Nevertheless, ombudsmen in the UK have found themselves engaged in human rights protection. In practice, ombudsmen tend to provide

[11] *Anufrijeva and another v Southwark London Borough Council* [2003] EWCA Civ 1406; Q.B 1124.

assistance to a particular group of citizens who face similar problems caused by similar administrative defects. This assistance is achieved by conducting a systemic investigation with the aim of improving and developing public authority procedures within this area of defects. Health service users, social security recipients, war pensioners, taxpayers – all of these categories of citizens have benefited from the ombudsman's systemic work in achieving good administration. What can be concluded from the above point, is that the ombudsmen have a clear intention to improve and strengthen the social and economic position of citizens against the powers of bureaucracy (Bradley, 1980). Accordingly, ombudsman could be an important mechanism for protecting individuals' right to good administration and high-quality public services (Bradley, 1980). In practice, most of the public sector ombudsmen in the UK have recognised their role in the area of human rights, and have used human rights language and principles in their reports (O'Brien, 2009).

In this regard, the NIPSO in partnership with the Northern Ireland Human Rights Commission have developed a human right manual (NIPSO, 2016). This guidance has regarded human rights protection as a fundamental part of the ombudsman work. According to this manual, the NIPSO in its investigations will adopt human right principles contain in international treaties in which the UK is a party, Human Rights Act 1998, equality legislation, as well as a number of principles and values (NIPSO, 2016). Based on this human rights-based approach, the failure of public authorities to adhere to human rights norms can be considered as a form of maladministration. Human rights principles can also be used during the investigation process as a benchmark to explain the injustice occurred (NIPSO, 2016). It seems that unlike other UK public sector ombudsmen, the NIPSO has direct intention to contribute to human rights protection.

In conclusion, although the UK ombudsmen – except the NIPSO – make indirect contributions in human rights protection as part of their function in remedying maladministration and injustice caused by government organisations, this role has not been substantially developed in the UK.

5.5 Conclusion

The relationship between the citizens and the state, and the impact of bureaucracy on citizens' lives, are the key elements of ombudsmen's functions. There is some disagreement about the appropriate combination of roles for the public sector ombudsmen, both in the UK and worldwide. The basic function of the ombudsman, as it exists in most countries around

the world, is handling individuals' grievances against the executive. However, the role of the ombudsman has been developed over the years to cover other functions, including improving the quality of public administration, and human rights protection.

The UK public sector ombudsmen are concerned with improving the quality of public administration by highlighting any administrative insufficiency and notifying the public authority concerned about it, so that any similar wrongdoings can be prevented in the future. The UK ombudsmen have used a variety of methods to achieve this goal, such as conducting a group investigation and publishing guidance and standards of good administration.

In the UK there is a continuing debate about the key role of the ombudsman, regarding whether it should focus on its fire-fighting or its fire-watching role, and the potential impacts of this decision. As the ombudsmen legislation does not expressly deal with this issue, and there are different attitudes from both the ombudsmen themselves and the academic commentators, the question is still open.

In this chapter, we found that the role of the ombudsman in improving public services has been expanded to cover the standardisation of internal complaints procedures within public authorities. An ombudsman, based on his/her investigations, has the knowledge and experience required to help public authorities to improve their complaints procedures. Moreover, there are a number of human rights ombudsmen around the world that engage in human rights protection. Although the notion of human rights has a broad meaning, the institution of ombudsman is well equipped to promote human rights norms, especially in the area of social and economic rights. The link between the notion of human rights and the principles of good administration has encouraged the ombudsmen to engage in this area. Thus, in the UK, ombudsmen play an indirect role in promoting human rights, even if there is no explicit statutory basis for their work. However, the contributions of the UK ombudsmen in this area are primarily achieved as a consequence of performing the ombudsman's two main functions: complaints handling and promoting good administration.

The analysis of ombudsman's roles provided in this chapter explains why the ombudsman is a suitable institution to resolve the problems that exist in the Saudi administrative justice system. In the Saudi context, there is a gap in the justice system, as an individual who suffered from maladministration might not have an appropriate mechanism to complain and get a remedy. Additionally, maladministration is one of the defects that exist in the Saudi administrative system. There are also other deficiencies in the Saudi public administration,

that might affect the quality of public services. Thus, an ombudsman if introduced in Saudi Arabia can investigate maladministration occurred in public services, and provide remedies for aggrieved persons. It can also contribute to promote good administration and improve the quality of public services to meet citizens' expectations.

Chapter 6: Ombudsmen in the context of administrative justice

6.1 Introduction

In the context of legal transplants, it has been argued that in order to transplant a foreign institution, it is essential to have a deeper understanding of this institution, and this can be achieved by analysing its work in the broader system in which it operates (Jackson, 2012). Therefore, as the main aim of this thesis is to evaluate the validity of transplanting the institution of ombudsman into the Saudi Arabian legal system, it is essential to analyse the work of the ombudsman in the context of administrative justice. Indeed, the ombudsman institution, with its core roles of handling citizens' complaints and promoting good administration, cannot be analysed in isolation; therefore, it is important to properly locate the work of ombudsmen within the overall administrative justice system (Buck, Kirkham & Thompson, 2016). Thus, this chapter aims to discuss the definition and scope of administrative justice, and the ombudsman's contribution to the administrative justice system of the UK, compared to that of other redress mechanisms, particularly courts and tribunals. This chapter also intends to identify the available accountability arrangements that hold the UK ombudsmen to account.

Due to the complexity of the manifestations of bureaucracy, it is necessary to have a system which can review individual citizens' circumstances; rule on the legality of administrative decisions; and, where possible, identify any systemic failures, and seek to settle them (Ministry of Justice, 2012). Administrative justice is an important right of citizens, which has been enshrined in the constitution in a number of countries worldwide (Kirkham, 2011b). Furthermore, administrative justice, with its particular emphasis on securing the legality and fairness of public administration decisions, is one of the fundamental demands of society (OSCE's Office for Democratic Institutions and Human Rights, 2013).

A system of administrative justice can provide several benefits for individuals: for instance, it can build citizens' confidence and trust regarding decision-making in public administration (Ministry of Justice, 2012). The system can also obtain redress for citizens when public organisations' decisions or actions are not correct; whether this is because they are unlawful, or because maladministration has been found in the process of these decisions and actions.

The concept of administrative justice might be less familiar than either criminal justice, which is concerned with the prosecution of offenders, or civil justice, which involves disputes between individuals about their legal entitlements (Thomas & Tomlinson, 2017). The basic difference between administrative justice and other types of justice is that the former is essentially concerned with administrative decision-making (Thomas, 2011). Moreover, the administrative justice system consists of a number of institutions, values, principles, roles and procedures that aim to improve the quality of administrative decisions, and to help citizens to settle their disputes against the government; and on some occasions, to challenge the decisions of the executive or any other bodies that act on behalf of the government.

6.2 The concept of administrative justice

There is no consensus regarding the concept of administrative justice and its nature; in fact, there are diverse views (Partington, 1999). The concept of administrative justice encompasses a wide range of policy areas, which basically represent the interactions between citizens and government in the modern state. These policies cover a variety of areas relating to the essential interests and entitlements of citizens, such as health care, education, social security and immigration (PASC, 2012a). Although the administrative justice system is concerned with the important needs and interests of individuals, the system is less recognised and receives lower priority than either the civil or criminal justice systems, or the substantive policy in each area of government activity. It seems that the system lacks a clear understanding of its values and procedures, and also lacks strategic direction (PASC, 2012a). Thus, there is a need to concentrate on the users of public services, and to focus on the rule of the law and fairness, rather than merely focusing on public policy.

The term ‘administrative justice’ can be used to refer to ‘decisions made and actions taken by government bodies of all kind so the justice in question is that due to the citizen from the state’ (Mullen, 2010, p.383). Moreover, a statutory definition of administrative justice in the UK was provided by Schedule 7 of the Tribunals, Courts and Enforcement Act 2007, as follows:

> ‘the overall system by which decisions of an administrative or executive nature are made in relation to particular persons, including
> a) the procedures for making such decisions,
> b) the law under which such decisions are made, and

c) the systems for resolving disputes and airing grievances in relation to such decisions'.

However, this statutory definition is no longer in force, due to the abolition of the Administrative Justice and Tribunals Council (AJTC). The term 'administrative justice' can also refer to 'the principles that can be used to evaluate the justice inherent in administrative decision-making' (Adler, 2003, pp.323–324). According to Adler (2003), the concept of administrative justice has two main dimensions, namely, procedural fairness and substantive justice. Procedural fairness concerns the manner in which citizens are treated, while substantive justice focuses on the outcomes of administrative decisions.

Adler (2006) also states that there are two approaches to defining the concept of administrative justice. The first is a 'top down' approach, which focuses on a variety of redress mechanisms that play an essential role in resolving disputes between individuals and public organisations where citizens are dissatisfied with administrative decisions. In this conception of administrative justice, the role of judicial review is important as the primary mechanism for enunciating the general principles of legality, which cover a wide range of public administration processes (Thomas, 2011). This conception also recognises the importance of other redress mechanisms, such as tribunals and ombudsmen (Adler, 2006). The second approach is a 'bottom-up' conception of administrative justice, which is concerned with administrative decision-making (Adler, 2006). Thus, this view of administrative justice focuses not only on the external mechanisms of the administrative justice system, but also on the justice of initial decision-making and other processes that can enhance the quality and fairness of administrative decisions (Adler, 2006; Thomas, 2011). It is important to note that the position and existence of the above two conceptions of administrative justice 'has ebbed and flowed in recent years' (Adler, 2006, p.982).

Similarly to Adler's conception of administrative justice, Halliday and Scott (2010a) distinguish two perspectives from which the concept of administrative justice can be studied: (i) initial decision-making, which includes the application of rules and policies; and (ii) the reviewing of administrative decisions, which include the dispute resolution mechanisms. Mullen (2016) adds an important aspect to the notion of administrative justice, which other legal scholars might not pay enough attention to when they analyse the theory of administrative justice. Mullen (2016) states that one of the dimensions of the administrative justice concept is 'the non-decisional failing' of government organisations, which can take several forms, such as delay, bias and neglect.

Based on the above analysis, we might say that administrative justice has two main elements: initial decision-making, and redress mechanisms. Buck, Kirkham and Thompson (2016) add a third element: they propose that one of the primary areas of administrative justice is the accountability arrangements for both administrative decision-makers and redress mechanisms. They argue that treating accountability arrangements as an essential dimension of administrative justice helps to set the administrative justice system's position within the constitutional and political sphere. They use the terms 'getting it right', which refers to initial decision-making; 'putting it right', which refers to redress mechanisms; and 'setting it right', which refers to the governance and accountability forms (Buck, Kirkham and Thompson, 2016).

Accordingly, it seems that there is a general agreement amongst legal scholars on two areas in which the concept of administrative justice can be analysed: namely, initial decision-making by public authorities, and remedies available for citizens, for challenging adverse initial decisions. Thus, we can say that the scope of administrative justice covers these two areas. There is not yet a consensus that the third element suggested by Buck, Kirkham and Thompson, (2016), accountability arrangements, is an essential part of the concept.

Whatever the precise scope of the concept, administrative justice can be analysed either normatively or descriptively. The normative approach focuses on the normative and substantive values and principles of administrative justice; it also sets out how both initial decision-making and citizens' remedies ought to work. The descriptive approach explains how initial decisions are made in practice, and how citizens' remedies work in practice.

6.3 The scope of administrative justice

The scope of administrative justice, as stated above, involves both first-instance decision-making by government agencies, and redress mechanisms which review administrative decisions and provide remedies for citizens. Thus, the scope of administrative justice covers a large area, as administrative bodies issue millions of administrative decisions each year, adding to the high volume of administrative decisions that have been reviewed by dispute resolution mechanisms such as courts, tribunals and ombudsmen. It is also important to note that the scope and scale of administrative justice in practice is not fully fixed, as any changes in public policy can affect the scope of administrative justice, in terms of both initial decision-making and citizens' remedies (Thomas & Tomlinson, 2016). Although the traditional focus of administrative justice has been on redress mechanisms, the more recent

discussion of administrative justice has also emphasised on good initial decision-making – in other words, what occurs within public authorities, rather than the external redress mechanisms (Thomas, 2015).

6.3.1 Initial decision-making

One of the key areas of administrative justice is initial decision-making by public authorities. Legal scholars who follow this conception in their administrative justice research aim to evaluate and assess the process of first-instance decision-making that has been followed by public authorities and government bodies (Halliday & Scott, 2010a). Hence, the fundamental concern of this approach has been the justice and fairness of first-instance decision-making in public administration.

One of the foundation studies of this approach is that of Mashaw. [12] In his book *Bureaucratic Justice*, which examined social security disability claims in the US, Mashaw defined administrative justice as 'those qualities of a decision process that provide arguments for acceptability of its decisions' (Mashaw, 1983, pp.24-25). As a result, Mashaw's approach to administrative justice can be considered as a bottom-up approach because it concerns the initial decisions, instead of the review or the appeal of these decisions (Harlow & Rawlings, 2009).

In his case study, Mashaw identified three strands of criticism of the US disability scheme: failing to provide good services, individuals' incapacity to protect their rights, and production of unpredictable and inconsistent decisions. Mashaw (1983) posited that the three identified criticisms assumed three distinct models of administrative justice, which he labelled bureaucratic rationality, professional treatment, and moral judgment.

[12] Mashaw's conception of administrative justice has been singled out for discussion in this stage due to the fact that his study has been influential and has been used as a starting point in a number of scholars' publications that are concerned with administrative justice. Examples of these publications include:

- Adler, M., 2003. A socio-legal approach to administrative justice. *Law & Policy*. 25(4), pp.323-352.
- Adler, M., 2006. Fairness in context. *Journal of Law and Society*. 33(4), pp.615-638.
- Adler, M., 2010. Understanding and analysing administrative justice. In: Adler, M., ed., 2010. *Administrative justice in context*. Oxford: Hart publishing, pp.129-159.
- Thomas, R. and Tomlinson, J., 2017. Mapping current issues in administrative justice: austerity and the 'more bureaucratic rationality' approach. *Journal of Social Welfare and Family Law*. 39(3), pp.380-399.

For example, Adler (2003, 2006, 2010) has extended Mashaw's models of administrative justice, and added three further models, labelled managerialist, consumerist, and market models.

The bureaucratic rationality model aims to establish an accurate and efficient decision-making system with the least possible cost. The general technique of decision-making according to this model is processing and collecting information. The legitimacy of the bureaucratic rationality model flows from its concern for implementing social desires while spending minimum social resources (Mashaw, 1983).

The second model of administrative justice is the professional treatment model, which aims 'to serve the client'. The decision-making embodied in this model is by nature client oriented. One of the techniques used in this model is the collection of information; but unlike the bureaucratic rationality model, 'the incompleteness of facts, the singularity of individual contexts and the ultimately intuitive nature of judgement are recognised' (Mashaw, 1983, p.27). Therefore, according this model, the emphasis of justice is on having a proper judgment based on the unique circumstances and needs of each individual (Mashaw, 1983).

Similarly to the bureaucratic rationality model of justice, the moral judgment model seeks to make fair decisions which are made by applying legal rules. In fact, the moral judgment model differs from the bureaucratic rationality model in that its process includes not only the application of legal norms, but also the test of preference and values. Hence, the decision-making according to this model is 'value defining' (Mashaw, 1983, p.188). This means that the key issue of the adjudicatory process in this model is 'the deservingness of some or all of the parties in the context of certain events, transactions or relationships that give rise to a claim' (Mashaw, 1983, p.30). Mashaw (1983) argues that all these three models of justice have different objects, and follow distinct approaches and techniques to achieve their goals. Lastly, according to Mashaw's hypothesis, these models are 'coherent and attractive'; and although they might in practice exist at the same time, they are competitive (Mashaw, 1983).

6.3.2 Citizens' remedies

Administrative justice can be analysed in terms of the contribution made by various dispute resolution mechanisms, such as courts, tribunals and ombudsmen, in providing remedies for citizens and achieving administrative justice's values and goals. Research in this area tends to focus on a number of objects: for instance, it can study ordinary citizens' possible obstacles or motivations in using redress mechanisms. Such research can also focus on the individuals' experiences of the external mechanisms of administrative justice, or examine the performance and operation of a particular mechanism within the administrative justice system (Halliday & Scott, 2010a).

When discussing the mechanisms of administrative justice system, it is clear that courts can be considered as the first means that provide remedies for individuals, for poor decisions by public authorities. However, several other mechanisms with different features and procedures, such as tribunals and public sector ombudsmen, have been established for the purpose of achieving administrative justice's goals and overcoming the negative impacts of bureaucracy on citizens' lives. There are also a number of alternative dispute resolution mechanisms, such as mediation, conciliation, and internal procedures.

There is no doubt that courts have been the traditional mechanism for providing remedies for individuals in their disputes against government organisations. However, relying only on courts to achieve administrative justice and to strike a balance between citizens and the state might not be viable in this era. The development of public law, and the regulators' ambitions to safeguard the rule of law and protect individuals from the abuse of the executive, play a pivotal role in establishing a number of mechanisms in the administrative justice system; and to some extent, these mechanisms aim to overcome any limitations in the judicial review process. According to Buck, Kirkham and Thompson (2011), courts alone are not able to achieve all the values and constitutional principles derived from the concept of administrative justice. They indicated that the contributions of quasi-judicial institutions and non-adjudicative mechanisms are required to achieve the administrative justice principles, including the principle of good administration. This means that the concept of administrative justice has a wide scope, which covers not only the courts and the criterion of legality, but also includes other redress mechanisms (Buck, Kirkham & Thompson, 2011).

Practically, as there is a continuing increase in the use of judicial review, this can cause a number of problems, such as delays and cost inefficiencies; and these, in turn, might diminish courts' capacity as an effective means of dispute resolution. This might also reduce courts' ability to promote good administration practices within public administration (Marrani & Farah, 2014). Moreover, this might affect the quality of justice provided to citizens. As a result, alternative dispute resolution can be considered as a proportionate response to overcome the limitations of judicial review. However, there is a concern regarding whether alternative dispute resolution in the field of public law can occupy the important role that judicial review has played for a long time, in terms of protecting individuals from public authorities' unlawful decisions, while simultaneously promoting constitutional principles and standards (Marrani & Farah, 2014). In the White Paper *Transforming Public Services* in 2004, the government of the time aimed to develop:

> ‘a range of tailored dispute resolution services, so that different types of dispute can be resolved fairly, quickly, efficiently and effectively, without recourse to the expense and formality of courts and tribunals where this is not necessary’ (Department for Constitutional Affairs, 2004, para. 2.3).

Thus, one of the significant contributions of this White Paper was the principle of proportionate dispute resolution in the public sector. Here, it is important to distinguish between the terms ‘alternative’ and ‘proportionate’. Alternative dispute resolution aims to provide a redress mechanism which is solely an alternative to the work of the courts; whereas proportionate dispute resolution ‘is more inclusive, an instrument of potential integration without the surrender of difference’ (Abraham, 2011a, p.24). It seems that the concept of proportionate dispute resolution has a wider perspective, which considers the distinctive characteristics and procedures of each dispute resolution mechanism.

Ombudsmen can be considered as an alternative to the courts, tribunals, and even to a number of dispute resolution mechanisms. It is understood that the ombudsman has been established in the UK to fill a gap in citizens’ remedies against the executive, in relation to maladministration. Therefore, the public sector ombudsman is not intended to replace the essential role of judicial review. In fact, the ombudsman is a non-judicial institution, based on a set of distinctive characteristics that distinguish it from other redress mechanisms (Remac, 2014). The ombudsman has also been recognised as a type of alternative dispute resolution mechanism by the holders of this office as the institution to some extent considers as an alternative to the courts (Abraham, 2011a). Furthermore, the institution of ombudsman is also a type of proportionate dispute resolution mechanism, because it has informal procedures with no cost and time efficiency, compared to courts and tribunals.

In general, this conception of administrative justice emphasises reviewing public authorities’ decisions through redress mechanisms. These mechanisms of administrative justice have a dual role: to provide citizens with an accessible mechanism to complain against the wrongdoings of public authorities and obtain remedies, while at the same time promoting the principles of good administration by ensuring that the public authorities learn from their mistakes.

Having clarified the scope of the concept of administrative justice, the following paragraphs of this chapter will discuss the normative and descriptive analysis of administrative justice. The analysis will only cover initial decision-making, as administrative justice remedies will be analysed in more depth in section 6.6.

6.4 Normative analysis of administrative justice

According to Galligan (2001), the notion of administrative justice involves various principles and values which are accepted by the democratic states of Europe. In the UK, administrative justice and its important goals have been recognised as a result of the influence of a number of parties, such as courts, tribunals, ombudsman, meaningful external reviews – and to some extent, the impact of the European Court of Justice and the European Court of Human Rights. All of these efforts have produced a set of normative principles of administrative justice, which aim to ensure that government organisations are operated with high standards.

Galligan's (2001) point of view is that administrative justice involves a number of principles which mainly aim to organise the interaction between individuals and the state, with particular emphasis on the behaviour of public authorities. The principles of administrative justice in administrative law's rules can be expressed in the exercise of administrative justice mechanisms such as courts, tribunals and ombudsman. According to Galligan (2001), the notion of administrative justice involves a variety of concepts and norms. It covers citizens' right to equal and satisfactory treatment by public administration without any forms of bias. It also includes other principles such as fairness, transparency, openness and the rule of law. Furthermore, administrative justice also aims to limit the wide discretion given to government organisations, with the intention of preventing any abuse of power and providing high-quality public services (Galligan, 2001).

In his substantive analysis of administrative decision-making, Galligan (1996) proposes that there are two competitive models: the bureaucratic administration model and the fair treatment model. These two models resemble two of Mashaw's models, as the bureaucratic administration model matches to a great extent Mashaw's bureaucratic rationality model and the fair treatment model resembles Mashaw's moral judgement model.

The bureaucratic administration model aims to achieve accurate and appropriate decision-making through the implementation of legal standards and rules, and to achieve this with minimum cost and time. The emphasis of this model is on maximising the common good and achieving aggregate contributions, with limited consideration to individual cases. The fair treatment model is concerned not only with achieving accurate decision-making; it also seeks to apply fairness and moral values, which means that individual cases are the primary emphasis of this model (Galligan, 1996).

Galligan (1996) notes that the bureaucratic administration model is the prime and dominant principle that has been adopted by modern public administration. As the bureaucratic administration model is concerned only with the overall effective outcomes, and the fair treatment model is concerned with each individual case, Galligan (1996) suggests that it is essential to suppress the dominance of the bureaucratic administration model, with the purpose of boosting the fair treatment model. However, this conception of administrative justice has been criticised,

> 'because of its normative commitment to one, among several, competing conceptions of administrative justice and because of its failure to recognise the opportunity costs associated with its realisation' (Adler, 2010, p.152).

Generally, public authorities are required by public policy to issue administrative decisions which mainly affect the entitlements and burdens of individuals. When making administrative decisions, public bodies should fundamentally base their decisions on consideration of citizens' rights and interests. Furthermore, public agencies in the process of administrative decision-making should implement public policies endorsed by government. Administrative decisions that directly affect the citizens should be issued in accordance with the formal standards which can be found in legislation, case law and other authoritative sources (Mullen, 2016).

In recent decades, there has been more discussion of the importance of good initial decision-making and of promoting citizens' right to get administrative decision right first time. Public authorities ought to make good administrative decisions, for a number of reasons: for instance, this can ensure a good implementation of public policies and rules. It can also help to decrease the number of cases handled by dispute resolution mechanisms such as courts, tribunals and ombudsmen, which in turn can reduce the cost of public administration. Moreover, good administrative decisions contribute to good public services for users, which can reduce the stress experienced by the users involved. High-standard administrative decisions can also reinforce citizens' confidence and trust in public authorities, and promote the legitimacy of public authorities and their procedures (Thomas & Tomlinson, 2016; Thomas, 2015).

In theory, all administrative decisions should start and finish within government organisations (Thomas, 2015). Based on principles of good administration, government agencies should make good administrative decisions. Accuracy is the key value of

administrative justice, although there are other important goals, such as fairness, efficiency, transparency, and cost and time effectiveness (Thomas, 2015). Thus, it is clear that these values may be undermined if the administrative decisions are not correct. Furthermore, good administrative decisions have three essential elements, as follows. First, good initial decision-making should be based on a correct interpretation of the relevant law and guidance. Second, it also should rely on a full consideration and correct assessment of the facts concerning the circumstances of the users of public services. Third, where they have some discretion, government agencies should exercise that discretion appropriately, to achieve the best decision on the merits (Thomas, 2015; Mullen, 2016).

6.5 Descriptive analysis of administrative justice

In its strategic work programme for the period 2013–16, the Ministry of Justice stated that its intention was to ensure an effective and efficient system of administrative justice with a core emphasis on its users, in addition to providing great value for money for the taxpayer (Ministry of Justice, 2012). More recently, in a joint paper[13] by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, they announced that their vision is to attain a justice system that meets the needs of the citizens. One of the significant reforms included in this paper is the introduction of digitalisation to the justice system, including the administrative justice system. The aim of this reform is to modernise access to justice and to make it more accessible to citizens.

Over the years, there have been a number of reviews and reforms[14] of the administrative justice system in the UK. These have aimed to improve its structure and ensure the independence and separation between administrative decision-makers and mechanisms for the redress of grievances, particularly tribunals. This separation is essential to increase citizens' trust in both public authorities, who have the responsibilities of decision-making, and in the redress mechanisms which review these decisions. This separation can also prevent any conflicts of interest between the two processes, and can thereby enhance the role

[13] Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, 2016. Transforming Our Justice System. Ministry of Justice. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf [Accessed 19 February 2020].

[14] For example: The Leggat Review in 2001, T*ribunals for Users: One System, One Service: Report of the Review of Tribunals*; the White Paper *Transforming Public Services: Complaints, Redress and Tribunals* in 2004; and the Tribunals, Courts and Enforcement Act 2007.

of redress mechanisms in improving the decision-making process, and enabling government agencies to learn from their faults (Ministry of Justice, 2012).

In practice, there is no 'consistent system-wide data' on government agencies' administrative decisions, or on complaints which have been settled internally. This means that it might not be easy to identify if there are specific areas of the decision-making process where there is a genuine concern (Ministry of Justice, 2012). According to Thomas (2015, p.4) 'there is a general impression that initial decisions are of variable quality'.

The large volume of upheld and successful appeals by tribunals against public authorities' decisions can be considered an indicator of public administration's failure to get things right first time (PASC, 2012b). The PASC (2012b) also states that public administration should make correct administrative decisions in the first place, as the level of grievances occurring in this sector, and the cost of bad administrative decisions, are not acceptable.

Government bodies in practice make millions of administrative decisions that affect the entitlements and burdens of the ordinary citizen each year. On the other hand, thousands of appeals and complaints against these decisions have been handled by courts, tribunals and ombudsmen, where these complaints represent 'only the tip of the iceberg' of the overall scope of administrative justice (PASC, 2012a), and certainly of the actual proportion of poor decisions made by public authorities.

Ison (1999), in analysing administrative justice, distinguishes between citizens who suffer from bad administrative decisions and those who appeal or complain against these decisions. Not all individuals who are affected by defective decisions by government departments complain about them. According to Ison (1999), the actual amount of grievances and injustice can be larger amongst users who accept administrative decisions, compared to users who complain.

In this regard, there are a number of barriers that prevent citizens from challenging bad administrative decisions; these include lack of awareness, and the cost and complexity of the redress system in the public sector. There are also other barriers that might prevent specific categories of citizens from appealing or complaining about poor decisions by public authorities, such as disability, health problems, language (particularly in asylum and immigration cases), and the related issues of interpretation (Adler & Gulland, 2003). Taking

these facts into consideration, it is necessary that government agencies make more efforts to enhance the quality of initial decision-making.

6.6 Mechanisms of administrative justice

The institutional scope of administrative justice covers all the stages of administrative decision-making that establish the rights and burdens of individuals (Partington, 1999). This means that the institutions of the administrative justice system include both decision-makers and a variety of mechanisms that review administrative decisions. However, in this section we will focus on the second type of administrative justice institutions, namely dispute resolution mechanisms, with a particular emphasis on courts, tribunals and ombudsmen.

The following analysis is essential to answer the main questions of this thesis, as it will explain how the work and procedures of the ombudsman differ from courts and other redress mechanisms. As discussed in chapter 2, the Board of Grievances and the quasi-judicial committees are the redress mechanisms available in the Saudi justice system. Therefore, in the process of examining the idea of transplanting an ombudsman into Saudi Arabia, it is essential to illustrate the unique contribution of the ombudsman, and explain how the ombudsman if introduced in Saudi Arabia might make a greater contribution to the Saudi justice system compared to the Board of Grievances and the quasi-judicial committees.

Until recently, analysis of administrative law tended to strictly separate the mechanisms of administrative law into two groups: courts on one side, and alternative dispute resolution mechanisms, such as tribunals and ombudsmen, on the other. This analysis can undermine and minimise the significance and contribution of the alternative dispute resolutions (Buck, Kirkham & Thompson, 2011). Therefore, in order to explore the overall contribution of the administrative justice system, the mechanisms of this system and their contributions should not be analysed or reviewed in isolation.

It is essential to have a holistic overview of the administrative justice system. In the UK, there was a formal attempt to holistically review and assess the system of administrative justice by the establishment of the AJTC. The AJTC was set up by the Tribunals, Courts and Enforcement Act 2007; its main role as a public body was to supervise the administrative justice system in the UK, and to review the relationship between the redress mechanisms that existed in this system. However, this body was abolished in 2013, which means that currently there is no central body that oversees the administrative justice system in the UK,

and is able to assess the system as a whole and suggest improvements to it. Subsequently, it is difficult to make major improvements in the administrative justice system as a whole, or at least to review the system, in the absence of a formal specific body. Compared to civil justice and criminal justice, citizens on average are likely to face more issues which fall within the scope of administrative justice, as administrative decisions by public authorities can have diverse impacts on the lives of ordinary citizens (Abraham, 2011a).

The administrative justice system in the UK is complex because it consists of a number of mechanisms which were created incrementally in an *ad hoc* manner and supervised by a number of different authorities. Further complexity has been added by the development of the separate redress systems for devolved government. Each mechanism existing in the system of administrative justice deals with a number of matters and issues, and provides a variety of remedies. As the current remedial mechanisms have been created on an *ad hoc* basis, there has been no consideration of the overall structure of the system (Le Sueur, 2012).

Therefore, in practice there are overlaps in the remits of dispute resolution mechanisms in the administrative justice system, and gaps in the system, which have been recognised by legal scholars and the users of the system (Thompson, 2015a). Ultimately, the government's intention should be to reinforce the consistency of the administrative justice system in the UK. It is necessary to stress here that there is no conflict between the institutions that exist in the administrative justice system. In fact, each mechanism makes its own contribution to achieving the goals and constitutional values of administrative justice.

It is clear that the basic function of dispute resolution mechanisms is to handle citizens' grievances against public bodies. However, due to the development of the concept of administrative justice, there has been increasing demand for redress mechanisms in the public sector, to provide feedback to public authorities about the way they make decisions that affect citizens. The overall aim of this feedback is to prevent the occurrence of similar faults. In other words, redress mechanisms should have the capacity of 'putting things right' and 'getting things right first time' (Buck, Kirkham &Thompson, 2011). Undoubtedly, some mechanisms in the administrative justice system could be more effective in helping government departments to learn from their faults.

The following sections provide a comparative analysis of the three main redress mechanisms[15] existing in the administrative justice system in the UK: courts, tribunals and ombudsmen. This analysis is structured by referring to five criteria. The first criterion is the scope of their work, which means the areas of public administration covered by each mechanism. The second is called 'decision criteria', which refer to the standards used by each mechanism to resolve citizens' disputes. For the third criterion, the type of process, it is important to distinguish between four types of procedures: the adjudicative adversarial method, adjudicative inquisitorial method, non-adjudicative inquisitorial method, and the enabling approach. The fourth criterion is the effect of the decision; whether it is binding or not. The last criterion is the impact of redress mechanisms' decision on the individual case, and its influence and wider impact on the performance of public administration.

6.6.1 Courts

Courts are the traditional means of settling citizens' disputes against government agencies. Handling disputes against the state can takes three forms: application for judicial review, appeals created by specific statutes, and actions which fall under the scope of private law (Mullen, 2010). The scope of judicial review, in principle, covers all areas of public administration: for example, social security, immigration and asylum, education and licensing. By contrast, the jurisdiction of courts in appeals is available only when created by specific statutes.

Judicial review is a remedy of last resort, in that the individual is required to exhaust any alternative remedy available before applying for judicial review. Generally, the criterion against which the courts test administrative decisions and the actions of public administration is legality. Based on the notion of legality, the courts are entitled to question errors of law and have limited power to invalidate decisions for mistakes of facts. Thus, courts have a limited ability to test the appropriate use of discretionary power by public authorities. The concept of legality as the main criterion of the courts' work means that a number of individuals' disputes, which relate to lawful but unfair decisions or to various forms of maladministration, are beyond the remit of the courts (Mullen, 2010). The type of

[15] There are also other types of citizens' remedies which do not fit with these three main types. For example, there is the right of the dissatisfied applicant to appeal the decision of the local planning authority. In this case, the appeal decision will be made by the Secretary of State or a specific planning inspector. There is also the right of statutory review.

process followed by courts is adjudicative where this approach tends to be formal and adversarial.

It is also important to note that courts' decisions are binding on public administration. In terms of the impact of judicial review on individual citizens, the courts have a more limited ability to provide an effective remedy, compared to other redress mechanisms such as tribunals and ombudsmen, because judicial review is essentially concerned only with the legality of administrative decisions. Moreover, one of the shortcomings of judicial review from the citizens' perspective is the need for legal representation, as not all citizens can afford the expensive cost of that. Even with the availability of legal aid for specific categories of citizens, some of them may be not eligible (Thompson, 2015a). Therefore, judicial review may be less accessible than other redress mechanisms, such as an ombudsman, as there is no need to employ a lawyer in ombudsmen's investigations.

There is no doubt that courts are an important means of settling disputes between individuals and public administration. However, there is a debate among legal scholars regarding the contribution of judicial review in improving public authorities' behaviour and reinforcing good administration (Platt, Sunkin & Calvo, 2010; Buck, Kirkham &Thompson, 2011). The question arises here of whether or not judicial review plays an effective role in improving the quality of public services. In other words, do the courts help to achieve high standards of public services, and does judicial review motivate public administration to adhere to the principles of justice, fairness and legality, which in turn can promote principles of good administration? (Sunkin & Bondy, 2016).

The particular emphasis of the judicial review process, when resolving a dispute between an individual and a government body, is the application of law to specific cases. According to Buck, Kirkham and Thompson (2011), decisions made by courts are not followed up, which means that the extent to which public administration applies declarations made by courts is unknown. Hence, the main aim of judicial review is resolving individual cases, and the judges seem to pay less attention to the administrative impact of their rulings (Hertogh, 2001). By contrast, it has been argued that the collaborative relationship between the ombudsman and government agencies can lead to more systemic effects than arise from the enforcement style of the courts process (Hertogh, 2001).

According to Sunkin (2004), studying the effect of courts' rulings on bureaucratic decision-making and the internal complaints procedures within public authorities is one of the 'most

difficult' areas of research. Judicial review may have a variety of impacts, depending on the perspective from which this impact has been analysed. The influence of judicial review on bureaucracy and routine decision-making in public law can differ according to a number of dimensions, such as time, individuals, public authorities, or the nature of the task reviewed (Richardson, 2004). Therefore, there is no one dimension that can determine the impact of the courts in improving the quality of public administration decisions and actions. It could be said that the effects of court rulings on public administration might take two forms: changing public policy within a particular public body, or altering of the application of the law according to which the administrative decision-making has been processed by public authorities.

In other words, there are two types of response to judicial review: formal and informal. The formal response is represented in the formalisation of a particular rule or an official decision. The informal response can take a variety of forms, such as the changing attitude or behaviour of decision-makers (Sunkin, 2004). In a broader analysis of the impact of judicial rulings on public administration, it has been noted that the constant and deep influence of courts can be found in the informal attitudes of government organisations and their internal work cultures, instead of their formal response and their public policy (Sunkin & Le Sueur, 1991, cited in Hertogh & Halliday, 2004).

The predominant view among legal academics is that the courts have a limited capacity to positively affect the bureaucratic decision-making (Richardson, 2004). In her empirical research on the courts' influence on administrative decision-making in the UK, Richardson (2004, pp.114–115) concluded that:

> 'there is nothing particularly significant about judicial review; it is likely to be simply one of a number of factors within what Sunkin describes as an administrative soup of influences on decision-making'.

In their quantitative study, Platt, Sunkin and Calvo (2010) observed that judicial review makes a modest contribution to improving the quality of public authorities' services. Moreover, Halliday (2000), in his research on the impact of judicial review on local government's administrative decisions of regarding homelessness, found that:

> 'despite extensive and prolonged exposure to judicial scrutiny, unlawful decision-making was rife in each authority. In different (and sometimes subtle) ways the local authorities' administrative processes displayed

> considerable evidence of values and priorities which were in conflict with the norms of administrative law' (Halliday, 2000, p.122).

Therefore, from the research that has been carried out to date, it seems that judicial review might make a limited contribution to improving the general quality of administrative decisions issued by public authorities.

6.6.2 Tribunals

Tribunals are one of the significant features of public law in the last century. The intention for establishing tribunals was to provide the citizens with an independent institution to settle their grievances against the unlawful actions and decisions of public authorities. Thus, they have been considered a judicial means to protect citizens' rights by providing a means of pursuing their disputes against the executive (Thomas, 2011). Tribunals have been developed for a number of reasons. The impact of the state's increasing intervention in society, and the growth in the entitlements and burdens of ordinary citizens, led to the need to provide citizens with another means to settle their disputes against government agencies. Factors related to the court's procedures, such as high cost, delay, and the potential 'antipathy to social legislation', made it irrational to resort to the courts for all kinds of citizen v. public administration disputes (Mullen, 2010).

The scope of tribunals covers various areas of public administration that affect the life of citizens. According to Thomas (2016b), the tribunals' remits covers both high-volume jurisdictions such as social security, immigration and asylum, and tax credits; and lower-volume jurisdictions, which include education and mental health. The concept of legality is central to the work of tribunals, but their decision criteria are broader than legality in the narrow sense, as citizens can appeal administrative decisions to the tribunals based on errors of law, fact and discretion. Unlike the courts, tribunals have full jurisdiction to correct errors of fact and can re-exercise any discretion possessed by the administration. This means that citizens have the right to challenge before tribunals the merits of administrative decisions in a number of areas of public administration. According to Mullen (2016, p.73), challenging the merits of administrative decisions is the 'gold standard' for redressing citizens' grievances.

One similarity between courts and tribunals is the nature of their procedures. They are both part of the judicial system, which means that they follow adjudicative process. By contrast,

what distinguishes courts and tribunals is that the latter tend to have less formal process, a simpler and more informal environment, and might adopt an inquisitorial or enabling approach to hearings (Mullen, 2010).

From a legal perspective, in the Tribunal, Courts and Enforcement Act 2007, there is no explicit imposition of any specific procedural model that should be followed by tribunals. In practice, it is difficult to make a generalised statement about the type of procedures followed by tribunals, whether they are adversarial or inquisitorial. In the UK, there are a number of tribunals, which have different natures and deal with disputes against different areas of public administration. Some tribunals have adopted a relatively adversarial approach, which involves the parties' right to an oral hearing, and to submit evidence that support their arguments. Other tribunals have followed a more inquisitorial procedure, by which the judges intervene more in the proceedings. The principal purpose of the inquisitorial or enabling approach is to assist the unrepresented appellant (Elliott & Thomas, 2017; Thomas, 2016b). In terms of effect, tribunals' decisions are binding on public authorities. Moreover, most tribunals, in practice, provide the citizens with a simple and cheap route to complain about unlawful or otherwise defective administrative decisions (Thomas, 2016a). Hence, tribunals fulfil one of the fundamental goals of administrative justice, which is providing redress for citizens against government when something goes wrong.

Another aspect of the tribunals' role in promoting the values of administrative justice is their potential function in improving the quality of first-instance decision-making, by helping public bodies to learn from their mistakes. In theory, the decisions of tribunals might be considered as a useful source of feedback for public authorities, who could use these data to improve initial administrative decision-making. However, in practice, the function of tribunals in improving the performance of government agencies is not fully developed (Thomas, 2015). Compared to the ombudsman, one of whose primary functions is improving public administration practices, this role is less common in the tribunal context. Nevertheless, tribunals should, in principle, be well-suited to recognising any systemic failures in public administration decisions, given that tribunals settle a large volume of appeals against government bodies (Thomas, 2015).

6.6.3 Ombudsmen

Previously, both government agencies and legal scholars tended to view ombudsman's effectiveness through a legal approach which focused only on their role in testing the fairness

of specific administrative decisions. Such an attitude suggested a limited understanding of the ombudsman's possible functions, and might undermine the effectiveness of the institution. Indeed, one of the significant factors which has had a great influence on the development and improvement of ombudsman schemes is the concept of administrative justice, and the consideration of the ombudsman as an important tool in the administrative justice system. In other words, the role of the ombudsman not only concerns testing the fairness public authorities' administrative decisions, but also includes enhancing good administration, where this is one of the significant principles of administrative justice (Buck, Kirkham & Thompson, 2011).

Although the ombudsman can be considered in isolation, the position of the ombudsman should be viewed in the context of the administrative justice system as a whole, with its broader scope and goals (Abraham, 2011a). Public sector ombudsmen have the power to handle complaints against a variety of public authorities and government departments, covering a number of subjects such as health services, housing, education and social care.

One of the major differences between the ombudsmen and other redress mechanisms (such as courts and tribunals) is the criteria based on which the ombudsmen make their decisions. As noted above, the intention of judicial review is not to review the facts or test the fairness of public administration decisions and actions, but merely to check if the administrative decision is lawful or not. In contrast, the ombudsman has the power to investigate the process through which the administrative decision has been issued, and to check if there has been maladministration in this process. Therefore, public sector ombudsmen can investigate citizens' complaints if they have suffered injustice caused by maladministration. The majority of public sector ombudsmen in the UK may also consider complaints that involve service failure; and those that cover the national health services, such as the HSO, may consider complaints involving clinical judgements.

Ombudsmen follow a non-adjudicative inquisitorial method, with broader legal powers of investigation than courts and tribunals, and access to public administration documents and information. The ombudsman procedure is also informal and user-friendly, as there is no formal hearing, and there is the possibility of interviewing the parties or witnesses (Mullen, 2016). The complainant is only required to exhaust the internal complaints procedure before complaining to the ombudsman. In addition, there is no lawyer needed, as the ombudsman can carry out all the work and investigation needed to settle the complaint. Hence, one of

the important benefits of using the ombudsman is that the citizens can resort to the ombudsman free of charge.

It is possible that this inquisitorial and informal method of ombudsman procedures can increase the complainant's opportunity to obtain redress, compared to the adversarial process of judicial review. Therefore, the ombudsman can to some extent help to overcome any limitations or gaps in the judicial process, which reflects the fact that the ombudsman is one of the essential dispute resolution mechanisms in the welfare state. But unlike courts and tribunals, ombudsmen's findings are not binding upon public administration, which means that they lack enforcement power.

In term of ombudsmen's impact, Longley and James (1999, p.47), in their analysis of administrative justice in the UK, stated that 'ombudsmen can be judged as one of the few success stories in our system of administrative justice'. They also found that the ombudsman, with its informal procedure, is a significant dispute resolution mechanism in the UK, based on the number of complaints that ombudsmen resolved each year. Practically, it could be said that individuals to some extent prefer to pursue their complaints through the ombudsman, instead of resorting to the courts via judicial review (Longley & James, 1999). An evaluation of ombudsmen's impact will be conducted in the next chapter.

The above comparison can justify the value of introducing an ombudsman in Saudi Arabia, despite the existence of the Board of Grievances and the committees. This comparative analysis also confirms that the existence of a variety of mechanisms in the administrative justice system is desirable and beneficial.

6.6.4 The relationship between redress mechanisms

There is no formal coordination of all the mechanisms of the administrative justice system. This situation has led to a number of practical consequences. For instance, there is an overlap between the jurisdiction of the ombudsman and the remit of the court, as some grievances could be subject to the both jurisdictions. In practice, legality (as the basic criterion of judicial review) and maladministration (as the main focus of ombudsman investigation) have intersected in the last two decades, which has caused a confusion about the meaning of each criterion and where different types of dispute should be settled (Le Sueur, 2012).

As stated elsewhere in this thesis, the general rule is that the ombudsman has no power to investigate a complaint where the complainant has a right of appeal to a tribunal or a remedy in court. However, according to the Parliamentary Commissioner Act 1967, the PO has the discretion to investigate a complaint even if there is a right of appeal or remedy in court, if he/she considers that it might not be reasonable to expect the aggrieved person to pursue that remedy. Therefore, the ombudsman has the discretion to handle a complaint even if there is an available legal remedy. However, there is no precise criterion in the ombudsman legislation for the exercise of this discretionary power, which means that it can be interpreted by the ombudsman; and certainly, such a decision can be challenged in the courts (Kirkham, 2004). According to Bondy and Le Sueur (2012), the PHSO and the LGSCO have used this discretion very widely.

Thus, courts, tribunals and ombudsmen are part of the broader system of administrative justice, along with other alternative dispute resolution mechanisms (Thompson, 2015b). The public sector ombudsmen in the UK are created by statute, which means that the decisions of the ombudsman can be subject to judicial review by the court. There is also in most cases a right to appeal tribunals' decisions to the ordinary courts, on a point of law (Elliott & Thomas, 2017). However, there is no right to appeal ombudsmen's decisions to the courts; which raises question regarding the available routes to review ombudsmen's decisions and the existing arrangements to hold ombudsman to account. The following section provides a brief analysis of the current forms of accountability of the public sector ombudsmen in the UK.

6.7 The accountability of ombudsmen

In the context of this thesis, analysing the accountability of the ombudsmen can help to determine the effective approach to hold the institution into account, and this can be utilised when writing a proposal for a Saudi Arabian ombudsman. In theory, any redress mechanism in the public sector ought to be accountable for its work and performance. Therefore, it can be argued that to ensure the effectiveness and transparency of a public sector ombudsman, the office must be accountable to an external body. The purpose of the ombudsmen's accountability is to ensure that they explain their work and justify their performance.

The ombudsman has a wider discretionary power in relation to investigation, access to information, interpretation of the concept of maladministration, and accepting a complaint even if there is a legal venue to complain. Although this discretion and flexibility are

essential for the ombudsman to carry out its functions, an external oversight is crucial to ensure that these discretions are being used appropriately. In general, the constitutional nature of the ombudsman's functions in securing redress for citizens against the executive, and improving the quality of public services, requires an efficient form of accountability, with the aim of ensuring the ombudsman's legitimacy.

The public sector ombudsmen in the UK operate under the supervision of a variety of institutions; indeed, some of them even operate with no specific supervision body, such as the SPSO. Furthermore, there is no one specific body that carries out the tasks of scrutiny and accountability of all the public sector ombudsmen in the UK. Therefore, it has been suggested that there should be a body to supervise the overall framework of the public sector ombudsmen, similar to the work of the Lord Chancellor in relation to courts (Longley & James, 1999).

In general, there are four formal means of holding the ombudsmen to account: Parliament (via select committee), courts (via judicial review), internal review, and external review. There is also an informal oversight of ombudsmen's work, which is the criticisms of ombudsmen by users who are dissatisfied with their services and decisions. Anti-ombudsman groups, such as ombudsman watchers, can to some extent put pressure on ombudsmen to operate with high standards and to create new methods to prove their effective performance. Anti-ombudsman groups are online groups with a basic demand to reassess ombudsman schemes to fit with citizens' expectation. In fact, dissatisfied users' groups on some occasions have 'achieved sufficient traction to lobby for questions to be raised in parliamentary hearings' (Kirkham, 2016, p.109).

From the ombudsman watchers' perspective, the ombudsman institution lacks accountability because there is no adequate means to appeal their decisions. Although citizens can recourse to courts to challenge ombudsmen's decisions, this form of accountability is to some extent less accessible. Furthermore, internal review as a form of accountability has been seen as merely 'rubber stamping' activities, as it is not effective (Creutzfeldt & Gill, 2015). In the following paragraphs, we will discuss the formal means of ensuring ombudsmen's accountability.

6.7.1 Parliamentary scrutiny

Essentially, as there is a strong relationship between the PHSO and the UK Parliament, the work of the ombudsman is subject to parliamentary scrutiny. This role of Parliament is conducted by a select committee, through two possible approaches. First, a dedicated committee is created with a remit over the ombudsman's work, along with other remits. Second, the ombudsman's issues can be overseen by one or more parliamentary committees, mainly as a result of particular events (Buck, Kirkham & Thompson, 2016).

The PCASC was established in 1967, and put the PO in the parliamentary context (Seneviratne, 1994). That committee's sole role was to examine and oversee the performance of the ombudsman. This task was transferred in 1997 to the PASC, which had a much broader remit concerned with public administration. In 2015, the Public Administration and Constitutional Affairs Committee (PACAC) was established by the House of Commons Standing Order No.146 to replace the PASC; it now has the responsibility of oversight of the PHSO.

According to the UK Parliament website, the role of the PACAC is to examine any constitutional issues, oversee the quality of administration, and scrutinise the PHSO's reports (UK Parliament, 2020). However, there is no detailed information as to how the PACAC handing these roles. In practice, every year the PHSO presents its annual review to the House of Commons as a means of holding the ombudsman to account. The PACAC has the power to scrutinise ombudsman's annual reports and any other special reports lay before the Parliament. However, the Select Committee has no power to review specific ombudsman's decisions in relation to citizens' complaints. Hence, the Select Committee cannot question the ombudsman's exercise of its discretionary power to accept a complaint for investigation, or its interpretation of maladministration in any particular case.

On a regular basis, evidence sessions are held between the PHSO and the Select Committee, in order to scrutinise the ombudsman's work and identify any weaknesses in its performance (Maer & Priddy, 2018). According to Kirkham (2012, p.9) 'the quality of the scrutiny through Parliament depends upon the resources available, including the quality of the scrutinisers and the energy they are willing to devote to the task'.

In terms of the LGSCO, according to s.23A(3A) of Local Government Act 1974, the LGSCO must submit a copy of its annual reports to the UK Parliament. However, unlike the PHSO,

Parliament has no responsibility for scrutinising the work of the LGSCO, even though there have been a number of occasions when the LGSCO has given evidence to a parliamentary select committee through a one-off evidence session.

Moreover, based on the provision of s.23(12) of the local government Act 1974, the LGSCO is required to conduct a review of the operation of its current legislative framework every three years. This triennial review should be submitted to the Office of the Deputy Prime Minister (ODPM) (ODPM: Housing, Planning, Local Government and the Regions Committee, 2005). In practice, this review is conducted by the LGSCO as a part of its role in overseeing the arrangement of local redress in England, including the ombudsman (Housing, Communities and Local Government Committee, 2019). However, this might not be considered as a form of accountability, as it is concerned with examining the legal framework of the LGSCO rather than evaluating its actual performance. Therefore, there is no parliamentary committee or other organisation that scrutinises the overall work and performance of the LGSCO.

In Scotland, there is no dedicated committee of the Scottish Parliament to scrutinise the work of the SPSO. A consequence of this approach is that the SPSO can be used as a resource by the whole parliament. The SPSO can appear before any Scottish Parliamentary committee at its request (Buck, Kirkham & Thompson, 2016). In practice, this task has been carried out by the Local Government and Communities Committee. However, there is some concern regarding the effectiveness of this arrangement, as a wide range of the SPSO's activities are outside the area of local government (Gill, 2014). Therefore, it is essential to have a dedicated parliamentary committee to effectively oversee the work of the SPSO. This could also strengthen the relationship between the SPSO and the Scottish Parliament.

6.7.2 Judicial review

Judicial review is an option for complainants who are not satisfied with an ombudsman's decisions. The role of the courts in overseeing the ombudsman's operations is a reactive role. In fact, judicial review of ombudsmen's decisions is not a form of appeal of the decision. From the user's perspective, the absence of an external route for appealing ombudsmen's decisions might seem to conflict with their basic right of access to justice (Thomas, Martin & Kirkham, 2013). In fact, the idea of an appeal process for ombudsmen's decisions by an external mechanism has emerged from a misunderstanding of the ombudsman's nature and features. Reviewing all the elements of ombudsmen's decisions – which would mean testing

the law, facts and even the discretionary power of the ombudsman – would certainly undermine the reliability of their work. It has been noted that the proposal of an appeal process for ombudsmen's decisions 'might lead to a judicial process being super imposed on the ombudsman process' (Kirkham & Wells, 2014, p.194). Such an approach would entirely conflict with the functions and processes which the ombudsman employs to achieve the values of administrative justice. Moreover, in an oral evidence given by Brian Thompson before the Communities and Local Government Committee (CLGC) in 2012, in relation to a question about the right to appeal ombudsmen's decisions, he argued that the ombudsman has been established as a means of last resort, and therefore there should be a final point in the system. This means that allowing the complainant to appeal an ombudsman's decision can change the nature and purposes of the ombudsman system.

Furthermore, ombudsman schemes must be considered as a part of the system of proportionate dispute resolution, with its particular emphasis on a number of features such as accessibility, user-friendliness, cost and time efficiency. However, allowing ombudsmen's decisions to be subject to a full review by the courts might be incompatible with the strengths of the ombudsman as a proportionate dispute resolution mechanism.

Judicial review can only intervene to ensure that ombudsmen's decisions and processes are legal. However, beyond the scope of legality, it seems that judicial review has limited power, or even none at all, to question the discretion of ombudsmen. Courts have also paid less attention to the ombudsmen's role in improving the quality of public administration services (Buck, Kirkham & Thompson, 2016). In his study of the influence of judicial review on ombudsmen's decisions, Kirkham (2018, p.122) finds that:

> 'the success rate for claimants in the ombudsman sector is very low at all stages of the judicial review process, and is less than the equivalent outcomes found in other studies on judicial review'.

From the claimants' perspective, judicial review, as a legal channel to challenge ombudsmen's decisions and services, might not contribute to the accountability of the public sector ombudsmen. Hence, the users of ombudsman services might consider judicial review as an ineffective form of redress; this reflects the need for another route to challenge ombudsmen's decisions (Kirkham, 2018). However, it is not true to say that judicial review is ineffective in this respect. There is some evidence that out-of-court settlements can play an effective role in encouraging ombudsmen to alter their response and reopen the investigation (Kirkham & Wells, 2014; Thomas, Martin and Kirkham, 2013). It is

noteworthy that from the establishment of the first UK ombudsman until 2019, only approximately 111 judicial reviews have been conducted against ombudsmen's decisions (Kirkham & O'Loughlin, 2020). This might mean that judicial review, as route to ensure ombudsmen's accountability, is not commonly used by dissatisfied complainants.

In their systematic analysis on the courts' attitude in reviewing ombudsman decisions, Kirkham & O'Loughlin (2020, p.680) find that 'the dominant approach of the courts is one of deference to ombud decision-making and loyalty to general principles of administrative law'. Based on ombudsman case law, Kirkham & O'Loughlin (2020) also find that the strategies of courts and their level of intensity to review ombudsman decisions might differ from those adopted in other areas of administrative law, due to their recognition of the unique nature of the ombudsman sector.

In general, according to Kirkham (2021), the role of courts in holding the ombudsman to account involves three main areas. First, the courts contribute to fill a gap in ombudsman legislation, and to provide legal oversight of ombudsman schemes. Courts via judicial review can also provide redress to complainants. Finally, based on its regulatory role, courts can supervise the standards developed and followed by the ombudsman (Kirkham, 2021).

Based on the above analysis, it seems that courts play a vital role in ensuring the legitimacy of the ombudsman sector. However, courts alone are not capable to perform this important function, which means that the existing of a combination of accountability tools might be an appropriate approach to hold the ombudsman to account.

6.7.3 Internal review

Most of the public sector ombudsmen in the UK operate with an internal review arrangement, as a channel for complainants who are not satisfied with an ombudsman's decisions. Buck, Kirkham and Thompson (2016) distinguish two elements in which the ombudsmen's work can be reviewed through an internal process: a review of ombudsmen's decisions and a review of ombudsmen's services.[16] The operation of internal review varies across the public sector ombudsmen in the UK. One of the features of an internal review process is that it can review not only the procedural matters, but also the merits of

[16] The internal review of ombudsman services will be analysed in greater depth in the next chapter.

ombudsmen's decisions (Buck, Kirkham & Thompson, 2016). However, this form of accountability lacks independence from the ombudsman.

6.7.4 External review

In the context of ombudsmen's accountability, there is two types of external review. The first type is the external review of ombudsmen's decisions, which is carried out by courts, as indicated earlier in this chapter. The second type is the external review of ombudsmen's performance; this section will focus only on the second type.

External review of ombudsmen's performance is another accountability arrangement that may be used to hold ombudsmen to account. Unlike the internal review, this form of accountability focuses on reviewing an ombudsman's services, instead of reviewing a particular decision it has made. Although external review can shed light on a number of issues of ombudsmen's services, it has been argued that the impact of external review as an accountability form is limited (Buck, Kirkham & Thompson, 2016).

Gill (2019) distinguishes three categories of external review as a tool of ombudsman accountability: independent review, peer review, and hybrid review. First, the predominant type of external review is the independent review, carried out by reviewers outside the ombudsman community. The second type is peer review, which is conducted by peers within the ombudsman sector. The third type is hybrid review, which combines reviewers inside and outside the ombudsman community. An example of this type is the review of the PHSO's *Value for Money Study* in 2018, which involved a panel of three members, two ombudsmen and one academic.

Peer review, as a process for examining ombudsmen's performance has been considered as a new trend in the UK public sector ombudsmen (Gill, 2019; PACAC, 2019). An example of peer review is the review conducted by the LGSCO in 2009, regarding the SPSO's performance on a particular complaint. In the findings, the reviewer stated that 'it is the worst case of complaint handling by an Ombudsman's office that I have seen'. [17] This review

[17] SPSO, 2009. An 'other' report by the Scottish Public Services Ombudsman about a Report1 on the handling of a complaint (200502514) by the SPSO. Available at: http://www.scottishombudsmanwatch.org/files/LGO_invetsigation_of_SPSO.pdf [accessed 24 October 2019].

also contained a number of criticisms of the process of the SPSO's investigation, which led the latter to lay another report to the Scottish Parliament.

Independent review as a form of accountability has the advantage of credibility, but the independent reviewers might not have a full understanding of the context in which the ombudsman operates. By contrast, reviewers involved in the peer review ought to have knowledge and experience of the ombudsman's work and procedures (Gill, 2019). However, one of the weaknesses of peer review is the lack of reviewers' independence; and thus, from the public's perspective, it might not an effective mechanism of accountability.

In 2019, the PACAC recommended that the PHSO conduct an external review every three or four years, where the latter should ensure that this review considers other perspectives from outside the ombudsman community. There is no doubt that if a review is conducted by peers, along with professional members from other related sectors, this can increase the effectiveness of the review's findings for both the public and Parliament (PACAC, 2019). If we apply Gill's (2019) analysis of the different forms of external review to the Select Committee's above recommendation, this means that in the future, more hybrid reviews might be held to evaluate and scrutinise the performance of the PHSO.

It also has been suggested that there should be a combination of two approaches to accountability – namely, external review and parliamentary scrutiny – in order to effectively ensure ombudsmen's accountability. External review by reviewers who are independent and have a good understanding of the ombudsman's nature and roles is an auxiliary source that can help the Select Committee in its scrutiny role (Buck, Kirkham & Thompson, 2016).

As noted by Thomas, Martin and Kirkham (2013), the accountability of public sector ombudsman schemes is addressed using a combination of methods, where the impact and efficiency of each arrangement differ. Although there are now a variety of methods to hold the ombudsman institution to account and ensure its integrity, in the future, ombudsmen's accountability arrangements might be subject to extra examinations. Correspondingly, it is necessary to ensure systematic and organised ombudsman accountability, in order to ensure the legitimacy of the public sector ombudsmen (Kirkham, 2016).

6.8 Conclusion

Administrative justice has become one of the essential rights of citizens; it refers to individuals' right to receive correct administrative decisions from public bodies. It also involves their right to a variety of appropriate dispute resolution mechanisms, and to challenge these decisions if they are unlawful or do not meet the criteria of fairness. But what we mean by the concept of administrative justice is a difficult question to answer. Administrative justice is a type of justice that concentrates on both routine decision-making by public authorities and redress mechanisms that provide remedies for citizens. The term 'administrative justice' can be analysed normatively; this approach explains how the administrative justice system ought to work, and focuses on a number of principles and values that aim to promote citizens' rights and reinforce the principles of good administration. The administrative justice concept can also be analysed descriptively, which concerns the actual work of the administrative justice system. However, what the administrative justice system lacks is recognition from both the state and the public. There is an absence of a formal policy and formal institution to protect and enhance the administrative justice goals and motivate further developments, if needed. There is no doubt that more efforts should be made to ensure the adequacy of the administrative justice system in the UK.

This chapter has examined the courts, tribunals and ombudsmen, and their effectiveness as a part of the administrative justice system. We found that the first role of the ombudsman within this overall system is handling a particular type of grievance: namely, maladministration. By contrast, the concept of legality is central to the work of courts and tribunals. The second function of the ombudsman is improving the quality of public administration in certain respects. The methods and procedures followed by the ombudsman to achieve its functions are different from those followed by other remedial institutions, including courts and tribunals. The ombudsman follows a non-adjudicative inquisitorial method, whereas courts adopt an adjudicative method which tends to be formal and adversarial. Although tribunals adopt an adjudicative method that is similar to the courts, their procedures are less formal, and they might adopt an inquisitorial or enabling approach to hearings. Therefore, there a number of differences in the work and method followed by different remedial institutions in the administrative justice system, which to some extent reflect their different functions and goals.

It is important to stress here that all the mechanisms available in the administrative justice system make their own contribution to achieving the goals of the system, based on their unique process and powers. Certainly, the extent to which each institution can successfully contribute will vary. From the researcher's perspective, the public sector ombudsman is well placed to be more effective in providing the citizens with accessible access to justice, while at the same time making improvements in public administration practices. Thus, transplanting an ombudsman into Saudi Arabia might enhance administrative justice values and principles, and this can limit the problems existing in the system.

The ombudsman and its important role as a watchdog institution do not mean that the office should not be subject to any forms of accountability. Indeed, there are a number of tools to ensure the accountability of the ombudsman, which include parliamentary scrutiny, internal review, external review, judicial review, and ombudsman watchers. Each of these forms has a number of weaknesses and strengthens, in that some focus only on the ombudsmen's decisions regarding citizens' complaints, and others merely concentrate on the ombudsmen's services and performance. It seems that all these forms of accountability need to be consistent and integrated, in order to perform their important task of securing the legitimacy of the ombudsman. However, as these forms are not officially linked to each other, and they have irregular patterns of operation, it might not be easy to determine the comprehensive effectiveness of accountability procedures for the public sector ombudsmen (Buck, Kirkham & Thompson, 2016).

Chapter 7: Evaluation of the public sector ombudsmen in the UK

7.1 Introduction

In the previous chapters, we considered the problems that exist in the judicial and administrative systems in Saudi Arabia, and explained why the ombudsman enterprise with its possible functions is a suitable means to overcome the limitations and defects that exist in Saudi Arabia. Nevertheless, in the context of legal transplants, Zweigert & Kötz (1998) argue that an evaluation of the success of the foreign institution in the country of origin is an essential part of the process of legal transplantation. Therefore, this chapter will focus on the actual performance of the UK ombudsmen, and examine if they are successful in meeting the purpose of their establishment.

It is well known that the concept of the ombudsman has been widely adopted around the world as a means of limiting the negative impact of bureaucracy on ordinary citizens' lives. However, we do not have full knowledge regarding the ombudsman's actual effectiveness in achieving its goals (Danet, 1978).

'How to evaluate or measure the effectiveness of the ombudsman?' is a difficult question to answer. It has been noted that although the evaluation of ombudsmen's success is essential, it is not an easy task (Aufrecht & Hertogh, 2000). Ayeni (1999, p.184) also indicates that it is difficult to evaluate the effectiveness of the ombudsman because it is not possible to find a 'fool-proof' methodology to conduct this evaluation. There is little research that has aimed to evaluate the impact of ombudsmen's work. The reasons for this situation include the fact that ombudsman investigations are concerned with maladministration and unfair decisions, and these concepts are not easy either to define or to measure (Steimatycki et al., 2015). There is no effective comprehensive methodology that can be used to evaluate all the elements of the ombudsman's contribution and impact; neither is there at the global level an approved method to evaluate the ombudsman's effectiveness (Stuhmcke, 2018). In practice, the existing research studies evaluating the effectiveness of ombudsmen are 'approximations' (Aufrecht & Hertogh, 2000, p.400).

Although there are number of ombudsman associations existing around the world, such as the Ombudsman Association, IOA, Australian & New Zealand Ombudsman Association, and the United States Ombudsman Association, none of them has developed an effective methodology to evaluate the ombudsman's work. This might be because there are a variety

of ombudsman models around the world, based on the legal and political system in each country; and consequently, designing a generalised methodology that can be used to evaluate all the different ombudsman models is problematic.

However, most of the ombudsman associations have developed a number of criteria that should be met by their members. These sets of criteria have been used as standards to evaluate the ombudsmen's performance. For example, Thomas, Martin and Kirkham's external evaluation of the LGSCO in 2013 adopted the Ombudsman Association's membership criteria as standards to examine and measure the LGSCO's performance.

Moreover, as there is no comprehensive method for evaluation, it has been suggested that to evaluate the work of an ombudsman, it is essential first to determine its aims and goals, and then identify an appropriate method to measure the actual performance in relation to these aims (Aufrecht & Hertogh, 2000). In Chapter 5, we found three possible roles of the public sector ombudsmen in the UK. First, the original role of the ombudsmen is handling individuals' complaints where maladministration and injustice have occurred. Their second role is improving the quality of public administration, including as a CSA.

Thirdly, an ombudsman can also have a role in human rights protection. However, although the ombudsman's role includes human rights protection in several countries around the world, this statement cannot be applied to the public sector ombudsmen to the UK. Most of the recent developments and reforms in the UK's ombudsman sector focus on the design and structure of the ombudsmen. They also pay more attention to the ombudsman's role in promoting good administration and as a CSA. Therefore, it can be said that less attention has been directed to the role of the ombudsman in human rights protection in the UK. It also has been noted that the emphasis of human right protection 'has clearly not featured evenly in the development of the ombudsman: in the UK … human rights have not been prominent in debates about ombudsman reform' (Gill, Mullen & Vivian, 2020, p.826). As a result, there is no clear sign that this role has been considered as a key function of the UK ombudsmen. Thus, in this chapter, the researcher will not evaluate ombudsmen's performance in relation to this role, as it has not yet been sufficiently developed in the UK. The evaluation will be limited to the roles of handling individuals' complaints and of improving the quality of public administration (including through acting as a CSA).

In this chapter, the researcher will assess the performance of three ombudsmen in the UK: the PHSO, the LGSCO and the SPSO. Examining the work of the PHSO and the LGSCO

can help to provide an overview of ombudsmen's performance in three sectors: UK government departments, health services and local authorities in England. The SPSO has been chosen as an example of a one-stop-shop ombudsman in the UK, as its jurisdiction covers Scottish government departments, the health service, local authorities, and most of the public authorities in Scotland. The second reason for choosing the SPSO is that this ombudsman has a statutory power to perform as a CSA. The figures and statistics for these three ombudsmen will be analysed for the most recent year at the time of writing this thesis: namely, 2018–2019. Statistics for the performance of these ombudsmen in other specific years will also be analysed where relevant.

This chapter will be divided into two sections. The first aims to evaluate the complaints-handling role of the ombudsmen, based on a set of criteria, which represent the main elements that ought to be covered by an ombudsman in performing this role. The second section aims to measure the ombudsmen's effectiveness in improving the quality of public administration practices.

7.2 Evaluation of the ombudsmen's complaints-handling role

There is no doubt that the institution of the ombudsman has spread across the world to limit the negative effects of bureaucracy, by providing citizens with an effective form of remedy in cases of maladministration. However, establishing an ombudsman in a state will not automatically guarantee that the institution will operate effectively in performing its core function and achieving its goals (Reif, 2004). Generally, the institution of the public sector ombudsman in each of its different models – classical, human rights or local government – has a number of characteristics which are fundamental for its effective operation (Owen, 1999). In other words, the ombudsman's effectiveness in providing remedies for citizens against the executive is dependent on the recognition of interconnected factors related to the political, legal, economic and social systems (Reif, 2004). These factors include, for example, independence, fairness, impartiality, accessibility, adequate powers, speed, and publicity (Reif, 2004; Gregory & Giddings, 2000; Ombudsman Association, no date).

Therefore, the evaluation of the ombudsman's role as complaints handler will be measured based on the following elements: remit, scope, independence, appropriate methods, procedural fairness, speed, cost, accessibility, effectiveness, and customer satisfaction. These criteria have been recognised and accepted by legal scholars, and by a number of ombudsman associations (Reif, 2004; Gregory & Giddings, 2000; Ombudsman Association,

no date). This set of criteria provides an appropriate method to evaluate the performance of the ombudsman in achieving the aim of effective remedies for maladministration. In the complaints handling role, complainants and public authorities are the main stakeholders of ombudsman scheme, therefore, if the above criteria are met by the ombudsman, this will be regarded as an assurance that these stakeholders have a positive perception of the ombudsman as complaints handler. The emphasis of this section is not only on examining the existence of these criteria, but also on measuring the ombudsman's level of performance in these areas. Each criterion will also involve a number of specific standards to measure ombudsman success or failure in respect to this criterion.

7.2.1 Remit and scope

The remit of an ombudsman should be specified in a way that advances the key aims of the institution. This means that the remit of the public sector ombudsmen should, in principle, cover all the ways in which the administration interacts with the citizens, and which, therefore, might result in maladministration.

The jurisdiction of the UK ombudsmen is specified in three ways: (i) by reference to the public bodies covered, (ii) by reference to the concepts of maladministration and injustice, and (iii) by reference to excluded matters. The first means defining the jurisdiction of the ombudsman very precisely. By contrast, the second approach is general and imprecise. We will deal with the concepts of maladministration and injustice first, then the jurisdiction in terms of the bodies covered, and finally the excluded matters.

7.2.1.1 Maladministration and injustice

The main role of the UK public sector ombudsmen is the investigation of public administration's decisions and actions where maladministration has occurred. Although all the principal public sector ombudsmen statutes existing in the UK have adopted the same formulae to define their role, which is the investigation of 'injustice in consequence of maladministration', the term 'maladministration' has not been defined; either in the Parliamentary Commissioner Act 1967 or in other ombudsmen's statutes.

The concept of maladministration was suggested in the Justice Report as the means of defining an ombudsman's remit (Justice, 1961). Justice organisation noted that the term 'maladministration' has no precise definition; and during the course of the Justice inquiry,

it was noted that there was a lack of clarity regarding the activities and actions that were within the scope of maladministration (Justice, 1961).

As maladministration is not defined in the legislation, there has been considerable discussion of what this concept might mean. Richard Crossman, Leader of the House of Commons, said this during the debate on the second Reading of the Parliamentary Commissioner Bill (HC Deb 18 October 1966):

> 'A positive definition of maladministration is far more difficult to achieve. We might have made an attempt in this Clause to define, by catalogue, all of the qualities which make up maladministration, which might count for maladministration by a civil servant. It would be a wonderful exercise- bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on. It would be a long and interesting list'.

These defects became known as the 'Crossman Catalogue'. Birkinshaw (1994) argued that it would be beneficial to avoid any statutory definition, either of the term 'maladministration' or the role of the ombudsman in handling complaints. Accordingly, the lack of a legal definition of maladministration was thought to be helpful, as it would provide more flexibility and more discretionary power to the ombudsman to apply the concept widely.

This situation might raise a concern about the clarity of the rules and standards that are adopted by the ombudsman (Remac, 2014). It also noted by Abraham (2011a) that the standards used by the ombudsman might lack substance in the eyes of the public. However, in practice, ombudsmen tend to issue guidance to the public – and in particular, to potential complainants – with regard to what they think maladministration means. According to Buck, Kirkham and Thompson (2016), this approach is more appropriate than if the concept of maladministration has been defined in legislation, as flexibility in its application is desirable. It seems, therefore, that the concept has largely been left to the public sector ombudsmen to define through their practice.

Furthermore, it has been noted by Kirkham (2007) that the concept of maladministration can be adopted as a criterion to investigate a complaint by the ombudsman, even if the legality of an administrative decision has been reviewed. An example of this is the *Debt of Honour* report, where the PHSO investigated potential maladministration in the *ex gratia* scheme run by the Ministry of Defence for civilian internees in Japan during World War II. The legality of the scheme had been challenged via judicial review, but the litigation failed before both the High Court and the Court of Appeal. Then a complaint was submitted to the PHSO based

on maladministration rather than the illegality of the *ex gratia* scheme. The PHSO decided that the complaint was not fully 'amenable' to challenge via judicial review, because 'maladministration is not synonymous with acting unlawfully' (PHSO, 2005a, p.5). The PHSO's report in this complaint concluded that the announcement and the operation of the *ex gratia* scheme contained maladministration that led to injustice to the complainant (PHSO, 2005a). Thus, there can be maladministration even where the action or decision is clearly lawful.

The flexibility of the term 'maladministration' is one of the elements that contributes to the effectiveness of the ombudsman, as the office enjoys more flexibility than do other means of redress – both in deciding whether specific cases fall within its jurisdiction, and in deciding whether a complaint should be upheld. Courts in citizens v. state disputes have manifest limitations in relation to settling factual disputes. By contrast, the ombudsman has more capacity and power in relation to fact-finding. Judicial institutions such as courts and tribunals apply restricted criteria of legality when deciding whether to uphold a grievance. By contrast, the ombudsman resolves citizens' complaints based on the flexible criterion of maladministration (Kirkham, Thompson & Buck, 2009). Ann Abraham, in a report by Kirkham (2007, p.1), stated that 'the central concept of "maladministration" has proved over the years sufficiently malleable to allow the Ombudsman's role to adapt and grow'. It is essential to note that although the investigation of maladministration is the core task for all the public sector ombudsmen in the UK, the remit of several ombudsmen has been expanded to cover other tasks such as investigation of service failure, the exercise of professional judgment, and questioning clinical judgment.

The second concept connected to the remit of the ombudsman is injustice. As with maladministration, there is no statutory definition of injustice, which means that the ombudsman has flexibility in interpreting this term. It is worth noting that injustice has a wider meaning than the terms 'loss' or 'damage' as the term 'injustice' can cover 'the sense of outage … evoked by incompetent or unfair administration'; even though the aggrieved person had not suffered any actual or financial loss (Gregory and Hutchinson, 1975, p.329). The PO in practice has interpreted this term widely to include: '(1) damage to reputation, (2) faulty procedure, (3) inconvenience, annoyance and distress, and (4) financial loss' (Gregory and Hutchinson, 1975, p.330). Thus, the concepts of maladministration and injustice have proved sufficiently flexible to allow ombudsmen to address the full range of administrative deficiencies, and there is probably little to be gained by adopting a statutory definition.

7.2.1.2 Public bodies covered

In terms of the jurisdiction of the ombudsman as defined by the public bodies covered, the PO has the power to investigate actions and decisions made by public authorities listed in Schedule 2 of the Parliamentary Commissioner Act 1967, and any other bodies acting on behalf of public authorities. The LGSCO has a jurisdiction over local authorities listed in s.25 of the Local Government Act 1974. Finally, the SPSO has jurisdiction over government organisations and public authorities listed in in Schedule 2 of the Scottish Public Services Ombudsman Act 2002.

It has been noted that there are some circumstances in which the PO was unable to conduct an investigation where maladministration has been found, because the public authority concerned with the complaint is outside the jurisdiction of the office (Seneviratne, 2002). This is because the Parliamentary Commissioner Act 1967 lists the bodies and departments within the jurisdiction of ombudsman, instead of using a general description for them – such as using the phrase 'public authority' (Seneviratne, 2002). This statement can also be applied to most of the public sector ombudsmen in the UK, as they list the public authorities within their jurisdiction.

The PCASC has suggested that the general principle for defining the jurisdiction of the PO should be that all central government agencies, public departments and non-departmental bodies are within the jurisdiction, unless the laws establishing these bodies have excluded them. However, this recommendation has not been accepted by the government, which claimed that this suggestion is difficult to implement (PCASC, 1997).

The above point was also considered by the Cabinet Office in its *Review of the Public Sector Ombudsman in England* in 2000. In an attempt to improve the situation, the Cabinet Office review's suggestion was to reverse the current method by listing only the departments that are excluded from the ombudsman's jurisdiction. Hence, all public bodies would be subject to the ombudsman's investigation unless they were specifically excluded. Putting this method in place would remove the need for further amendments when new government organisations were created, or organisations were dissolved. The review stated that a 'mixed approach' could be adopted to implement the above suggestion (Collcutt & Hourihan, 2000, para.5.8). The approach includes two ways to recognise the bodies that are within the jurisdiction of an ombudsman. The first is to clarify the generic types of the bodies within the jurisdiction, such as governments departments and the NHS. The second method is

listing in a schedule those bodies which are difficult to categorise. According to the 2000 review, such an approach can be found in the Freedom of Information Act 2000 (Collcutt & Hourihan, 2000).

Seneviratne (2002) notes that it is very important to find a new method for defining the PO's jurisdiction, given that new legislation frequently creates or abolishes organisations or otherwise reorganises the public sector. Trying to keep up to date a list of more than 250 public authorities and government bodies may not be the best way to define the PO's jurisdiction. This point could also be applied to the other public sector ombudsmen in the UK, as their jurisdiction is also defined by listing the authorities that are covered, rather than describing the types of organisation included.

In this regard, it is also important to note that the increasing scope of privatisation has led to unclarity between public and private boundaries, and this has its impact on the ombudsman jurisdiction. Due to privatisation and the delivery of public services by private agencies, several previously public services which were within the jurisdiction of the ombudsman have been removed from its remit. The argument in this area is whether a public sector ombudsman should only investigate maladministration occurred in public administration, or should its jurisdiction be expanded to cover public services delivered by private companies. The Venice Principles published by the Council of Europe, has made no distinction between the private and public boundaries when determining the remit of an ombudsman. According to the Venice Principles, the remit of the ombudsman should 'cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities' (Council of Europe, 2019, p.4). Similarly, Hirst & Gill (2020) argue that the jurisdiction of the ombudsman should not be determined only based on the public and private distinction, and that using 'public interest' as a standard to define the ombudsman remit should also be adopted. Hirst & Gill (2020) also debate that the jurisdiction of ombudsman should also cover private entities receiving public funds. An example of this approach can be found on the jurisdiction of the LGSCO, as before 2010, citizens whose adult social care was funded by a local authority were able to complain to the LGSCO, whereas those whose care was funded differently could not do so. However, since 2010 the jurisdiction of the LGSCO has been extended to cover complaints from all adults receiving social care (Sandford, 2017). The above standards to define the ombudsman remit are more likely to reserve extra attention in the following years due to the potentially expansion of privatisation landscape.

7.2.1.3 Excluded matters

The scope of the PO has been criticised on the basis that a wide range of public authorities' activities are excluded from the PO's jurisdiction (Seneviratne, 2002). Schedule 3 of the Parliamentary Commissioner Act 1967 lists all the matters which are not subject to the ombudsman's investigation. The exclusions of commercial and employment matters are the most contentious and most criticised exclusions (Sueur, Sunkin & Murkens, 2019). The exclusions of employment and commercial matters also applies to the other principal UK public sector ombudsmen.

According to the Parliamentary Commissioner Act 1967, sch. 3, para. 9, one of the matters excluded from the PO's jurisdiction is contractual and commercial transactions. The rationale for this exclusion is that the ombudsman's role should be handling complaints submitted by individuals rather than by government contractors and suppliers (Seneviratne, 2002). However, this exclusion has been criticised by Clothier (1986), as contractual and commercial relationships might cause considerable hardship for contractors and suppliers. Clothier (1986) also noted that suppliers' grievances might go unremedied, as the law does not provide a remedy for maladministration. There also might be a significant injustice caused to contractors or suppliers; and in this case, it seems that the ombudsman is well-equipped to handle this type of grievance. Moreover, this exclusion might be irrational, due to the public authorities' increasing use of commercial and contractual transactions in delivering their functions (Elliott & Thomas, 2017), as it might have several implications for the nature of the relationship between citizens and government. There is also the possibility that commercial and contractual transactions, as a governance method, might be used by government organisations as a technique to avoid accountability (Kirkham, 2007). Thus, it is important to amend this exclusion.

Personnel matters in relation to the armed forces and 'office or employment under the Crown' are also exempt from the PO's jurisdiction (Schedule 3, para 10 of Parliamentary Commissioner Act 1967). The PO cannot handle complaints concerned with personnel matters such as appointment, dismissal, pay, discipline, or superannuation. This exclusion includes also past employees (PCASC, 1969). The justification for this exclusion, according to the PCASC (1969), is that the emphasis of the ombudsman's work should be on the relationship between ordinary citizens and the executive, and that the ombudsman should not be concerned with the relationship between the government and its employees.

Another argument in favour of this exclusion is that giving civil servants the right to resort to the PO to complain against their employer might make them a privileged class among employees. It also has been argued that allowing civil servants to submit their complaints to the PO might ruin 'the non-political character of the Civil Services' (PCASC, 1969, p.122). However, this exclusion has been criticised, as Members of Parliament can take up complaints from civil servants in relation to employment matters (Gregory &Pearson, 1992). It also has been argued that the PO has been established with the intention of strengthening parliamentary control over public administration, which means that the PO can be considered an additional tool of Parliament's control (Gregory &Pearson, 1992). Therefore, Gregory and Pearson (1992, p.489) argued 'that there was … no case in principle for excluding from the Commissioner's remit anything it was open to MPs to take up with ministers'.

Moreover, ombudsmen in Sweden and Denmark are empowered to handle civil servants' complaints concerning their employment (Seneviratne, 2002). The PCASC in 1991 suggested that the remit of the PO should be expanded to cover personal matters, with a proposal similar to those operated in Denmark and Sweden. In these two countries, the general rule is that the ombudsman has a remit over civil servants' complaints, with some exemptions to this rule (PCASC, 1991).

Based on the above analysis, it seems that the UK approach to defining the ombudsman's jurisdiction might be appropriate in the early years of the ombudsman's establishment. However, due to the changes occurred in the public and private landscape in recent decades, this approach seems outdated, and a more comprehensive reform is required to expand the ombudsman remit to cover all the matters that ought to be included.

7.2.2 Independence

The effectiveness of ombudsman schemes relies to a considerable extent on their independence; this is a key criterion because it is connected to the ombudsman's impartiality. Ombudsmen should be independent, in order to conduct impartial investigations (Seneviratne, 2002). Independence means that an ombudsman must be independent from those who are subject to its investigations, and should not be part of any authorities.

The independence of the ombudsman also plays a vital role in enhancing citizens' confidence in government agencies. Furthermore, it gives citizens a reaffirmation that any

defective decisions by public authorities will be reviewed and corrected (Seneviratne, 2002). The two concepts of confidence and effectiveness are the key elements which the authority of the ombudsman depends on, especially as the ombudsman has no power of enforcement (Oosting, 2001). This means that the ombudsman's independence can reinforce the effectiveness of the office and increase citizens' confidence in it, which in turn can strengthen its contribution and impact. Briefly, 'independence is the bedrock on which the other fundamental characteristics rest' (Gottehrer, 2009, p.6).

Because of its importance, independence is the first in the list of criteria adopted by Ombudsman Association for the recognition of ombudsman institutions. According to the IOA Code of Ethics, 'the Ombudsman is independent in structure, function, and appearance to the highest degree possible within the organization' (IOA, 2007, no page number).

In general, there are two elements of the independence of the ombudsman that can be analysed: institutional independence and functional independence. The former means that the ombudsman in its structural design should be independent from the three main branches of the state and any other authorities; while functional independence requires that the ombudsman in performing its functions must be autonomous and independent from any external influence or political interference, and should not follow orders from any organisations.

7.2.2.1 Institutional independence

The institutional independence of the ombudsman requires that the office in performing its roles should be independent from the powers of the state, and undoubtedly from government agencies subject to its investigations. In other words, the ombudsman must be external in relation to public authorities' subject to its scrutiny (Oosting, 2001). Ensuring the institutional independence of the ombudsman is fundamental to securing its position as an essential accountability mechanism in the state.

It has been argued that if the ombudsman lacks independence from the powers of the state or any other political influences, this means that the entire scheme might 'become little more than a façade for abuses or neglect' (Uggla, 2004, p.427). Uggla (2004) also noted that the ombudsman might have adequate powers but lack independence. In such a case, the ombudsman might to some extent be considered as a tool to achieve political objectives, rather than handling citizens' grievances against the executive.

As discussed in Chapter 5 of this thesis, the researcher found no agreement amongst legal scholars regarding the constitutional role of the public sector ombudsmen in the UK and their position in relation to the three branches of the state (legislative, executive and judicial). We concluded that the ombudsman is not a part of these three main branches of government. In fact, the ombudsman derives its powers from the essential concept of administrative justice, in which the goals of the administrative justice system cover all the powers of the state (Gill, 2014).

In general, there are a number of risks that might face the public sector ombudsmen, and could obstruct their activities, budget, or even lead to removal from office (Pearce, 1999). Therefore, to ensure the permanence of the ombudsman, the institution should be created by the constitution or by legislation. This is due to the difficulty of amending the constitution, a feature which is intended to prevent frequent amendments (Gottehrer & Hostina, 1998). Permanency is important because it can lead to stability and increase citizens' confidence and trust in the ombudsman. Constitutional or legal protection also enables the ombudsman to act independently and autonomously, without any fears or risks of abolishment.

In a number of countries around the world, the institution of ombudsman has been enshrined in the constitution, in addition to a statute that defines the scope, powers and roles of the ombudsman. This mode provides an additional protection to the ombudsman and increases its profile, which in turn can minimise the risk of any political influences. However, this does not mean that the quality of ombudsman's work is negatively affected if it is established merely by legislation, without a constitutional instrument (National Democratic Institute for International Affairs, 2005). In the UK, most of the public sector ombudsmen are created by a statute, which gives statutory powers to the ombudsman and defines its jurisdictions and roles.

Here, the question arises of whether the public sector ombudsmen in the UK can be regarded as a part of the British constitution. Worldwide, the starting points for the discussion of controlling administrative decisions issued by the executive are the constitution of the state and the notion of constitutionality. Due to the uncodified nature of the British constitution, the notion of constitutionality presents clear difficulties (Giddings et al., 1993). However, ombudsmen themselves, and several legal scholars, consider the ombudsman to be an essential part of the UK constitution. According to Abraham (2011a, p.11), the PO 'has a place at the heart of the constitution, holding to account the Executive in its day-to-day

encounters with citizens'. Giddings (2008, p.101) also states that the PHSO 'became an established part of the UK's constitutional arrangements'. Therefore, the PHSO and other public sector ombudsmen in the UK enjoy a high level of constitutional and legal protection, which helps them to perform their functions fairly and independently.

The legislation also includes specific provisions to ensure the independence of the public sector ombudsmen, which include provisions on appointment, dismissal and tenure. The general rule is that those responsible for the appointment of the ombudsman should be independent from public authorities within the ombudsman's jurisdiction. Worldwide, there are four methods used to appoint an ombudsman: by the head of the state, by the head of government, by the legislative authority, or by a combination of these methods (Giddings, 2000). In the UK, the head of state and the head of the government take part in the PHSO's appointment process. The PHSO is appointed by the Queen, on the advice of the prime minister. The recruitment processes are managed by the House of Commons in cooperation with a number of government agencies: in particular, the Cabinet Office, Ministry of Justice and Department of Health. Based on the Venice Principles, an important requirement in the recruitment process, is that 'the procedure for selection of candidates shall include a public call' (Council of Europe, 2019, p.4). The appointment of the current holder of the PHSO was conducted through an open competition, and the received applications were reviewed fairly and independently (Health and Public Administration and Constitutional Affairs Committees, 2017). This recruitment process is intended to ensure the independence of the ombudsman from government agencies, and at the same time indicate the parliamentary nature of the ombudsman (Health and Public Administration and Constitutional Affairs Committees, 2017; Giddings, 2001).

An important safeguard of the ombudsman's independence is security of tenure. This means that the appointment of the ombudsman should be for a specific term, and that the ombudsman cannot be removed from his/her position before finishing their term, except with good cause, such as misconduct or incapacity (Reif, 2004; Gregory, 1999). As with their appointment, the ombudsman should be dismissed by an independent authority, which must certainly not be a part of the authorities' subject to its investigations (Gregory, 1999).

In the UK, according to s.1 of the Parliamentary Commissioner Act 1967, the PO's term of appointment should not be longer than seven years, and he/she should hold this position until the end of their term. The position of the PO is not renewable. In terms of dismissal,

according to s.1(3) of the Parliamentary Commissioner Act 1967, the ombudsman can be relieved by the Queen at his/her request, or can be removed by the Queen on the ground of misconduct.

These processes, according to Giddings (2008), can ensure the ombudsman's independence from government, although the prime minister's role in the appointment might suggest the possibility of dependence on the executive where its actions are subject to ombudsman investigations. Giddings (2008) suggested that the choice of the suitable candidate had to be sanctioned by agreement of the Houses of Parliament before submitting it to the Crown. Although this suggestion might have limited or even no practical impact on the current level of ombudsman's independence, it might to some extent 'have symbolic significance in bringing the United Kingdom's arrangements closer to the "model" legislative ombudsman'[18] (Gregory, 1999, p.136). In Scotland, Wales and Northern Ireland, the public sector ombudsman is appointed by the Queen on the nomination of the relevant parliaments and assemblies. This mode of appointment can ensure that the ombudsman has a high level of independence from the government.

Another requirement for the independence of the ombudsman is ensuring the impartiality of the person who holds the office. According to the Health and Public Administration and Constitutional Affairs Committees' paper, *Appointment of the Parliamentary and Health Service Ombudsman* in 2017, each candidate in the recruitment process should prove their impartiality, which means that he/she should prove the absence of any previous political actions or connections with any agencies that might to any extent undermine their impartiality and independence.

7.2.2.2 Functional independence

In order to perform their core functions, the public sector ombudsmen should be autonomous and free from any outside influences and pressures (Thomas, Martin & Kirkham, 2013). This means that there should be no hierarchical instructions regarding how the ombudsmen perform their roles and functions. Therefore, the ombudsmen must enjoy flexibility and discretion in interpreting their remits and in using their wider powers of investigation,

[18] For more information about the executive ombudsman model and the legislative ombudsman model, see Gregory, R., 1999. Building an ombudsman scheme: statutory provisions and operating practices. In: Reif, L.C., ed., *The international Ombudsman anthology: selected writings from the International Ombudsman Institute*. The Hague: Kluwer Law, pp.156–161.

without any external influence on their findings and decisions. In addition, publicity is one of the available tools for an ombudsman in its work. Based on its statutory powers, the ombudsman should be free to use this tool with no restrictions or instructions from any external body. This is essential, because the ombudsman's power to publicise its works through annual reports or any other special reports can certainly enhance the government's transparency (Oosting, 2001).

Part of the functional independence of the ombudsman is the extent in which mechanisms of accountability can have an influence on its work. According to the Ombudsman Association criteria, there should be an independent body who is responsible for scrutinising ombudsmen's work and safeguarding their independence. However, based on the criterion of independence, any mechanisms of ombudsmen's accountability should not adversely affect their flexibility, discretion and powers of investigation. Moreover, any accountability arrangements for scrutinising the work of an ombudsman must be independent from those who are subject to the ombudsman's investigations.

Another essential dimension of the functional independence of the ombudsman is funding. Funding in general has been regarded as a tool for controlling public institutions, since it indicates a type of accountability (Giddings, 2008). The salary of the PHSO is paid from the Consolidated Fund. Section 2(1) the Parliamentary Commissioner Act 1967 states that:

> 'there shall be paid to the holder of the office of Commissioner the same salary as if he were employed in the civil service of the State in such appointment as the House of Commons may by resolution from time to time determine'.

In practice, the PHSO's salary is paid from the Consolidated Fund, where the salary was previously set within the permanent secretary pay-band at the point equivalent to that of an English High Court Judge. This arrangement was changed on 18 July 2011, as the House of Commons agreed that:

> 'the remuneration of the Parliamentary Commissioner for Administration and Health Service Commissioner for England should be agreed by the Prime Minister and the Chair of the Public Administration Select Committee in advance of the recruitment process, and reported to the

> House, prior to the House being invited to agree to an humble Address on such an appointment'[19].

This decision arises from government's attempt to change the PHSO's remuneration policy by itself, with no agreement or cooperation with Parliament. This attitude has been criticised by the PASC,[20] which describes it as 'arbitrary'. Also, in a letter to the prime minister in 2011, a former holder of the PHSO, stated that such an attitude might diminish the independence of the ombudsman, by reflecting the executive's improper external influence on the ombudsman's work (Abraham, 2011b). In practice, in the following years after 2011, the salary of the PHSO has been paid based on the House of Commons Agreements on 11 July 2011 (PHSO, 2013; 2014).

Therefore, to ensure the functional independence of the ombudsman, the salary of the office-holder should be sanctioned by Parliament instead of the government. Undoubtedly, the negotiation between the ombudsman and the government regarding the ombudsman's salary can undermine the independence of the office, as government organisations are subject to ombudsmen's scrutiny. However, the current arrangement for the PHSO's remuneration can secure the autonomy of the ombudsman. Based on the above analysis, it could be said that the public sector ombudsmen in the UK have met the requirements of institutional and functional independence and enjoy a high level of independence.

7.2.3 Appropriate methods

In principle, the methods used by an ombudsman ought to be effective for the purposes of establishing the relevant facts, the reasons why the public body concerned acted in that manner, and the precise nature of the complainant's grievance. In practice, the ombudsman can adopt a variety of methods in running its investigations. As the Parliamentary Commissioner Act 1967 and other ombudsmen legislation in the UK have left the ombudsman with considerable discretion, each holder of the office has a wide latitude to use different methods and techniques in carrying out their functions (Buck, Kirkham & Thompson, 2016). Thus, the ombudsman can resolve a complaint by mediation or conciliation, or through conducting a full investigation. It is essential to mention here that

[19] For more details, see HC Deb (18 July 2011). Vol 531. Available at: https://hansard.parliament.uk/Commons/2011-07-18/debates/11071918000001/ParliamentaryCommissionForAdministrationAndHealthServiceCommissionerForEngland [Accessed 18 January 2021].
[20] For full details, see PASC, 2011. Remuneration of the Parliamentary and Health Service Ombudsman. Tenth Report of Session 2010–12. House of Commons. HC 1350.

not all the complaints submitted to the PO or other public sector ombudsmen will undergo a full investigation. The PHSO, for example, indicates in its annual reports that there are a number of stages for resolving citizens' complaints, which include a helpline, assessment and investigation. Certainly, not all of the complaints accepted will proceed through all these three stages.

In the helpline stage, the ombudsman checks if it can investigate the complaint or not. For example, the ombudsman checks if the complainant has exhausted any internal complaints procedure of the public authority before submitting their complaint to the ombudsman, and whether the complaint is within its jurisdiction. The ombudsman then can either reject the complaint because it is a premature complaint or outside its jurisdiction, or it can accept the complaint. In that case, it will be taken to the second stage. The ombudsman can also, at the helpline stage, advise the complainant which (if any) is the correct organisation to complain to, if the complaint is outside its jurisdiction.

The second stage is assessment, where the ombudsman looks at the complaint in more depth, in order to decide whether a full investigation is needed or whether it is possible to resolve the complaint without an investigation. During this stage, the ombudsman can enable an agreement between the public authority concerned and the complainant, to put things right without carrying out a full investigation. At this stage, a number of remedies can be negotiated for the complainant. The PHSO uses the term 'resolution' to describe this activity. The ombudsman in the assessment stage can also decide that a full investigation is not needed where it considers that there is no service failure, or that the public authority concerned has already put things right for the complainant. The PHSO uses the term 'assessment decision' to describe this process. Therefore, the ombudsman has the flexibility and discretion to resolve and close complaints without the need for a full investigation. This approach can help to increase the speed of resolving citizens' complaints and provide good value for money.

In the third stage, the ombudsman conducts a formal investigation to check for any forms of maladministration or service failures. Based on the investigation's findings, the ombudsman can either fully uphold, partly uphold, or not uphold the complaint. There is also the possibility of resolving the complaint before the investigation is concluded. In some circumstances, the investigation might be discontinued for several reasons, such as the complainant's request (PHSO, 2018b). At the end of this stage, the ombudsman will inform

the parties of its provisional decision, and give them the opportunity to comment on it before it issues the final decision.

Most of the public sector ombudsmen in the UK follow these stages when handling citizens' complaints, even though they might use different terminologies and categories to describe them. For instance, the SPSO in its annual report in 2019 used two categories to describe its methods of handling complaints: assessment and investigation. The assessment stage is comparable to the helpline stage adopted by the PHSO. In the investigation stage, the SPSO distinguishes between two types of decisions: proportionality decisions and investigation decisions. The former is similar to the decisions resulting from the assessment stage followed by the PHSO, whereas the investigation decisions are comparable to the PHSO's investigation stage.

It is important to mention that in practice, ombudsmen across the world tend to conduct formal investigation only in complex and difficult complaints. By contrast, the legislation of the PO is focused on formally investigating the complaint and then writing an official report about it. In practice, official investigations conducted by the PO involve visiting the public authority concerned, examining its documents and official papers, and in some circumstances interviewing the public servant concerned in the action that caused the complaint. It has been noted that the investigation method followed by the PO is 'a very through method' which should be only adopted in complex and difficult complaints; and therefore, simple complaints can be resolved informally without such an approach (Justice 1977, p.6).

This very through method of investigation and reporting is still one of the significant practices used by the PHSO in handling citizens' complaints. However, this emphasis of the ombudsman practice restricts the PHSO's capacity to deal with complaints appropriately based on their complexity and type (Seneviratne, 2002). Tyndall, Mitchell and Gill (2018, p.10) also state in this regard that 'the legislation's emphasis… has been unhelpful in anchoring the PHSO to an outdated model of ombudsman practice'.

In a study by Gill et al. (2013), it has been noted that in the ombudsman sector, there is a trend towards using quicker and informal techniques to resolve citizens' complaints, as a part of their overall goal to improve consumer services. Participants in this study indicate that the speed in resolving individuals' complaints is more important and valued than a detailed report resulting from full investigation (Gill et al., 2013). Moreover, in a survey

conducted among the Ombudsman Association's members, it was found that 'nearly every ombudsman service offers – and is placing increased emphasis on – some form of informal resolution' (Doyle, 2003, p.2). According to the PHSO's publication *Our Strategy 18–21*, the office is focusing on improving its services by speeding up procedures for resolving citizens' complaints. To achieve this goal, the PHSO has planned to use methods that aim to resolve complaints at the early stages, and to search for other techniques for dispute resolution, such as mediation and conciliation, which can be introduced into its procedures (PHSO, 2018a). However, this shift towards informal methods by the ombudsman has raised some concerns. Firstly, there is no clear and comprehensive definition of the informal procedures followed by the ombudsman. Moreover, users of the ombudsman services seem to have no clear understanding of these procedures, which in turn can undermine the fairness of the ombudsman in citizens' eyes. Therefore, more clarity about the informal process used by the ombudsman is required (Doyle, 2003).

There is also no clear view of the criteria used by the ombudsman to decide whether to resolve the complaint via formal or informal resolution. In 2012, the CLGC detected two risks from the LGSCO's use of mediation to resolve citizens' complaints. First, there was a concern regarding whether mediation was an appropriate method to adopt. The second concern was about the level of complainants' awareness of the differences between mediation and investigation as procedures for resolving complaints. The CLGC suggested that the LGSCO 'needs to be completely clear how the distinct processes operate and differ as well as the criteria against which complaints are allocated to these resolution processes' (CLGC, 2012, p.25). Moreover, relying largely on informal procedures to resolve complaints might to some extent reduce the ombudsman's opportunity to discover systemic failures in public administration practices. In practice, the level of complainants' understanding of the procedures followed by the ombudsman to resolve their complaints is still low, especially among those whose complaints are resolved by informal processes instead of full investigations (Gill et al., 2013). Hence, this situation might to some extent diminish the ombudsman's legitimacy (Creutzfeldt & Gill, 2014).

In practice, the UK public sector ombudsmen tend to use informal resolution in order to accelerate their procedures in handling citizens' complaints. Informal resolution has also been used as a response to reduced budgets and the increasing demands made on ombudsman services. This means that there is in practice a trade-off between desirable goals such as speed and thoroughness, and more of one may mean less of another. Therefore, it is

important for the ombudsman to achieve a balance between handling complaints through informal resolution, and enhancing citizens' understanding of ombudsmen's processes. Certainly, both speed and citizens' better understanding of ombudsman procedures are fundamental elements of the ombudsman's role as a complaints-handler. For instance, the greater speed in handling individuals' complaints by following informal process can increase customers' satisfaction with ombudsman services. It is also one of the ombudsman's essential characteristics as a form of proportionate dispute resolution. On the other hand, citizens' better understanding of the nature of the informal resolution process adopted by the ombudsman can increase trust and confidence in its work, and can thereby underpin the fairness of the ombudsman scheme. Thus, more attention should be paid to the consistency and clarity of ombudsman schemes, particularly with the adoption of two approaches to handling individuals' complaints: informal resolution and formal investigation. These two approaches are equally appropriate for resolving complaints. Informal resolution can be used as method to resolve simple types of complaint, whereas the ombudsman can conduct a formal investigation to resolve complex complaints and those that may involve systemic issues.

7.2.4 Procedural fairness

Fairness is an essential criterion for evaluating the performance of the ombudsman in handling citizens' complaints. Procedural fairness of the ombudsman means that the office should follow a fair process in all stages of its decision-making. According to the Ombudsman Association criteria, 'the Ombudsman should be impartial, proceed fairly and act in accordance with the principles of natural justice' (Ombudsman Association, no date, p.3). Fairness and impartiality are important for ensuring the confidence and credibility of the ombudsman, in the eyes of both the public and government (Gottehrer, 2009). It also has been stressed that procedural fairness of redress mechanisms is an essential requirement for their viability (Brewer, 2007).

It has been noted that with the absence of enforcement power, the strength of an ombudsman's decisions relies largely on the quality of evidence on which they are based. Following fair procedures for both parties is likely to enhance the quality of the evidence-base for making decisions. Allowing the complainant and the public authority complained about to comment on the investigation, and on the provisional decision, before the ombudsman issues its final decision, can help to provide assurance that the factual

conclusions which support the ombudsman's decision are sound (Buck, Kirkham & Thompson, 2016). Therefore, procedural fairness helps the ombudsman to make impartial and accurate decisions, which in turn enables both parties to respect and comply with these decisions. Procedural fairness can also ensure that the ombudsman respects both parties to the complaint, and treats them in an appropriate and equal manner. Moreover, both procedural fairness and impartiality are crucial elements of ombudsmen's effectiveness, because there is no possibility of external appeal against their decisions.

Although there is no specific method of measuring the level of procedural fairness followed by the ombudsman, several factors, such as independence and impartiality, can help us gain a general overview of an ombudsman's fairness. As noted earlier, independence is the fundamental factor in ombudsmen's success. All the public sector ombudsmen in the UK enjoy a high level of independence, which enables them to follow fair procedures with the purpose of achieving their functions and goals. The independence of the ombudsmen also helps to reinforce their impartiality (Gregory, 1999). This means that the ombudsmen can make fair decisions and recommendations without favouring any party, whether citizen or government, and without any fear or consideration of the impact of these decisions on their offices. Therefore, impartiality, fairness and independence of the ombudsman are connected to each other. The ombudsman is unlikely to be able to follow fair procedures and to be impartial if the office lacks independence from the powers of the state – particularly the executive.

It is essential to note that there are different models of fairness, based on the redress mechanisms concerned. The fairness requirements that should be met by the ombudsman are different from those followed by courts; and there are a number of reasons for this. First, the ombudsman follows an inquisitorial and investigatory approach which differs from the adversarial approach applied in courts. Second, applying the courts' fairness requirements to the ombudsman scheme will alter the core goal of the institution. Third, the ombudsman is concerned with a specific type of grievance, which is different from those resolved in courts (Thomas, Martin & Kirkham, 2013). Therefore, certain procedures which are assumed to be necessary for fairness in the courts may not be necessary in the ombudsman

context – for example, public hearings. Certainly, 'public hearing is not the only fair way of finding facts'.[21]

One of the ombudsman's fairness requirements is that the office should inform the complainant of the reasons for its decision whether or not to accept the complaint, especially given that the ombudsman has a wide discretion to define the concepts of maladministration and service failure. Therefore, one of the requirements of fairness in the assessment stage is for the ombudsman to inform the parties of its decision to conduct a formal investigation, or to resolve the complaint by adopting informal resolution, and the reasons for this decision. As the ombudsman at this stage can also decide to refuse the complaint because there is no service failure, it should inform the parties of its decision and explain the reasons.

At the investigation stage, all the public sector ombudsmen in the UK conduct their investigations in private, based on the provisions of their legislation. An ombudsman should give all the parties involved in the complaint the opportunity to comment and submit any relevant evidence that supports their arguments. However, in ombudsmen's procedures, there is no opportunity for the parties to cross-examine those who have been interviewed by the ombudsman, as would occur in court proceedings (Kirkham & Wells, 2014). Ombudsmen can interview the complainant and the principal officer concerned in the complaints, or any other public servants involved. The ombudsmen also have the power to access official information and documents, to conduct their investigations. However, in some circumstances, the ombudsmen cannot examine all the relevant information needed for the investigation, due to poor records management by the public authority concerned. In this case, the ombudsmen will err on the side of the complainant if the public department concerned with the investigation has not retained adequate evidence (Seneviratne, 2002).

All the UK's principal public sector ombudsmen state clearly in their websites that they will inform the complainants of the progress of their complaints, including any information discovered, and will give them the opportunity to submit any additional evidence; however, all these processes are subject to the discretion of the ombudsman. According to Harlow (2018), claimants in practice might not have full information on the complaint's progress until the ombudsman makes the final decision. Such an approach might undermine not only

[21] *R (Bradley & others) v Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin) at [58] (Bean J). Mentioned in Buck, Kirkham and Thompson, 2016, p.44.

the procedural fairness of the ombudsman, but also the transparency and openness of the office.

It is important to mention here that there are several groups of dissatisfied complainants who protest against ombudsmen's services and work. Several public sector ombudsmen in the UK, such as the PHSO, LGSCO and SPSO, have been subject to critiques from ombudsman watchers. Examples of these groups include the Local Government Ombudsman Watch, The PHSO The Facts and Accountability Scotland. These groups protest against ombudsman schemes and their procedures through an online campaign. Ombudsman watchers' main criticisms in relation to the procedural fairness of the office can include the following forms:

> 'Information provided by the bodies being investigated was often accepted at face value rather than being challenged …The process was seen as one-sided, with complainants not being made privy to discussions between ombudsman schemes and the bodies investigated … the perception that there was a tendency for ombudsman schemes to be both procedurally and substantively biased in favour of the body being investigated' (Creutzfeldt & Gill, 2015, p.6).

It has been noted that ombudsman watchers' criticisms focus on the fact that individuals might misunderstand the functions of the ombudsman and the nature of the procedures it follows. They also show the difference between what citizens expect from the ombudsman and the actual role and service that the office can offer (Creutzfeldt & Gill, 2015).

In 2019, Opinion Research Services conducted a focus group with a number of complainants who had used the PHSO's services. Although this focus group was carried out to identify the best method to assess fulfilment of the Service Charter[22] commitment 10,[23] it highlighted complainants' views on whether the PHSO's methods were procedurally fair. Participants' views included:

> 'several participants said that the organisation against which they complained had been obstructive, making it difficult for PHSO to investigate as thoroughly as it and the complainant might like … Many participants said they felt PHSO favours organisations on the issues as opposed to complainants … The use of experts during the investigation was thought in itself to contribute to a feeling of imbalance inasmuch as it

[22] More information about the Service Charter can be found in section 7.2.9.
[23] The Service Charter commitment 10 is to 'evaluate the information we've gathered and make an impartial decision on your complaint'.

> was felt that the former are unlikely to criticise members of their own profession' (Opinion Research Services, 2020, p.4).

Furthermore, during its scrutiny of the PHSO in 2016–17, the PACAC noted that several written submissions indicated 'that the PHSO's investigators are biased towards professionals or the body being investigated' (PACAC, 2018, p.13). The same issue was also found in the PHSO scrutiny in 2017–18 (PACAC, 2019). This raises the question of how the Select Committee can ensure the procedural fairness of the ombudsman without affecting the independence of the office. As indicated in the section discussing independence, accountability mechanisms that monitor the work of an ombudsman must not have any adverse influence on its work. Thus, a balance between these two elements should be achieved.

In practice, there are a number of arrangements that might to some extent ensure the ombudsman's fairness; these include publication of decisions, a quality assurance board, and decision/service review (Kirkham, 2020). As noted by Kirkham (2020), these practices have been developed by the ombudsmen themselves rather than by statutory provision. Kirkham (2020) suggests that these arrangements should be confirmed in legislation to safeguard the procedural fairness of the office and its accountability, with an overall aim of ensuring the quality of justice provided by the ombudsman.

It seems that analysing complainants' views[24] of ombudsmen's fairness might not reflect the actual level of fairness, as their opinions might be affected by the outcome of their complaint, and by misunderstanding the nature of ombudsman procedures. From a theoretical point of view, evaluating the procedural fairness of an ombudsman requires an approach with a high level of sophistication that can combine both qualitative and quantitative analysis. Such an approach cannot be conducted without the existence of a set of consistent arrangements that monitor the procedural fairness of the ombudsman in a regular pattern. However, based on the analysis provided in this section, we can conclude that in general, the principal public sector ombudsmen in the UK follow fair procedures in handling individuals' complaints.

[24] More information about customer satisfaction regarding the PHSO's fairness and impartiality is presented in section 7.2.9.

7.2.5 Speed

The speed of handling and resolving citizens' complaints is one of the essential criteria for evaluating the ombudsman's role as complaints-handler. Firstly, it is not acceptable that complainants should have to wait a long time for their complaints to be resolved. Secondly, the potential delay can be considered as one of the barriers that prevent citizens from submitting their complaints to the ombudsman.

How quickly an ombudsman closes individuals' complaints depends to a considerable extent on the method it uses to resolve them. As noted above, ombudsmen often settle simple complaints by informal methods instead of conducting a full investigation. Such an approach can provide a quicker form of dispute resolution and can increase satisfaction with ombudsman services, for both complainants and the government. In this regard, Pearce (1999) argued that unlike courts and tribunals, the ombudsman in general is not required to investigate a complaint to the fullest extent, as the essence of ombudsmen's work is to remedy complainants' grievances. If the ombudsman operated like courts or tribunals, it would have to follow a slow procedure, which conflicts with the purpose of the institution's establishment.

Furthermore, the speed with which the ombudsman resolves individuals' complaints can be affected by two other factors. First, the budget and resources available to the ombudsman can accelerate or slow its processes (Gregory, 1999). More financial resources mean more staffing, or more staff training, which in turn can increase the speed with which complaints are resolved.

The second factor is the degree of emphasis an ombudsman places on its different roles: for example, whether the institution should focus more on securing remedies for individual grievances against public authorities, or on using complaints investigations as a means of improving the quality of public administration. If the focus is more on providing redress for individuals, then the ombudsman may be able to use more informal and quicker procedures to resolve complaints, and hence increase consumer satisfaction. On the other hand, focusing more on using complaints-handling to identify systemic weaknesses and promote improvement implies a more thorough investigation, which will cost more and take longer (Gregory, 1999).

Therefore, in evaluating the actual performance of UK public sector ombudsman, it is important to measure the speed of each stage of complaint resolution. In the case of the PHSO, for example, this would mean separately examining the speed of complaint resolution at the helpline stage, at the assessment stage, and after a full investigation. The following paragraphs provide an evaluation of the speed of the PHSO, LGSCO and SPSO in handling complaints in the year 2018–2019.

PHSO: When reporting the speed of handling complaints, the PHSO does not distinguish between the speed of each stage of complaint resolution: helpline, assessment and investigation. The PHSO basically divides complaints into two categories; the first includes the number of complaints closed by the helpline within seven days, and the second contains the number of complaints that took more than seven days to be closed. The second category involves reporting the number of complaints closed within three time-frames: 13 weeks, 26 weeks and 52 weeks. According to PHSO (2019), 92% of the complaints recorded and closed in the helpline stage in the year 2018–2019 were closed within seven days. Similar figures have been reported in the past few years: 92% in the year 2017–2018 and 93% in 2016–2017 (PHSO, 2019). The rest of the complaints in the year 2018–2019 took a longer time to be resolved.

Figure 7.1: Complaints closed by the PHSO in relation to the time taken, for the years 2018–19, 2017–18 and 2016–17.

Source: PHSO, 2019.

As shown in Figure 7.1, 39% of complaints were closed within 13 weeks, 71% were closed within 26 weeks, and 91% were closed within 52 weeks. This means that 9% of the complaints handled by the PHSO took more than one year to be resolved. Based on Figure 7.1, the PHSO in 2018–19 took longer to close complaints compared to the previous two years.

Amanda Amroliwala, Chief Executive and Deputy Ombudsman of the PHSO, indicated in an oral evidence that the PHSO has no time targets for closing complaints, as the office has adopted a strategy of 'right decision, right time' (PACAC, 2020b). However, she also stated that the PHSO aims to close 50% of complaints within 13 weeks, 75% within 6 months, and 95% of the caseload within 52 weeks (PACAC, 2020b).

Table 7.1: Time taken to close complaints by the PHSO in the year 2018–2019, compared to its timeframe targets.

Timeframe	Target % of cases	Actual % of cases	Difference between target and actual %
13 weeks	50%	39%	-11%
26 weeks	75%	71%	-4%
52 weeks	95%	91%	-4%

Source: PACAC, 2020a, p.9.

From Table 7.1, it can be seen that the PHSO was not successful in meeting its timeframe targets. Moreover, in its Service Charter, the PHSO scored only 53% in complainants' feedback on its commitment to giving them the final decision on the complaint as soon as the office could do so (PHSO, 2019).

In the following paragraphs, we will analyse the speed of the PO in closing complaints, after a full investigation that compares earlier years with more recent years.

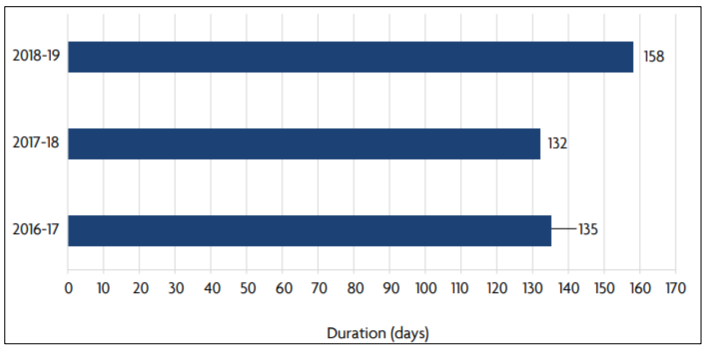
Table 7.2: Average times for the PO cases in the investigation stage, for the years 1984–1997.

Year	Week and days
1984	52.5
1985	52
1986	50
1987	42.4
1988	52.2
1989	65.5
1990	64.4
1991	58.3
1992	53.6
1993	58.5
1994	70.4
1995	74
1996	88

Source: Gregory and Giddings, 2000, p.45.

In some years of the PO's operation, there was a concern regarding the institution's speed in closing complaints. From Table 7.2, it can be seen that in the years 1994, 1995 and 1996, the PO had a considerable delay in handling individuals' complaints, with an average of 88 weeks in the year 1996. In light of this situation, the PO in 1997 changed the institution's emphasis from traditionally focusing on thoroughness instead of speed, to seeking a balance between the speed of the ombudsman process and thoroughness of investigations and settling individuals' complaints (PO, 1998).

Figure 7.2: Average time to close complaints[25] by the PHSO for the years 2016–2017, 2017–2018 and 2018–2019.



Source: PHSO, 2019, p.34.

The average time taken by PHSO to close complaints ranges from 132 to 158 days in the recent years, as shown in Figure 7.2. By converting Figure 7.2's data from days to weeks, to make them comparable to Table 7.2, this means that the PHSO's average time to close complaints in the years 2017 to 2019 is approximately in the range of 19–23 weeks, compared to 88 weeks in the year 1996.

The above figures are not directly comparable, as in the earlier years of the PO's operation, the data relate only to formal investigations; nevertheless, a general pattern of the ombudsman's speed can be inferred. We can conclude that the average time of handling and closing complaints by the PHSO in recent years has been improved substantially, compared to the earlier years of its operation.

LGSCO: The LGSCO sets time targets for its investigations to be closed, as follows: 65% of investigations should be completed within 13 weeks, 85% of them should be closed within 26 weeks, and 99% within 52 weeks. In the year 2018–2019, the LGSCO was successful in

[25] It is important to note that this includes complaints closed in both the assessment stage and investigation stage. It also involves complaints closed in the helpline stage that took more than seven days to be closed.

meeting or even exceeding these time targets. According to the LGSCO (2019), 78% of the investigations were completed within 13 weeks (against the target 65%), 90% were closed within 26 weeks (against the target 85%), and 99% within 52 weeks (against the target 99%).

For complaints resolved in the assessment stage (the initial investigation stage), the LGSCO in 2018–2019 took an average of 31.8 days to make decisions. It is worth adding that there is no information in the LGSCO annual report about its speed in handling the complaints at the helpline stage (initial check stage). However, contrary to the view that the LGSCO is slow in handling complaints, Jerry White, a holder of the LGSCO office, stated that it does not provide an emergency service and the time taken to close cases is acceptable (White, 2007).

SPSO: The SPSO's time targets to close complaints are set in the Model Complaints Handling Procedure as follows: five days for the frontline resolution stage, 20 days for the investigation stage, and 20 working days for escalated complaints. In the year 2018–2019, the SPSO was successful in meeting two of these targets, as complaints at the frontline resolution stage were closed in four days, on average (against the target five days), and escalated complaints were closed on average within 17 days (against the target 20 days). The investigation stage took an average of 21.5 days (against the target 20 days), which exceeds the time target by 1.5 days.

It seems that each ombudsman examined in this section has adopted a different approach for reporting its speed in handling and closing complaints. They also have different time targets for closing and resolving complaints. In general, there are no major concerns about the time taken by the LGSCO and the SPSO for closing complaints. The speed of the PHSO in closing complaints has improved over the years, as there was a trade-off between desirable but incompatible goals such as speed and thoroughness. Although the PHSO has a wider jurisdiction and a heavy caseload compared to the LGSCO and the SPSO, the office should make extra efforts to increase its speed.

7.2.6 Cost

Cost, as a criterion to evaluate the effectiveness of the public sector ombudsmen, involves both the cost to the complainants and the value for money of ombudsmen's work. In this section, we will only analyse their value for money, as the cost to the complainants will be analysed in the following section.

A value for money approach aims to examine if the ombudsman service is worth the cost of its operation. In other words, the purpose of this approach is to establish if there is a balance between the budget provided to the ombudsman and the contribution and outcomes of its work. However, the major difficulty in adopting this approach is that the contribution of the ombudsman is difficult or even impossible to measure.

In the year 2018–2019, the budget of the PHSO was £28,004,000, that of the LGSCO was £11,085,000, and that of the SPSO was £4,732,648. In recent years, the PHSO and the LGSCO have faced a reduction in their budget, while the figures also show that the number of complaints received by these two ombudsmen has increased over the years. For example, according to the PHSO (2019, p.43), its budget has reduced in the recent years, as follows:

- 2016–2017: £31,993,000
- 2017–2018: £31,186,000
- 2018–2019: £28,004,000
- 2019–2020: £25,942,000

Therefore, the PHSO has faced a 24.3% reduction in spending from 2016 to 2020, as a part of the 2015 Comprehensive Spending Review (PHSO, 2019). Similarly, the LGSCO states that the reduction in its budget led the office to concentrate only on its statutory functions; and as a consequence of this reduction, the institution might lack the flexibility and ability to deal with any increasing demand on its services (LGSCO, 2019). The LGSCO concludes that the current budget of the office is inadequate for carrying out its core functions (LGSCO, 2019). By contrast, the budget of the SPSO has been increased in the recent years, as follows:

- 2015–2016: £3.24 million
- 2016–2017: £3.25 million
- 2017–2018: £4.3 millions
- 2018–2019: £ 4,732,648

One of the suggested measures for evaluating the value for money delivered by the public sector ombudsmen is cost per case. However, the PHSO *value for money study*, found that:

> ‘cost-per-case was a very limited measure of value that required significant contextualisation and sensitivity in terms of its interpretation. It was also a measure that excluded or underplayed a large amount of the

> added value that ombudsman offices delivered for their stakeholders' (Tyndall, Mitchell & Gill, 2018, p.2).

In this sense, several activities delivered by the ombudsman are excluded from the cost per case approach, even though they are certainly of high value for the parties who benefit from ombudsman services. These activities include providing advice and support for people, referring the complainant to the appropriate resolution mechanism, as well as other activities conducted to improve the quality of public services – these can take different forms, such as publishing guidance and principles, carrying out systemic investigations, and monitoring complaints-handling procedures within public authorities.

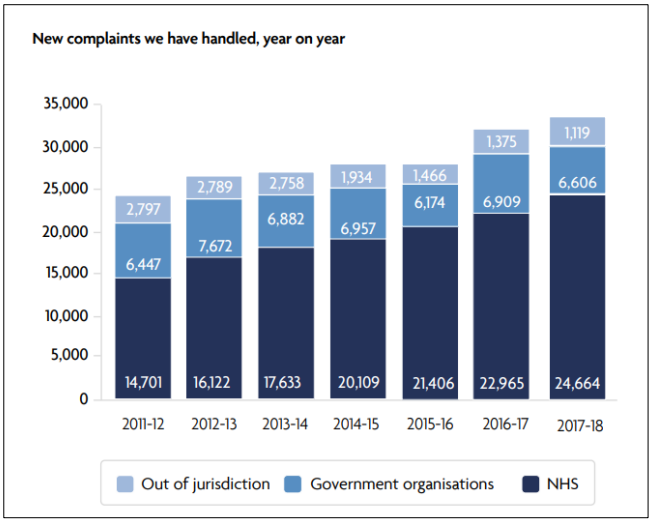
It could be said that the cost of handling complaints by the ombudsman can be affected by two factors: the method used to resolve complaints, and the types of complaint handled. First, as noted earlier, the ombudsman has the discretionary power to decide whether to resolve complaints through informal resolution procedures or through formal investigation. There is no doubt that resolving complaints through informal resolution procedures, such as mediation is less costly than conducting full investigation.

Second, in evaluating the ombudsman scheme's value for money, it is important to note that some types of complaints handled by the ombudsman might incur greater costs than others. The cost of handling complaints about health services is on average higher than for complaints about other government organisations (Tyndall, Mitchell & Gill, 2018). In health services complaints, the ombudsman has the remit not only to handle complaints where maladministration or service failure has been found, but also to review clinical judgement. The process of handling this type of complaint might involve additional cost compared to other types, particularly because such complaints require inputs from clinical experts and involve more caseworkers, due to their complexity (Tyndall, Mitchell & Gill, 2018). Health services complaints also require more training for the ombudsman staff, due to the greater emotional sensitivity involved in these cases (Tyndall, Mitchell & Gill, 2018).

Therefore, it is essential here to analyse the ombudsmen's type of complaints-handling in relation to the sector complained about. The following paragraphs analyse the data for ombudsmen's work in terms of the sector concerned in the investigations. This includes the figures for complaints handled in the year 2018–2019, in terms of the sector and the number of complaints investigated, in relation to the sector complained about.

PHSO: According to the PHSO's annual report in 2019, the number of complaints it handled was 29,841, of which 23,293 were within the jurisdiction of the HSO, while only 5,567 were within the PO's jurisdiction. Thus, complaints about the health sector represented 78% of the PHSO's caseload in 2019. Moreover, the number of full investigations during this year in relation to the public authority concerned, was 115 complaints concerning the UK government bodies and other public authorities, and 1,722 complaints involving the NHS in England. This means that a high percentage of the ombudsman's investigations involved the health sector.

Figure 7.3: Complaints handled by the PHSO in the years from 2012 to 2018.



Source: PHSO, 2018, p.18.

From Figure 7.3, it can be noted that in the years 2011 to 2018, the majority of the complaints handled by the PHSO were about the NHS in England, while complaints about government department formed a much smaller proportion of the total. Thus, complaints about health services have dominated the PHSO's caseload in recent years.

As the HSO and the PO shared a single budget, it is difficult to determine the exact cost of operating the HSO. But based on the dominance of health complaints in the PHSO's caseload, it could be said that the average cost of handling health services complaints is higher than that of handling other complaint types.

LGSCO: The LGSCO handled 18,482 complaints and inquiries in the year 2018–2019, of which 18% concerned education and children's services, and 16% were about adult care services. These two figures represent the highest proportion of the LGSCO's caseload. The

LGSCO's 2019 annual report includes no information on the number of complaints dealt with by full investigation, in relation to the sector complained about.

SPSO: The SPSO received 4,188 complaints in the year 2018–2019, of which 34% were concerned with the health sector, and 31% were about local authorities. Similarly to the PHSO's caseload, the highest percentage of complaints handled by the SPSO involved the health services. However, what distinguishes the SPSO's caseload from the PHSO, is that unlike the latter, health sector complaints handled by the SPSO represent a proportionate amount of the total complaints. According to Tyndall, Mitchell and Gill (2018), this might be related to the existence of the MP filter and the absence of an integrated jurisdiction for the PHSO, such as applies to the SPSO. Similarly to the LGSCO, there is no information on the number of complaints resolved by conducting a full investigation, in relation to the sector concerned.

Based on the above analysis, it is difficult to evaluate the cost-effectiveness of operating the public sector ombudsmen in the UK, as there is no methodology that can effectively measure all the impacts and outcomes of each ombudsman. The cost per case approach might be an incomplete measure of ombudsmen's value for money, as several contributions of their work cannot be covered in this approach.

7.2.7 Accessibility

One of the important dimensions of the ombudsman's role as a complaints-handler is accessibility. The ombudsman, as a form of alternative dispute resolution, ought to provide citizens with an accessible route to complain, which can give them a more positive experience of ombudsman processes. It has been noted that one of the benefits of the ombudsman as a remedy is that it is not subject to the same limitations and barriers as court proceedings.

The term 'accessibility' covers four elements: cost, ease of access, ease of use of procedures (Giddings et al., 1993), and awareness of ombudsman services. It has been noted that poor awareness of ombudsmen's services and functions is 'a major barrier to access' (Seneviratne, 2002, p.146). Each of these elements will be analysed in the following subsections.

7.2.7.1 Cost

Because of their expense and the delay in their proceedings, courts are not always an appropriate means for complaining against government decisions. By contrast, citizens can use the public sector ombudsmen free of charge. Moreover, as the ombudsman follows an investigatory approach to resolve complaints, there is no need to employ a lawyer.

7.2.7.2 Ease of access

All the public sector ombudsmen in the UK, except the PO, provide direct access to their services, so that the complaint can be submitted directly by the aggrieved person. By contrast, complaints to the PO must be referred by a Member of Parliament. The MP filter means that an MP decides whether or not to refer a complaint for investigation by the PO. There is no legal requirement for an MP to pass on a complaint to the PO. The basic convention is that the MP should deal with their own constituents' complaints only. Except for this, there are no restrictions.

The existence of the MP filter might be related to the fact that the PO was originally created in the UK to assist Members of Parliament in performing their function of obtaining redress of grievances, rather than as a free-standing citizens' defender (Giddings, 1993; Kirkham, 2007). Therefore, the MP filter was introduced to support the constitutional role of the Parliament's members in protecting and promoting citizens' interests (Collcutt & Hourihan, 2000). The PM filter was also included in the 1967 Act to reduce the risk of the PO being overwhelmed by the number of complaints. It was envisaged that the MPs would continue to deal with most complaints themselves, but would refer appropriate complaints to the ombudsman (Collcutt & Hourihan, 2000).

However, suggestions for abolition of the MP filter have been made by ombudsmen, Select Committees, Cabinet Office and legal scholars. Although the MP filter seemed to be necessary in the first period of the PO's establishment (Kirkham, 2016), the case for the filter now seems much weaker. The Whyatt report, as the original proposal for the PO in the UK, suggested that citizens should have direct access to the office after five years of its existence (Justice, 1961). Fears that the ombudsman would be overwhelmed by the number of complaints have not been realised, and the introduction of direct access to the other public sector ombudsmen makes the MP filter seem anomalous.

Research by the National Audit Office in 2005, which involved a number of participants, found that the existence of the requirement to complain to an MP first 'was not well known'. When an explanation was given to four of the groups involved in this research, three of them thought that the MP filter was 'unhelpful and hard to understand' (National Audit Office, 2005, p.64). The research also found that some citizens 'distrusted MPs to pass on to the Parliamentary Ombudsman a complaint with which they or their party disagreed' (National Audit Office, 2005, p.64)

The MP filter can also cause some difficulties in cases where some aspects of the complaint fall within the jurisdiction of the PO and so require a referral by an MP, whereas others fall within the jurisdiction of the HSO, where such a referral is not required (PASC, 2009). Moreover, in a survey conducted by the Cabinet Office as a part of their review in 2000, regarding MPs' understanding of the PO's arrangements:

> '10% said they were rather confused about arrangements for referral, 20% were not very clear or were unclear about the PCA's jurisdiction, and 15% were rather or very confused about overall arrangements' (Collcutt & Hourihan, 2000, p.23).

Therefore, there appears to be no formal process or procedure to ensure that MPs are aware of the jurisdiction and the functions of the PO, or to evaluate their understanding; this does not seem satisfactory for such an important citizens' remedy. Therefore, the MP filter might be a barrier that prevents potential complainants from using the PO, and hence represents a concern about the PO's accessibility. However, it is important to mention that the Draft Public Service Ombudsman Bill 2016 did not include an MP filter.

Moreover, the existence of several redress mechanisms in the UK's administrative justice system, such as courts, tribunals, ombudsmen and internal complaints procedures, may make it difficult for individuals to identify the correct mechanism to use. Therefore, the complex landscape of the redress mechanisms against public administration in the UK can be considered as a potential barrier to ombudsmen's accessibility.

Furthermore, the ombudsmen sector itself, given the existence of several public sector ombudsmen in the UK, may make it difficult for potential complainants to decide to which of these ombudsmen he/she should complain to – especially as in practice there are jurisdictional overlaps between these ombudsmen (Buck, Kirkham & Thompson, 2016). An example of this difficulty can be found when a complaint is concerned with both the NHS

and a social care provider in England. In this case, it difficult for the ordinary person to decide whether to submit their complaint to the PHSO or the LGSCO. However, there is a lack of empirical research to support this argument.

7.2.7.3 Ease of use of procedures

One of the features relevant to accessibility is the method adopted to submit a complaint to the ombudsman. In the case of the PO, the complainant should submit a written complaint to a Member of Parliament, who can then refer the complaint to the PO. There is no such process for the other public sector ombudsmen in the UK, as citizens can submit their complaints directly to the LGSCO, HSO and SPSO via an online complaint form, phone, freepost, or in person.

The requirement to complain in writing may disenfranchise certain citizens, especially those for whom English is not their first language, or who are not comfortable with writing (Law Commission, 2010). Thus, with the aim of improving access to the PHSO, the Law Commission (2010) has suggested that a new provision be inserted in the PHSO Acts, to give discretion to disapply the writing requirement.

Part of the informality and simplicity of ombudsman procedures is that there is no formal requirement for complainants' attendance or oral hearing, as there is in courts and tribunals. Thus, using the services of the ombudsman may be less stressful than judicial remedies. Broadly speaking, the non-bureaucratic and simple process of the ombudsman's work is likely to make it more accessible and consumer-focused, compared to other grievances redress mechanisms.

7.2.7.4 Awareness of ombudsman services

Public awareness is an important element in the effectiveness and accessibility of the ombudsman. As a number of the public sector ombudsmen in the UK have no power to start an investigation into a defective decision on their own initiative, the first action for conducting an investigation is the aggrieved person's submission of a complaint to the ombudsman. Obviously, citizens must be aware of the existence of the ombudsman in order to complain to it.

There is some evidence that supports the view that citizens might not be aware of the ombudsman's existence and its role as a complaints-handler against public administration. Justice (1977), after ten years of the PO's establishment, argued that the percentage of citizens who know and use the PO is small, and therefore the PO might be 'under-utilised', due to the lack of awareness of its existence or the misunderstanding of its functions.

According to a survey by Mori (2003), only 37% of citizens were aware of the PO, 45% had heard of the HSO, and 44% knew of the LGSCO. In 1997, a survey[26] found that only 14% of the public were aware of the PO, and after promptings of participants, this percentage of awareness rose to 23%. Thus, although these figures are not up to date, they raise a significant concern about public awareness of the ombudsmen, which in turn requires more arrangements to publicises and advertise their functions and powers. Kirkham (2005a) noted that despite all the efforts made by the public sector ombudsmen in the UK to raise public awareness of their existence and services, it appears that public awareness of the ombudsmen has not increased to a level similar to their awareness of the courts. However, it is essential to note here that with the absence of up-to-date opinion surveys, conclusions about the extent of public knowledge are highly speculative.

The accessibility of the ombudsman can also be examined by analysing the demographic data of ombudsman users. According to the PHSO (2019), 83% of its users in the year 2018–2019 were white, while only 17% were black, Asian or ethnic minority. Moreover, 42% of the PHSO's users were aged 35–54, and 38% were 55 to74. Therefore, the highest proportion of the PHSO's users are white and older people, and its services are less used by young and ethnic minority citizens. This might reflect the fact that the level of people's awareness of the ombudsman varies remarkably between 'different socio-economic and demographic groupings' (Gregory & Giddings, 2000, p.23). It was also observed in a report by the National Audit Office in 2005 that older citizens are more aware of ombudsmen, compared to younger citizens. Therefore, any arrangements to publicise ombudsman services must take into account the different social and economic groups, especially vulnerable groups.

As there are no up-to-date surveys about the level of citizens' awareness of ombudsmen's existence and functions, the rapid growth of using the PHSO can be considered as evidence of the increasing public awareness of ombudsman services. As shown in Figure 7.3, the number of complaints handled by the PHSO has steadily increased in recent years, which is

[26] Based on the PO, Press Release on 17 July 1997, cited in (Gregory and Giddings, 2000).

a trend that might continue. However, this does not mean that citizens' awareness of the PHSO reached an acceptable level.

The public sector ombudsmen in the UK can be considered as a second-tier redress mechanism, which means that complainants are required to exhaust any internal complaints procedures before resorting to them. Thus, it has been suggested that public authorities themselves can play a role in raising public awareness of the ombudsmen's existence (Buck, Kirkham & Thompson, 2016). This suggestion is inspired by the Citizens Charter in 1991, which indicated that public authorities are responsible for informing the users of their services about their right to complain (Kirkham, 2005a). Therefore, internal complaints procedures can make citizens aware of their right to complain to the ombudsman. This could be an effective strategy to increase public awareness, as it targets most of the ombudsman's potential users.

In practice, most of the public sector ombudsmen in the UK use a variety of methods to improve and increase citizens' awareness of their services; these include the use of new technologies such as websites and Twitter. However, there is no evidence available on the success of these methods in increasing public awareness of the ombudsman. It is worth mentioning here that although the use of the internet, computers and social media can help to increase public awareness of the ombudsman, there is a risk that over-reliance on these tools might not help spread knowledge of the ombudsman amongst specific groups – particularly those with no access to the internet, or poorer and less educated individuals.

From the above analysis, it seems that there is a concern about the PHSO's accessibility, especially with the existence of the MP filter, the requirement of written complaint, and the absence of an integrated ombudsman in England. Compared the PHSO, it appears that the LGSCO and SPSO are more accessible to citizens. More broadly, due to the lack of up-to-date data and evidence, and taking into account the rising caseload of most of the public sector ombudsmen in the UK, it is difficult to draw a clear-cut conclusion about the level of public awareness regarding the existence of ombudsmen and their roles.

7.2.8 Effectiveness

There are two fundamental aspects through which the effectiveness of the ombudsman can be evaluated. First, it is essential to evaluate ombudsman's performance in delivering sound decisions. By way of explanation, the first aspect is concerned with the ombudsman's

performance in upholding justified complaints and rejecting unjustified complaints. The second aspect of evaluating ombudsman's effectiveness is to examine the remedy provided to the aggrieved person. This can be assessed by analysing the types of remedies recommended by the ombudsman, and measuring public bodies' compliance with these recommendations.

7.2.8.1 Making sound decisions

The core role of the ombudsman is handling individuals' complaints where maladministration has occurred. The aggrieved person should show that he/she has suffered from injustice caused by maladministration. Accordingly, the ombudsman is required to decide whether there has been maladministration and injustice, in order to decide whether to uphold the complaint or not. As indicated earlier, part of evaluating an ombudsman's effectiveness is to analyse its ability to make sound decisions in practice. It is worth noting that in practice, there might be some situations in which, on the basis of the evidence obtained, there is no single uniquely correct decision. Therefore, in order to evaluate an ombudsman's decision, it would be more appropriate to test if this decision is sound and reasonable. In other words, it is important to test if the ombudsman generally upholds complaints which are well founded, and rejects those that are not.

We can begin examining this issue by analysing the figures and statistics of ombudsmen's performance, as provided in their annual reports. The three following figures show the performance of the PHSO, LGSCO and SPSO for the year 2018–2019 based on the statistics and terminologies used in their annual reports.

Table 7.3: The performance of the PHSO in the year 2018–2019.

Type of figure	Number/Percentage
Inquiries received	112,262
Complaints received	29,841
Complaints not ready for the ombudsman	24,183
Assessment decisions[27]	3,597
Resolutions[28]	444
Complaints investigated	1,837
Complaints upheld/partly upheld	746 (41%)
Complaints not upheld	871
Complaints about ombudsman services	335 (1%)
Upheld complaints about ombudsman services	147
Complaints about ombudsman decisions	96
Upheld complaints about ombudsman decisions	43
Percentage of ombudsman decisions' implementation	--

Source: PHSO, 2019.

Table 7.4: The performance of the LGSCO in the year 2018–2019.

Type of figure	Number/Percentage
People helped on the telephone	15,637
Inquiries and complaints dealt with	18,482
Cases dealt with by initial check	8,709
Cases dealt with by initial investigation	5,315
cases dealt with by detailed investigation	4,458
Complaints upheld	2,588 (58%)
Complaints not upheld	--
Complaints about ombudsman services	235
Upheld complaints about ombudsman services	74 (31%)
Complaints about ombudsman decisions	752
Upheld complaints about ombudsman decisions	39 (5%)
Implemented recommendations	99.4%

Source: LGSCO, 2019.

[27] Assessment decision means that the ombudsman found that it cannot do anything more to remedy the complainants.
[28] Resolution means that a complaint has been resolved without an investigation with a positive outcome for the complainant.

Table 7.5: The performance of the SPSO in the year 2018–2019.

Type of figure	Number/Percentage
Inquiries handled	1,707
Complaints received	4,188
Total number of complaints closed at initial assessment - Resolved with no investigation - Number of complaints that the ombudsman found that it can do any things more to remedy the complainants (proportionality) - Premature - Outcome not achievable - Out of jurisdiction (discretionary) - Out of jurisdiction (non-discretionary) - Not duly made or withdrawn	3,285 89 900 798 210 163 188 937
Complaints closed after investigation	670
Complaints upheld/partly upheld	58%
Complaints not upheld	--
Complaints about ombudsman services	68
Upheld complaints about ombudsman services	17 (25%)
Complaints about ombudsman decisions	10%
Upheld complaints about ombudsman decisions	--
Implemented recommendations	94% of SPSO recommendations were implemented within three months of the target date set.

Source: SPSO, 2019.

Before analysing the above statistics, it is important to mention that the comparison of the performance of these ombudsmen might not provide a correct conclusion or clear-cut facts, for the following reasons. From the figures above, it can be seen that each ombudsman uses different terminology to present its work. For example, the PHSO uses the term ‘inquiries’ for all the inquiries received, whether by phone, post or mail; and the number of inquiries presented in the annual report includes both the number of inquiries with advice provided and the number of complaints handled. By contrast, the LGSCO distinguishes between the number of people it helped by phone and the number of inquiries and complaints received. The SPSO distinguishes between the number of inquiries received and the number of complaints received, where the term ‘inquiries’ includes general inquires, out-of-jurisdiction cases and premature cases. Thus, the term ‘inquiries’ has a different meaning for each ombudsman, and therefore, these figures are not directly comparable. Furthermore, each ombudsman uses a different method to collect its data and figures. Also, each ombudsman

in this study has a different jurisdiction, which in turn will affect the number of inquiries and complaints handled.

More clarity is needed in presenting the ombudsman's performance figures. For example, in presenting the number of investigations in a specific year, it is essential to distinguish between the number of complaints accepted for investigation during the year, the number of launched investigations, the number of discontinued investigations, and the number of concluded investigations. In the number of concluded investigations, it is important to distinguish between the investigations continued from the previous year – or even previous years – and the number of investigations started during the year. Making these distinctions should help to provide an accurate percentage of investigations carried out by the ombudsman, and of fully or partly upheld complaints.

From the above tables, it can be seen that the PHSO has the highest volume of inquiries and complaints received, compared to the LGSCO and the SPSO in the year 2018–2019. Nevertheless, the LGSCO has the largest number of complaints investigated, with 4,458 investigations, compared to 1,837 investigations by the PHSO and 670 by the SPSO. The LGSCO and the SPSO have the same percentage of upheld complaints, which is 58% of all complaints investigated.

It seems that using the published statistics to compare the performance of these three ombudsmen in making sound decisions demonstrates the difficulties of conducting such a comparison, rather than enabling us to draw firm conclusions about their actual performance. Therefore, as the comparison between different public sector ombudsmen in the UK is inconclusive due to the several reasons analysed above, the following paragraphs will analyse the PO's work of the from its establishment in 1967 to 2019, in case this provide some insights. The following table represents the number of the PO's investigations and the percentage of upheld complaints over the years.

Table 7.6: The performance of the PO from 1967 to 1991.

	Complaints investigated	*Complaints upheld*	*Percentage*
1967	188	19	10.1
1968	374	38	10.2
1969	302	48	15.9
1970	259	59	22.8
1971	182	67	36.8
1972	261	79	30.3
1973	239	88	36.8
1974	252	94	37.3
1975	244	90	36.9
1976	320	139	43.4
1977	312	111	35.6
1978	341	131	38.4
1979	223	84	37.7
1980	225	107	47.6
1981	228	104	45.6
1982	202	67	33.2
1983	198	83	41.9
1984	183	81	44.3
1985	177	75	42.4
1986	168	82	48.8
1987	145	63	43.5
1988	120	59	49.2
1989	126	61	48.4
1990	177	74	41.8
1991	183	87	47.5

Source: Gregory and Pearson, 1992, p. 472.

Table 7.7: The performance of the PO and the PHSO from 1992 to 2019.

Year	Complaints investigated	Complaints fully upheld	Complaints partly upheld	Percentage of complaints fully and/or partly upheld
1992	190	103	74	93%
1993	208	127	72	95.6%
1994	226	131	69	88.5%
1995	245	153	83	96%
1996	260	189	57	94.6%
1997-1998[29]	376	234	117	93.3%
1998-1999	372	250	97	93%
1999-2000	313	219	72	93%
2000-2001	247	157	69	91.5%
2001-2002	195	122	43	84.6%
2002-2003	136	74	42	85%
2003-2004	148	67		45%
2004-2005	2,886	-	-	-
2005-2006	3,606	-	-	37% fully upheld 30% partly upheld
2006-2007	2,502	-	-	34% fully upheld 28% partly upheld
2007-2008	959	-	-	37% fully upheld 18% partly upheld
2008-2009	806	-	-	37% fully upheld 15% partly upheld
2009-2010	371	-	-	80% of complaints about government departments 62% of complaints about health bodies
2010-2011	412	-	-	78% of complaints about government departments 79% of complaints about health bodies
2011-2012	410	236	57	83% of complaints about government departments 79% of complaints about health bodies
2012-2013	384	225	99	60% fully upheld 26% partly upheld
2013-2014	2,199	312	542	42%
2014-2015	4,159	416	1105	37%
2015-2016	3,861	347	1196	40%
2016-2017	4,239	277	1254	36%
2017-2018	2,676	179	825	37.5%
2018-2019	1,837	746		41%

Source: PHSO annual reports for the years 1992 to 2019.

As with the comparison between different ombudsmen, there are several reasons why the comparison of the PHSO's work and performance over the years does not provide a good basis for assessing actual performance in making sound decisions. First, the method used to calculate and present the ombudsman's caseload and figures in its early years is different from the current method. One difference is that in some years, the total number of complaints

[29] In this year, the PO changed its reporting method. Instead of writing the annual reports on the basis of calendar years, which was the method used from its establishment in 1967 until 1996, the PO decided to write the annual reports on the basis of the financial years. The reason for this change, according to the PO (1998), is that it was difficult for Parliament to measure the use of resources by the PHSO, where the HSO issued its annual reports on the basis of financial years and the PO used calendar years.

investigated includes discontinued investigations, fully or partly upheld investigations, and not-upheld investigations. By contrast, in other years, the total number of complaints investigated includes only the number of investigations fully or partly upheld, and not-upheld complaints, with no mention of the discontinued investigations. This attitude can certainly affect the percentage of upheld complaints over the years, and thus these figures are not comparable. A second reason is that the terminology used to present these figures has also varied over the years. In 2005, for example, the PHSO's annual report states that in that year it changed its method of recording and reporting the caseload; and therefore, the figures in this report cannot be compared with the statistics provided in previous reports (PHSO, 2005b).

Furthermore, the current jurisdiction of the PHSO covers more public authorities, government departments and quasi-autonomous non-governmental organisations, compared to the PO's jurisdiction in its early years. In addition, devolution is another factor that makes comparison over the long term difficult. Before devolution, complaints about the Scottish and Welsh government agencies were within the jurisdiction of the PO. After devolution, complaints about devolved matters were transferred to the devolved parliaments. Therefore, the figures included in the PO's annual reports before devolution are different from those after devolution, due to the change in its jurisdiction.

One of the major difficulties in analysing the above figures is that although one person carried out the tasks of both the PO and HSO, each office issued separate annual reports, from its establishment until the year 2003–2004. In the year 2004–2005, the PHSO started to issue a single annual report for both offices. Thus, the statistics provided in Table 7.6 are exclusively for the PO; while those in Table 7.7 are for the PO's performance from 1992 until the year 2004, and the PHSO's performance from 2005 to 2019.

Although examining and analysing the above figures might not have resulted in an accurate and comprehensive conclusion, due to the reasons mentioned above, nonetheless it can reflect a general overview or pattern of the ombudsman's performance over the years. It can be seen in Table 7.6 that the number of complaints investigated by the PO in the first 25 years of its work was in the range of 120–374 complaints, and that the percentage of upheld complaints increased gradually from 10% in the first year of the ombudsman's work (1967) to 47.59% in 1991.

In Table 7.7, it can be noticed that in recent years, the number of complaints resolved by conducting a full investigation has increased dramatically, from 371 complaints in 2010 to 4,239 complaints in 2017. This change started in the year 2013–2014, due to the new policy that the PHSO adopted in this year to increase the number of complaints it could investigate (PHSO, 2014). In previous years before 2013, a complaint had to meet a set of criteria in order to be resolved via a formal investigation; thus, if the complaint did not meet all of the criteria required, it would be resolved informally. However, based on the new policy, a complaint should only meet some of the main criteria in order to be resolved by formal investigation (PHSO, 2013).

As a result of this new complaints policy, the PHSO in the year 2013–2014 investigated 2,199 complaints, compared to 384 complaints in 2012–2013. According to Table 7.7, in the year 2013–2014, the PHSO fully or partly upheld 854 complaints, compared to 324 complaints in the previous year; even though the percentage of fully or partly upheld complaints dropped from 86% in 2012–2013 to 42% in the following year. The PHSO (2014) noted that when the PHSO reduced the standards required to conduct a formal investigation, the office was able to redress more grievances and provide more remedies, which means that the ombudsman was more customer-orientated.

Table 7.7 also shows a reduction in the number of complaints investigated in the years 2017-2018 and 2018-2019. This reduction might have resulted from the PHSO's attempts to resolve citizens' complaints in earlier stages without the need to conduct a full investigation, as part of its ambition to resolve cases as soon as possible. This might also mean that the PHSO has worked to change its emphasis towards resolved complaints, through informal resolution in the assessment stage; this strategy differs from the policy adopted in the year 2013–2014.

As shown in Table 7.7, the PHSO in some years tended to separate the figures of the health sector from those of the other government departments regarding the number of complaints upheld, with no total figures for both categories together. Moreover, in the years from 2006 to 2011, the PHSO's annual reports present only the number of complaints investigated, and do not give the numbers of complaints fully or partly upheld. In these years, the annual reports provide only the percentage of complaints fully or partly upheld. In contrast, most of the recent annual reports of the PHSO provide more clear and detailed information and figures of ombudsman investigations.

In the years from 1992 to 2003, where the detailed information of ombudsman's fully or partly upheld complaints has been provided, it can be found that during these years the number of complaints fully upheld is higher than those partly upheld. By contrast, in the years from 2013 to 2018, the number of complaints partly upheld exceeds fully upheld complaints.

In the above paragraphs, we have attempted to analyse the performance of the PHSO, LGSCO and SPSO, with the aim of comparing their effectiveness in delivering sound decisions. However, this comparison has limited value, due to the reasons mentioned above. Therefore, a comparison of the PHSO's performance over the years has been conducted, to analyse its effectiveness in the long run. However, this comparison also presents some practical difficulties. Although all the figures and statistics analysed in this section do not show whether the ombudsman generally makes sound decisions, they at least suggest that citizens who complain have a reasonable chance of obtaining a remedy.

Furthermore, other evidence might be used to evaluate the effectiveness of the UK's principal public sector ombudsmen in making sound decisions, such as case studies published in ombudsmen's annual reports, case summaries, and ombudsmen's decisions published in their official websites. Although there is an absence of legal research that has analysed this type of evidence, these evidence show that in general the ombudsmen make sound decisions. Therefore, based on the analysis provided in this subsection, we can conclude that the work of the UK's principal public sector ombudsmen has led to increasing citizens' opportunity to obtain a remedy against unfair decisions made by government organisations.

7.2.8.2 Providing effective remedies

The general rule is that the aggrieved person should be restored in the position that he/she was in before the injustice occurred. Thus, the second aspect of evaluating the ombudsmen's effectiveness as a complaints-handler is to examine whether it helps the complainant to obtain an effective remedy when a complaint has been upheld. When examining this aspect, it is essential to distinguish between two issues: the types of remedies *recommended* by the ombudsman, and the level of public authorities' *compliance* with those recommendations.

There is no specification in the UK ombudsman legislation the regarding the types of remedies that the ombudsman can propose. Therefore, the public sector ombudsmen have

sustainable discretion in deciding which remedy to recommend. In practice, ombudsmen recommend a variety of remedies, which include formal apology, financial compensation, review of a decision, service improvement, and review of procedure.

Table 7.8: Types of remedies provided and percentage of compliance for the PHSO, LGSCO and SPSO in the year 2018–2019.

Type of figure	PHSO	LGSCO	SPSO
Number of full investigations	1,837	4,458	670
Formal apology	510	-	342
Service improvement	450	1241	644
Financial compensation	345	-	8
Other actions	103	-	36
Percentage of implemented recommendations	-	99.4%	94%[30]

Sources: PHSO, 2019; LGSCO, 2019; SPSO, 2019.

The types of remedies provided by the ombudsmen as indicated in their annual reports can include apology, financial compensation, public services improvements, and other actions such as a review of a decision. There is no information in the LGSCO annual report in 2019 about the types of remedies provided to the complainants; the report only mentions that 1,241 recommendations were made to improve public services. The same approach can be found in its annual report for the year 2017–2018, which states that it made 730 recommendations to improve public services (LGSCO, 2018a).

One of the remarkable differences in Table 7.8 is the number of services improvements made by the LGSCO and the SPSO. The SPSO made 644 services improvements, compared to 450 for the PHSO, even though the number of complaints investigated by the PHSO was 1,837 compared to 670 for the SPSO. This might be because that the SPSO has a statutory function in standardising and monitoring complaints-handling procedures within government departments. The LGSCO made 1,241 service improvements, which means that the LGSCO is more likely to recommend improvements in public administration practices, compared to the PHSO and SPSO. Another notable figure is that from the 670 complaints investigated by the SPSO, it recommended financial compensation only in eight cases in the year 2018–2019. The PHSO recommended financial compensation in 345 cases in the year 2018–2019, which totalled £236,038.18 from NHS organisations and £16,435.00 from UK

[30] According to the SPSO (2019), 94% of its recommendations were implemented within three months of the target date set. There is no information about the total percentage of the implemented recommendations.

government organisations. Thus, it can be said that in practice the PHSO and the SPSO provide the complainants with a variety of remedies. This statement cannot be applied to the LGSCO, as there is no detailed evidence about its performance in this regard.

Another issue in relation to the remedies recommended by the ombudsman is the extent to which public bodies comply with these recommendations. As noted, most of the public sector ombudsmen in the UK only issue recommendations to the public authority concerned, based on the findings of the investigations. These recommendations are not legally enforceable.

Although this feature of ombudsmen's decisions might be seen as a weakness by the public, it is in fact one of the key strengths of the public sector ombudsmen in the UK. Lack of enforcement power is a feature of the ombudsman institution, not only in the UK but in many countries around the world. With the aim of investigating government activities and holding them to account, the ombudsman has access to official information and documents, and can interview public servants within the public authorities. The knowledge and experiences obtained by using these wider powers of investigation might to some extent generate high-profile developments and changes in the public sector policies.

In other words, the ombudsman has the ability to identify systemic failures within public administration, and can make recommendations to remedy these failures and prevent them from affecting other citizens. This attitude towards good administration can in the long term reflect a political impact of the ombudsman's activities (O'Brien, 2009). Therefore, given this potential impact of ombudsman investigation, which on some occasions can have political elements, it is preferable to leave the power of compliance to the public authorities themselves. Another political aspect of the non-binding decisions of the ombudsmen is that this feature can be considered a safeguard against any improper influence of ombudsmen on the political sphere (Buck, Kirkham & Thompson, 2016). Therefore, it could be said that the ombudsman's ability to act as an accountability mechanism over the quasi-political actions of public administration, and the lack of enforcement power of ombudsmen's decisions, together represent one of the unique contributions of this institution (Buck, Kirkham & Thompson, 2016).

Public authorities have a moral duty to accept ombudsmen's findings, whether in relation to providing redress in a specific individual case, or to change a specific procedure with the aim of long-term improvement. Unlike the coercive nature of the courts process, the lack of

an enforcement power for ombudsmen's decisions allows government agencies to think appropriately of the ombudsman's findings and properly apply the recommendations, which in turn can enhance citizens' experiences of public services. This means that the lack of enforcement power encourages a cooperative relationship between the ombudsman and public bodies, in terms of providing information, acknowledging mistakes, and accepting any recommendations for improvements. It also has been suggested that:

> 'Ombudsmen working in constructive partnerships with public bodies are in a stronger position to secure workable solutions than if the Ombudsmen were seen as a hostile force imposing solutions' (Kirkham, Thompson & Buck, 2008, p.7).

Certainly, the existence of an enforcement power for ombudsmen's decisions could alter the nature of the ombudsman and its relationship with public authorities. In such circumstances, public authorities will follow a more defensive method when they are dealing with ombudsmen's investigations, such as hiring a lawyer (Buck, Kirkham & Thompson, 2016).

According to Giddings (1998, p.128), in practice, there are two bases for the government agencies' acceptance of the PO's recommendations: 'acknowledgement of the calibre of the investigative research and persuasive argumentation in the report; and … the (moral) authority of the PCA as an impartial investigator'. Although there are rare occasions where government agencies have refused to accept and implement ombudsman recommendations such as *Sachsenhausen* and occupational pensions, public authorities are aware that this is an exceptional attitude.

As seen in Table 7.8, the LGSCO was successful in seeing 99.4% of its recommendations implemented by public authorities. According to the SPSO (2019), 94% of its recommendations were implemented within three months of the target date set. However, there is no information about the total percentage of the SPSO's implemented recommendations. [31] Neither does the PHSO annual report provide any information on the percentage of its implemented recommendations for the years 2017–2018 and 2018–2019. However, in the years 2015–2016 and 2016–2017, the PHSO stated in its annual reports that the percentage of government organisations' compliance was 99% (PHSO, 2016; 2017).

[31] The same attitude was found in the SPSO annual report for the year 2017–2018, which states that: '94% of the recommendations we made were completed within three months of the target date set' (SPSO, 2018, p.20).

Giddings (1998) stated that in practice, nearly all the recommendations of the PO have been implemented by public authorities; even if the latter might be not have been fully persuaded by the findings of maladministration and injustice. Thus, according to Giddings (1998), despite the absence of enforcement power, the PO is successful in seeing almost 100% of its recommendations implemented by public administration.

There are a number of techniques that can be used by an ombudsman in cases where public authorities refuse to comply with its recommendations. The PHSO, for example, is backed up by Parliament with the aim of strengthening its powers. The PHSO can put a political pressure on a public body by laying a formal report to Parliament under section 10(3) of the Parliamentary Commissioner Act 1967, which will make the ombudsman's findings available for public scrutiny. In a response to the ombudsman report, the Select Committee in practice makes an inquiry and conducts its own assessment of the case, which can include taking evidence from the PHSO, the government body concerned, the complainant, and any public servants. From a theoretical perspective, this approach might be considered by government organisations as an appeal mechanism (Kirkham, 2006).

According to Maer and Priddy (2018), since the establishment of the PO in 1967 until 2018, the PHSO issued only seven special reports to the Parliament, in seven cases where it seemed that the injustice was unlikely to be remedied. Consequently, it can be inferred that there are very few occasions where government bodies refused to comply with the PHSO's recommendations.

There is insufficient space in this thesis to analyse all these reports. However, we can provide a summary of the lessons learned from these cases. For instance, all these reports involved complaints of a political nature. In handling these complaints, the PHSO conducted investigations which reached political areas of government policy. In most of these cases, hundreds or even thousands of citizens were affected by the grievances (Buck, Kirkham & Thompson, 2016). Government bodies concerned in those cases were required based on the PO's findings to provide a large-amount of money by establishing a compensation scheme. In most of these cases, the Select Committee has supported the PHSO's findings and interpretations of maladministration, which in turn reinforce its credibility (Buck, Kirkham & Thompson, 2016). In those disagreements between the PHSO and government bodies, the Select Committee's intervention encouraged public authorities to accept and implement all or some of the PHSO's recommendations.

In terms of the LGSCO, the office is backed up by two arrangements that can be used when local authorities fail to comply with the ombudsman's recommendations. First, according to section 31(2A) of the Local Government Act 1974, the LGSCO can publish a further report if it is not satisfied with the local authority's response. The LGSCO can also require the local authority to publish a statement in a local newspaper, consisting of the LGSCO's recommendations and any other information the LGSCO requests. Therefore, compared to the PHSO, the LGSCO lacks efficient support techniques, as the office has no power to report to Parliament or another democratic authority (Kirkham 2008a). However, in the year 2018–2019, the LGSCO published only one public report of a care provider's non-response to the LGSCO's recommendation (LGSCO, 2019). Apart from this one occasion, the LGSCO was successful in seeing its recommendations implemented.

Based on the above analysis, it can be said that the public sector ombudsmen in the UK have provided a variety of remedies for complainants, and the majority of its recommendations have been accepted by public authorities. Although there are rare occasions when government agencies have refused to accept and comply with ombudsmen's recommendations, these ombudsmen have generally been successful in persuading public authorities to implement their recommendations.

7.2.9 Customer satisfaction

Customer satisfaction is the final criterion used to evaluate the performance of an ombudsman as a complaints-handler. Customer satisfaction with ombudsmen's services can be measured by conducting a survey of the users, which helps to monitor the quality of the ombudsman's services and highlights areas where improvement is needed. It also helps to explore customers' views and perceptions of the ombudsman's services and procedures. However, it is important to note here that in the complaints sector in general, and the ombudsmen schemes more specifically, customers' satisfaction with the ombudsman services is strongly linked to the outcome of their complaints (LGSCO, 2019). This means that there is often dissatisfaction with ombudsman services based on unsuccessful complaints. However, it is not correct to assume that all the dissatisfaction arising from complaints that were not upheld is fundamentally linked to this outcome, or to misunderstanding the nature of ombudsman procedures (Buck, Kirkham & Thompson, 2016). Rather dissatisfaction with ombudsmen's performance might be related to actual defects and mistakes made by the ombudsman (Buck, Kirkham & Thompson, 2016).

In practice, when conducting their customer satisfaction surveys, the PHSO and LGSCO distinguish between complainants who are satisfied with the ombudsman's decisions, and those who are not satisfied with the outcomes of their complaints. More specifically, they distinguish between complainants whose complaints are upheld and those whose complaints are not upheld.

It is important to note that the quality of the survey's results is linked to the method used by the ombudsman to gather customer feedback. The ombudsman can commission an independent research company to gather these data, and certainly this method can ensure the quality of the survey findings. By contrast, the ombudsman can conduct an in-house survey; in this case, the ombudsman team carries out its own survey to gather complainants' feedback about its services. There is no doubt that this method lacks independence, which in turn might affect the quality of the survey's results.

Moreover, complaints about ombudsman services can to some extent indicate an overall view of customer satisfaction with the institution. Requests to review ombudsmen's decisions can also to some extent help to measure customers' satisfaction with ombudsmen's work. Therefore, customers' satisfaction with ombudsmen's services and decisions can be measured in four dimensions: customer survey, services complaints, and review requests. Thus, in the following paragraphs, we will measure customers' satisfaction with the decisions and services provided by three ombudsmen –the PHSO, LGSCO and SPSO – for the year 2018–2019, based on the four elements mentioned above.

PHSO: The PHSO commissioned an independent research company to conduct a customer satisfaction survey in the year 2018–2019. It included 31% of complainants whose complaints had been investigated by the PHSO, and 5% whose complaints had been resolved without an investigation. It found that 86% of complainants whose complaints were fully upheld were satisfied with the ombudsman's work. Among complainants whose complaints were partly upheld, 66% were satisfied with ombudsman services, whereas only 47% of complainants whose complaints were not upheld were satisfied (PHSO, 2019).

In addition, the PHSO published its Service Charter in 2016, which aimed to clarify the quality of services that it ought to deliver to citizens (PHSO, 2019). This charter contains several commitments that the PHSO's performance can be measured against, in three main sections: '1. Giving you the information you need; 2. Following an open and fair process; 3. Giving you a good service' (PHSO, 2019, pp.39-40).

The PHSO publishes its Service Charter reports on a quarterly basis. The data on which these reports rely are obtained from two types of sources: an internal casework process assurance team, and complainants' feedback. The latter is gathered by an independent research organisation.

Table 7.9: The PHSO's performance against the key performance indicator 'Giving you the information you need'.

KPI	2018–19 complainant score	2018–19 average internal casework assurance score[7]
1. We will explain our role and what we can and cannot do	79%	99%
2. We will explain how we handle complaints and what information we need from you	80%	99%

KPI	2018–19 complainant score	2018–19 average internal casework assurance score[7]
3. We will direct you to someone who can help with your complaint if we are unable to, where possible	78%	99%
4. We will keep you regularly updated on our progress with your complaint	81%	83%

Source: PACAC, 2020a, pp. 6–7.

Table 7.10: The PHSO's performance against the key performance indicator 'following a fair and open process'. [32]

KPI	2018–19 complainant score	2018–19 average casework assurance score
5. We will listen to you to make sure we understand your complaint	73%	97%
6. We will explain the specific concerns we will be looking into	88%	93%
7. We will explain how we will do our work	77%	83%
8. We will gather information we need, including from you and the organisation you have complained about, before we make our decision	48%	99%
9. We will share facts with you and discuss with you what we are seeing	68%	45%
10. We will evaluate the information we have gathered and make an impartial decision on your complaint	-[8]	98%
11. We will explain our decision and recommendation and how we reached them.	53%	99%

Source: PACAC, 2020a, p.7.

[32] Complainants' scores in relation to the KPI no. 10 have not been tracked and published by the PHSO.

Table 7.11: The PHSO's performance against the key performance indicator 'giving you a good service'.

KPI	2018–19 complainant score	2018–19 average casework assurance score
12. We will treat you with courtesy and respect	90%	-
13. We will give you a final decision on your complaint as soon as we can	53%	58%
14. We will explain how we will do our work	67%	96%

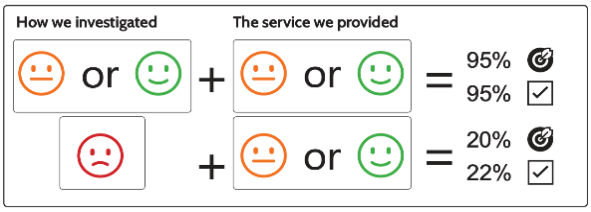
Source: PACAC, 2020a, p.8.

From the tables above, it seems that the quality of the PHSO's services is relatively positive. However, as shown in Table 7.10, there are two areas of concern regarding the ombudsman's fairness. The commitments of sharing information and explaining how the ombudsman makes its decisions and recommendations have scored 48% and 53% in the complainants' feedback. These two commitments have also scored 99% from the casework process assurance team. As noted by PACAC (2020a), it appears that there is a considerable gap between the scores of the complainants' feedback and those of the internal casework process assurance team; not only in the second section, but also in relation to most of the Service Charter's commitments. PACAC (2020a) also noticed that the figures in the Service Charter report represent significant dissatisfaction among a high percentage of the ombudsman's users. Although the outcome of complaints might negatively affect the complainant's feedback, more consideration should be given to these areas, to ensure that the public have confidence and trust in the ombudsman's investigation and findings (Tyndall, Mitchell & Gill, 2018). According to Tyndall, Mitchell and Gill (2018), the use of the Service Charter and the adoption of complainants' feedback as a basis to measure the quality of the PHSO's services is a robust and sophisticated approach, which should be followed by other public sector ombudsmen in the UK.

In the year 2018–2019, there were 335 complaints about the PHSO's services, which represents only 1% of the complaints it handled in that year. Of these complaints, 147 were upheld, with a variety of remedies provided, including apology, explanation, re-consideration of the matter, and compensation payments. According to the PHSO (2019), the total financial compensation provided as a result of poor services in the year 2018–2019 was £16,003. The PHSO also handled 96 requests to review its decisions, and upheld 43 of them.

LGSCO: The LGSCO sets two targets for measuring customer satisfaction with its services. The first is that 95% of complainants who are satisfied or neutral regarding the outcome of their complaints should be satisfied or neutral towards the LGSCO's services. The second target is that 20% of complainants who are not satisfied with the outcome of their complaints should be satisfied or neutral regarding LGSCO's services.

Figure 7.4: The LGSCO's customer satisfaction survey results for the year 2018–2019.



Source: LGSCO, 2019, p.12.

In the year 2018–2019, the LGSCO conducted an in-house survey to measure customer satisfaction with its services. Figure 7.4 shows that the LGSCO was successful in meeting or exceeding its customer satisfaction targets: 95% of the customers who were satisfied or neutral about the outcome of their complaints were satisfied or neutral with the services provided by the LGSCO. The office was successful in exceeding its second target, as 22% (against the target 20%) of the users who were not satisfied with the outcome of their complaints were satisfied or neutral regarding the LGSCO's services.

Moreover, the LGSCO received 235 complaints about its services, and upheld 74 of them. The LGSCO also appointed an external independent reviewer to audit a random sample of the LGSCO's services complaints, in which the complainants had not been satisfied with the services they received. The external reviewer is also responsible for making recommendations to the LGSCO, with the aim of improving its services, and ensuring that staff are dealing with these complaints in an appropriate manner, which meets the LGSCO's quality standards (LGSCO, 2019). Therefore, the external reviewer can be considered as tool for measuring the quality of services provided by the LGSCO, with the overall aim of improving its services. In the year 2018–19, the external reviewer reported that the LGSCO's managers handled all the service complaints appropriately. He also made some recommendations about procedural improvements related to the complaints reviewed (LGSCO, 2019).

The LGSCO also received 752 requests to review its decisions, and upheld only 39 of them, which in turn represents only 5% of the total review requests. The remedies provided for this include apology, conducting further investigation, or on rare occasions, changing the original decision.

SPSO: The SPSO states in its annual report for 2018–2019 that it conducted a customer satisfaction survey regarding its services. However, this annual report mentioned only positive comments from the service users, with no statistics or figures from the results of the survey. However, the SPSO's official website has published a number of customer surveys for recent years.[33] For example, the survey conducted in 2017–2018 showed that customer satisfaction with the SPSO's services was relatively high among complainants whose complaints were fully or partly upheld. By contrast, this survey found that customer satisfaction was low among complainants whose complaints were not upheld (SPSO, 2018c).

The SPSO received 65 complaints about its services in the year 2018–2019. Of these complaints, only 17 were upheld, which represents 25% of the total. The SPSO provides the complainants with another route, if they are still not satisfied with the decisions on their complaints about its services. Complainants can submit a complaint about the SPSO's services to the Independent Customer Complaints Reviewer (ICCR), to be handled independently. The ICCR received 15 complaints about the SPSO's services in the year 2018–2019; one of them was withdrawn, and 14 complaints were not upheld. The SPSO also handled 258 requests to review its decisions, which represents 10% of all the decisions made in 2018–2019. Of these requests, 22 complaints were 'reopened, original decision changed or amended' (SPSO, 2019, p.17).

To conclude, the PHSO has followed a distinctive approach to monitoring its service quality by combining two methods of gathering information: a dedicated internal assurance team, and customer feedback which is collected by an independent body. The quality of the PHSO's services as reported in the Service Charter are positive, although there are some areas of concern in relation to the ombudsman's fairness. By contrast, the LGSCO and the SPSO conducted their own customer surveys, which means that they lack independently gathered data. These surveys of the LGSCO and the SPSO show satisfaction with their services among complainants whose complaints were upheld, and dissatisfaction among

[33] For more information, see https://www.spso.org.uk/service-standards-performance.

those whose complaints were not upheld. The external independent reviewer in the LGSCO scheme, and the Independent Customer Complaints Reviewer in the SPSO, represent an excellent practice for monitoring the quality of services provided by the ombudsmen.

7.3 Evaluation of ombudsmen's role in improving the quality of public administration

The emphasis of this section will be on the impact of ombudsmen's work on public administration. In this section, we will first analyse the different activities of the ombudsmen in promoting good administration, and secondly examine the possible impact of these activities. Then the section will identify the difficulties of conducting empirical research in this area, and will explore the existing research. This section will also examine the performance of the SPSO and the PHSO in supervising and monitoring the complaints-handling procedures of public authorities within their jurisdiction.

7.3.1 Activities and possible impact of the ombudsmen in promoting good administration

The key activity that helps the ombudsman in promoting good administration is its position as a complaints-handler. Handling complaints against public administration helps the ombudsman to identify different forms of maladministration, and to highlight any systemic failures resulting from defective procedure or policy followed by public authorities. According to Buck, Kirkham and Thompson (2016), investigating citizens' complaints is the common method that has been followed by all the ombudsmen to encourage the improvement of public administration. Indeed, ombudsmen themselves indicate that handling complaints might be a cost-effective approach to achieving improvements in the public sector (LGSCO, 2019b).

During an investigation, the ombudsman can identify a rule or a policy that is causing hardship to citizens. In this case, the ombudsman can recommend that the public authority concerned should review this defective rule, with the intention of avoiding similar faults in the future. In practice, most of the public sector ombudsmen in the UK have recommended various service improvements including a recommendation for reviewing a particular policy. However, it has been noted that the role of the ombudsman – particularly the PO – in this area has to some extent lacked consistency (Lewis & Birkinshaw, 1993). Therefore, it has been suggested that in order to enhance the ombudsman's role in this area, the ombudsman

legislation should be amended to state clearly that the office has the power to recommend the reform of a defective rule (Lewis & Birkinshaw, 1993). Another criticism of ombudsmen's performance in improving the quality of public administration is that their contribution and achievements in this area are 'unpredictable and unpatterned' (Lewis & Birkinshaw, 1993, p.128).

The key concern here is whether an ombudsman report which has been issued against a specific government organisation will have an impact on other public authorities. To tackle this issue, most of the public sector ombudsmen in the UK tend to issue reports that aim to spotlight common types of maladministration, based on their experience as complaints handlers. The LGSCO's website, for example, regularly issues focus reports, which are classified by subject matter, with the aim of sharing learning and encouraging changes in administrative behaviour. In a similar fashion, the PHSO's website publishes case summaries that summarise the upheld complaints and the type of administrative failures identified. The majority of the PHSO's case summaries are related to the health sector. Moreover, in March 2020, the PHSO issued its first annual casework report, which covers a number of complaints received in 2019 and the decisions made in these complaints. The purpose of this type of report is to share learning and encourage improvements in the public sector (PHSO, 2020). Likewise, the SPSO publishes a monthly e-newsletter, which summarises the SPSO's decisions in that month, and highlights specific issues or trends, with the purpose of sharing lessons and encouraging improvements.

Academics and legal scholars have disagreed on how effective ombudsman have been in achieving improvements in public administration. According to Adler (2003, p.328), the existence of the ombudsman as a redress mechanism has 'if only to a small extent', promoted improvement of the administrative justice system. Moreover, Kirkham, Thompson and Buck (2009) suggest that systemic reports by the ombudsmen can be more effective than decisions of courts, in promoting long-term improvements in public administration. A more positive view of the ombudsman's impact on public administration has been made by John McMillan, a previous Commonwealth Ombudsman (Australia), who stated:

> 'a single and well written report can be more effective in triggering political and departmental change than a decade of oversight by courts, tribunals and investigation agencies' (McMillan, 2005, p.5)

There have been several reports by the UK ombudsmen that can be regarded as evidence of the ombudsman's capacity to highlight wider systemic failures in public administration

processes, and which make several recommendations for the purpose of preventing similar deficiencies from occurring. The following paragraphs provide examples of how ombudsmen's reports and investigations can have an impact on public administration:

- In the HSO report *NHS funding for long term care* in 2003, the ombudsman investigated a number of complaints concerned with the long-term care provided by the NHS. The key concern of these complaints was the criteria used by health bodies regarding eligibility for residential care. The HSO found that health authorities had been using restrictive criteria, which in turn caused hardship and injustice to several patients. The HSO recommended that the health authorities review these criteria and provide financial compensations not only to the complainants, but also to any patients who had suffered from these misapplied criteria. The HSO also recommended that the Department of Health review its 'national guidance on eligibility for continuing NHS health care' (HSO, 2003, p.9).

- In 2005 and 2007, the PHSO issued two reports about the Tax Credits system, which were concerned with the design of this system and its operation. The reports highlight several forms of maladministration and injustice that occurred in many cases, such as delay, and overpayments whose recovery caused hardship. The PHSO made several recommendations for the purpose of improving the processes of the Tax Credits system (PHSO, 2005c; 2007a). What is interesting about the Tax Credits case is that the PHSO issued not only one report to Parliament, but two. The PHSO's investigations and reports reinforced the quality of the debate about this system, and simultaneously increased awareness of the issues in the Tax Credits system (Kirkham, Thompson & Buck, 2009).

- In 2005, the PHSO laid a special report to Parliament regarding the findings of its investigation of the *ex gratia* scheme for British civilians interned by the Japanese in World War II. The PHSO found that several forms of maladministration were involved in how government organisation concerned had devised and announced the scheme, as it was unclear and misleading. The PHSO recommended that the Ministry of Defence (MOD) should review the *ex gratia* scheme and its operation. They also recommended that the MOD should review the position of the complainant and other people in the same position. Based on the findings of this investigation and the ombudsman's experience on handling complaints about *ex gratia* schemes, the

PHSO also made recommendations about *ex gratia* schemes in general (PHSO, 2005a). In a response to the PHSO report, the PASC issued a report in 2006 which supported the findings and recommendations made by the PHSO, particularly the recommendation to review the *ex gratia* scheme (PASC, 2006). Although at the outset the MOD rejected the PHSO's recommendation to conduct a review of this scheme, it subsequently accepted this recommendation and conducted a review of the scheme's eligibility criteria (Lunn, 2009).

- The LGSCO issued a report in 2019, regarding an investigation of Cornwall Council. The investigation concerned a young homeless person who was accommodated in a tent and caravan for weeks by the council. The LGSCO found that the manner in which the council housed the homeless was inappropriate. Along with an apology and financial compensation, the LGSCO recommended that the council should review its policies and procedures in relation to accommodating young homeless persons. The LGSCO also recommended that the council develop a plan with the aim of ensuring appropriate accommodation for young homeless persons (LGSCO, 2018b). Accordingly, the council developed a plan to allocate significant funds for this purpose (LGSCO, 2019).

It has been noted that special reports made by the ombudsman can 'enrich our understanding of what good administration entails and, in providing redress and supplying lessons for the future' (Kirkham, 2006, p.817). However, it seems that most of the ombudsmen's work in encouraging services improvements is conducted through the complaints they handle. Therefore, in order to increase ombudsman's capacity to play a proactive role in promoting good administration, an own-initiative power should be introduced to ombudsman schemes in England and Scotland.

Beyond the investigative activity, there are also various activities carried out by the ombudsmen that might help to encourage changes in public administration. These include issuing principles and guidance on good administration, complaints-handling and other issues. For example, in the year 2018– 2019, the LGSCO issued three guidance documents[34] with the aim of sharing lessons from complaints and investigations. Ombudsmen also

[34] This includes:
- Guidance on Recording Planning Decisions.
- Guidance on Summer Born Admissions.
- Principles of Good Administrative Practice.

provide training courses and workshops on complaints-handling for public authorities' staff, based on their experiences as complaints handlers. For example, in 2019, the LGSCO delivered 65 training courses to local authorities' staff, and six training courses to care providers' staff (LGSCO, 2019). The SPSO also delivered 37 training courses to government organisations in 2019 (SPSO, 2019). Another purpose of these activities is to reduce the number of complaints received by the ombudsmen, by improving the internal complaints-handling procedures in government organisations (National Audit Office, 2005).

In an excellent practice, the LGSCO each year conducts a survey among local authorities and care providers, to measure the extent to which these organisations have benefited from the LGSCO's work to improve their services. In the survey conducted in 2019, the LGSCO found that 99% of local authorities thought that the LGSCO's investigations had an impact on improving their service, while 93% of care providers believed that the LGSCO investigations were influential in improving adult social care services (LGSCO, 2019a).

When determining the possible impact of ombudsmen's activities in promoting good administration, it is essential to note that the ombudsman has no power to force public authorities to change their practices. In fact, the ombudsman relies on its cooperative relationship with public administration to encourage such changes. According to Adler (2003), the influence of redress mechanisms, including the ombudsman, on public administration (and particularly on decision-making) can be varied. He argued that:

> 'The more authoritative the judgments are, the more publicity is given to them, and the stronger the enforcement procedures are, the greater the impact they are likely to have and the more effective they are likely to be in achieving administrative justice' (Adler, 2003, p.328).

By contrast, Hertogh (2001, p.53) claimed that 'the legal force of decisions does not automatically lead to some form of policy impact'. In his study, Hertogh suggested a model to analyse the policy impact of courts and ombudsmen, by linking between the style of control adopted by courts and ombudsmen with their policy impact. He distinguished between the coercive style followed by courts and the cooperative style of control adopted by the ombudsmen, and indicated that ombudsmen's reports and recommendations might have more influence on administrative decision-making, compared to the impact of courts' decisions (Hertogh, 2001).

Ombudsmen's impact on public administration can take a variety of forms. Based on an ombudsman's findings, public authorities can provide citizens with updated and more accurate guidance about their services. Public authorities also can revise and modify the instructions given to their staff, in order to prevent similar faults occurring in future (Gregory & Hutchinson, 1975). The ombudsman's impact can also take the form of changing the procedures or work practices of public bodies. On some occasions, the ombudsman might have a role in changing a public policy. Ombudsmen's recommendations can also lead to better records management by government organisations. Furthermore, the ombudsman can have a wider impact on changing attitudes and administrative cultures in the long run.

Despite all these possible impacts of ombudsmen's work, in practice, there is no strategy or technique to check if ombudsmen's recommendations for improving public administration have been implemented (Adler, 2003). We need to know whether ombudsmen's recommendations for future improvements are usually implemented; not only immediately after investigation, but also in the long term. However, there is no complete record of all the changes in the British administrative system which have resulted from ombudsmen's investigations (Gregory & Hutchinson, 1975). Nor is there any detailed information in ombudsmen's annual reports, regarding their achievements in this area. For example, the PHSO stated in its annual report for 2019 that it recommended '450 service improvements such as changing procedures or training staff' (PHSO, 2019, p.36). However, no information is given on the types of improvements, or the responses of the public authorities concerned. Thus, Gill (2018) suggested that to have a full understanding of the ombudsman's role in helping public authorities to learn from their mistakes, the ombudsmen should make greater efforts to collect and publish more information about their outputs and achievements in this area.

7.3.2 Absence of empirical research in this area

Although most of the public sector ombudsmen in the UK state in their official reports that they were successful in achieving a number of changes in public administration attitudes, they do not provide the information that would enable us to evaluate this claim. The best evidence of whether ombudsmen have been successful in this area, would be empirical research that examines the actual impact of ombudsmen work on public administration. However, it has been noted that there is a lack of empirical studies that examine the ombudsman's effectiveness in promoting good administration (Stuhmcke, 2009)

Hertogh and Kirkham (2018) also noted that although there are many research and academic publications in the field of the ombudsman, the majority of them are descriptive. They indicate that there is a lack of empirical research that aims to evaluate and examine the theory of the ombudsman in practice (Hertogh & Kirkham, 2018). Therefore, more evidence and empirical studies are needed to test the theoretical analysis of the ombudsman provided in the literature, especially given that most ombudsman research tends to have a positive view of the institution's effectiveness and impact in improving the quality of public administration.

In aiming to identify a comprehensive methodology for evaluating the ombudsman's effectiveness, Stuhmcke (2009) distinguished between two possible categories of the ombudsman's impact: thick and thin impact. The thick impact refers to ombudsmen's contributions in changing government policy, or even changing legislation. The thin impact denotes any changes of procedures resulting from an ombudsman's work. Stuhmcke (2009) also distinguished between the direct and indirect impact, stating that the latter is not measurable. Therefore, Stuhmcke's methodology was intended to measure the direct impact of the ombudsman's work in relation to the thick and thin impact. However, this methodology has been criticised by Buck, Kirkham and Thompson (2016, p.151), on the grounds that:

> 'Measuring these various effects is a complex task and it will be difficult to make objective comparisons between the ultimate weight that should be attached to various claims to impact or perceived failures to facilitate real change'.

As noted, there is a lack or even an absence of comprehensive empirical research on the ombudsman's influence and outputs in improving the attitude of public administration. This situation might be explained by the difficulties and challenges that may face the researcher in this type of study. According to Gill (2018), there are conceptual and methodological difficulties in conducting empirical research that examines the ombudsman's influence on government organisations. The conceptual challenges can take a variety of forms. For example, the key concepts in the subject examined can involve different interpretations of their definitions. Another conceptual difficulty is to decide whether the study should focus on one type of impact resulting from a particular activity, or if it should have a wider focus, to examine all the types of impact from different activities (Gill, 2018). These conceptual challenges must be resolved in order to carry out useful empirical research. Researchers in

this type of study are also required to clearly determine the specific action investigated and the specific impact examined.

The key methodological difficulty is how to quantify all the possible impacts of ombudsmen's work (Gill, 2018). Improving the fairness of public authorities' practices is one the main aims of the ombudsman. However, this concept, according to Gill (2018, p.312), 'is both nebulous and difficult to measure, empirical enquiry is a complex endeavour'.

Determining the timescale of the empirical study is also one of the methodological difficulties. The majority of research that has examined the ombudsman's impact on public administration has used a short time-scale, rather than measuring the impact over a number of years (Gill, 2018). Moreover, it has been noted that it is difficult to measure the effects of the ombudsman on public administration performance over time, given the number and frequency of reforms, restructuring and reorganisations of public services (Seneviratne, 2002). In other words, it is difficult to identify causality between ombudsmen's work and improvements in public administration (Gill, 2018). For instance, in Giddings' research (1999) examining the HSO's performance in achieving good administration in NHS practices, he found that it was impossible to measure the effectiveness of the HSO in this area. The reason is that in the timescale examined in the study, there were many reforms in the health services, and hence 'it is not possible to isolate the effect of just one process' (Giddings, 1999, p.204). Lastly, resources and funding can also be considered as an obstacle that might prevent researchers from conducting empirical research in this area (Hertogh & Kirkham, 2018).

7.3.3 Available evidence

In 1975, Gregory and Hutchinson conducted an empirical study of the relationship between the PO and public administration, and the possible impact of the ombudsman's work, however, this study was carried out without an extensive inquiry. They found that the PO might not have a significant effect on changing the behaviour of government officials at any stages. Thus, they conclude that the PO might have little or marginal influence on improving public administration's practices (Gregory & Hutchinson, 1975).

In Kerrison and Pollock's research (2001) on the UK health services complaints system, they found that the HSO was able to highlight several issues in NHS administrations, such as

failing to implement public policies, or unfair public policy. They also found that only on rare occasions had the HSO's investigations led the Department of Health to issue guidance and reformulate its policies. It was also noted by the PASC in 1997–1998 that the HSO's work year after year had detected the same failures in the NHS administration (PASC, 1998). This means that although the HSO was able to identify administrative deficiencies in NHS practices, no major improvements had been made to prevent them. Therefore, the study by Kerrison and Pollock concluded that the HSO has had little influence in improving the quality of health services.

In 2010, the PHSO commissioned the IFF, which is an external research agency, to conduct research on the impact of its recommendations on public administration. The research examines the effects that 21 of the PHSO's decisions had on public authorities. They found that the majority of these decisions had led to changes in public authorities' practices (IFF Research, 2010, cited in Gill, 2011). However, this study has been criticised due to the lack of full details and analysis, which in turn affects the value of its findings (Gill, 2011).

Gill (2012) carried out empirical research on the SPSO's impact on the decision-making process of local authority housing bodies. He concluded that the SPSO has limited effects in this area; this conclusion differs from most of the literature in the ombudsman field. Moreover, Gill (2012) suggested that when comparing the effectiveness of the ombudsman in this area to that of the courts, it should not be assumed that the ombudsman is more successful than the courts in achieving improvements in public administration.

Gill (2016) also conducted an empirical study of the impact of redress mechanisms in particular courts, tribunals and ombudsman, on local authority education departments. He found that these mechanisms might not be well designed to act as bureaucratic control mechanisms, and that the nature of their effects are mostly reactive and *ex post*. He also found that the LGSCO, based on the cases examined in the study, 'led to limited but nonetheless useful changes in routine bureaucratic decision-making' (Gill, 2016, p.341). He noted that there was no clear view regarding the extent of the contributions of redress mechanisms, including the LGSCO, in achieving *ex ante* changes (Gill, 2016).

It seems that there is not enough evidence to support the idea that the ombudsman has an effective role in improving the quality of public administration and in changing public servants' attitude. In fact, all the empirical studies mentioned above have been small-scale inquiries. Therefore, the conclusions of these studies cannot be generalised to all aspects of

ombudsmen's activities. For example, the empirical research of Gill (2012) was concerned with the effects of the SPSO on housing departments; and hence the results of this study cannot be applied to the SPSO's impact on other government bodies. The study by Gregory and Hutchinson (1975) was also a small-scale inquiry: the researchers indicate that to conduct a comprehensive evaluation of the ombudsman's effects on public administration, a large-scale inquiry is required to cover all the possible aspects of the ombudsman's performance. However, such an inquiry is unlikely to be permitted by public authorities.

7.3.4 Evaluation of the ombudsman's role as complaints standards authority

Another dimension of the ombudsman's role in promoting good administration is its function in supervising and monitoring the internal complaints-handling procedures within government organisations. The focus of this section is on evaluating the CSA of the SPSO. It also aims to measure the PHSO's effectiveness in deriving improvements in the complaints system; especially in the NHS complaints system in England.

In Scotland, the CSA of the SPSO involves publishing standards, monitoring compliance with these standards, and sharing best practices (Gill, 2020). It is important here to distinguish between the tools used by the SPSO to handle this task, and the potential advantages of this role. The SPSO has a variety of tools for monitoring and standardising complaints-handling procedures, such as publishing MCHP that should be followed by public bodies in their internal complaint system. According to the model developed by the SPSO, all public services providers in Scotland should adopt a simple and clear model of complaints-handling which involves two stages:

- Stage One: frontline resolution: 5 working days.
- Stage Two: investigation: 20 working days.

In 2011, the SPSO published *Statement of Complaints Handling Principles*, which was approved by the Scottish Parliament, and *Guidance on a Model Complaints Handling Procedure*. The core goal of these publications was to promote simple, streamlined and quick complaints procedures across the public sector in Scotland (SPSO, 2011).

Furthermore, the SPSO has a duty to monitor compliance with the MCHPs, and to report on non-compliance. This can be achieved by using several tools, such as running compliance assessment and helping public bodies to meet compulsory requirements (SPSO, 2019). In

addition, the SPSO provides support, guidance and advice to public organisations regarding best practice in complaints handling; it also offers training to public bodies' staff. In addition, the SPSO has established and supports sector networks for complaints handlers, to support them and to share learning and good practice in complaints handling (SPSO, 2013).

There are several benefits of the SPSO's complaints handling authority, for both citizens and public authorities. In relation to citizens (or more specifically, consumers), this power will make the complaints system simpler to use and more consistent. One of the significant values of this power is to encourage cultural change by helping public services providers to see complaints as positive opportunities to highlight their deficiencies, and therefore improve their services and procedures. This power also helps to increase the confidence of both public service providers and citizens in the complaints system (SPSO, 2018b). As public services providers are required by the CSA to report and publicise complaints information, this means that citizens will have access to clear and transparent information about the complaints handled by each sector (SPSO, 2013). Therefore, it could be said that the CSA performed by the ombudsman helps to enhance transparency and openness in the public sector.

With regard to the evaluation of this power, there is no external formal assessments of the SPSO's use of this authority (Gill, 2020). The SPSO in its annual reports has mentioned several results of implementing its CSA; these results can to some extent be considered as an internal evaluation of the SPSO's work in this area. In practice, the MCHP has been adopted and implemented by all Scottish public bodies (SPSO, 2019). According to the SPSO (2015), the Scottish public bodies now have simpler complaints system which focuses on resolving complaints in early stages. The work of the SPSO as a CSA also helps public bodies to report consistent and transparent information about the complaints they handle (SPSO, 2015; 2014).

As a part of its task of supporting public bodies in implementing the MCHP, the SPSO receives and responds to *ad hoc* requests. According to the SPSO (2019), the office was successful in providing support and guidance to 259 *ad hoc* requests made by Scottish public bodies. The office also noticed that there had been a reduction in the number of such requests in recent years. The SPSO expects a further reduction in requests in the coming years, due to the establishment of the MCHP, and the current cultural change, whereby public organisations see complaints as positive opportunities to improve public services (SPSO, 2019).

Moreover, Mullen, Gill and Vivian (2017; 2020) conducted two small-scale studies regarding the MCHP's operation in the local authority sector in Scotland. The interviewers involved in the 2017 study, found that the complaints standards approach in Scotland 'has been a success' (Mullen, Gill & Vivian, 2017, p.2). They indicated that there are fundamental contributions of this approach, and also found that there is now more information on the performance of the local authorities' internal complaints procedures, than had been available in the past (Mullen, Gill & Vivian, 2017). The two studies concluded that the complaints system in the local authority sector in Scotland is now simpler and quicker. They also found that there is a cultural change towards best practice in complaints-handling within the Scottish local authority sector (Mullen, Gill & Vivian, 2017; Gill, Mullen and Vivian, 2020).

Although there is not enough evidence to make a clear evaluation of the SPSO's performance as a CSA, the SPSO's annual reports and the studies mentioned above, can reflect several signs of success. They present similar findings regarding the actual benefits and contributions of the CSA to the complaints system in the Scottish public sector. Certainly, large-scale empirical studies are needed to evaluate the actual and full contribution of the SPSO's new role.

In England, the PHSO has a different situation. Generally, the PHSO aims to improve the complaints system within government organisations (PHSO, 2014); hence, it works towards a complaints-handling system that learns and listens to citizens' concerns, and uses this knowledge to improve public authorities' services (PHSO, 2014). Currently, unlike the SPSO, there is no statutory power for the PHSO to act as CSA.

However, the PHSO is ambitious to develop the complaints-handling system in the public sector in general – and more specifically, in the NHS complaints system. For example, in 2003, there were a number of approaches to improve the NHS complaints-handling system, to enable it to learn lessons from the ombudsman's investigations. However, it has been noted that in practice, the NHS complaints-handling procedure 'has been always a trouble-spot' (Harlow, 2018, p.84). In the following years, a comprehensive overview and several research studies about the health service's complaints system were conducted by two holders of the PHSO, Ann Abraham and Dame Julie Mellor. Abraham found endemic weaknesses in the health services' complaints procedures, and hence recommended overall changes in

the system (HSO, 2005). The same issues were also highlighted by Mellor's research, which led her to describe the NHS complaints system as:

> 'a toxic cocktail, a combination of a reluctance on the part of citizens to express their concerns or complaints, and a defensiveness on the part of services to hear and address concerns' (PASC, 2014a, p.3).

In 2019, the PHSO also demonstrated that the complaints-handling procedures within the NHS had inconsistent standards and involved inadequate practices (PHSO, 2019). As a result of the above points, Harlow (2018) argued that there are some doubts that the ombudsman, as an external body to the public services, can in practice ensure that the public organisations learn from its investigations to improve their complaints systems (Harlow, 2018). However, as part of the PHSO's constant efforts to improve and develop the NHS complaints procedures, in 2020 the PHSO published a draft Complaint Handling Framework for the NHS.

Based on the above analysis, it seems that the PHSO might not be fully successful in securing effective complaints systems within public organisations in England; in particular; the NHS complaints system. This might be because there is no specific legislative basis that allows the PHSO to perform as a CSA. The reduction in the PHSO's budget in recent years might also limit its ability to increase its contribution in this area.

7.4 Conclusion

This chapter has aimed to evaluate the performance of the public sector ombudsmen in carrying out their functions of handling citizens' complaints, improving the quality of public administration, and regulating complaints-handling procedures within the public sector. It is found that there is no reliable method available that can be used to make a comprehensive evaluation. Therefore, a number of techniques to evaluate the ombudsman's performance have been adopted, which include an analysis of ombudsman statistics in relation to its complaints numbers, budget, level of speed, compliance rate, and customer stratification surveys. This data has been used to provide a comparative analysis of the performance of the following ombudsmen; the PHSO, LGSCO and SPSO. The data of these ombudsmen has been tested against their targets, strategies, objectives and quality standards. Moreover, the available empirical research on ombudsman's contribution have been reviewed with the purpose of evaluating the success of the ombudsman.

From the analysis provided in the chapter, we can conclude that the approach of evaluating the performance of the public sector ombudsmen in the UK requires a sophisticated method that can cover all the elements of ombudsmen's roles and their actual contributions in the long term. Certainly, the performance of an ombudsman should be evaluated on a long-term basis, to clarify its contributions in the wider system of administrative justice. With the absence of such a method and the lack of detailed information about ombudsmen's performance, a precise conclusion cannot be reached on a number of points investigated in this chapter.

We found in this chapter that it is difficult to track an ombudsman's performance over the years, as this can be affected by various factors, which include reforms, restructuring, budget, caseload, and the personality of each holder of the office. Due to these factors, it seems that depending on statistical data to measure ombudsmen's effectiveness might not result in definite conclusions.

In this chapter, a set of criteria have been identified to measure ombudsmen's performance in handling individuals' complaints: these include remit, independence, appropriate methods, procedural fairness, speed, cost, accessibility, effectiveness, and customer satisfaction.

Remit: The scope of the ombudsman's jurisdiction is set by referring to the public organisations covered, to the broad concepts of maladministration and injustice, and to excluded matters. The combination of these approaches to defining the ombudsman's jurisdiction seems to cover all the ways in which the administration interacts with the citizens; although there are some exceptions, such as commercial and employment matters. Moreover, the term maladministration has been interpreted widely in practice, to cover a variety of unfair and bad administrative behaviours which are unlikely to be covered by other redress mechanisms, such as courts and tribunals.

Independence: In this chapter, we found that one of the strengths of the public sector ombudsmen in the UK is their level of independence from the powers of the state, particularly the executive. This includes the ombudsmen's high level of institutional and functional independence, which in turn contributes to their fairness and impartiality.

Appropriate methods: The ombudsman uses two methods to handle complaints: informal resolution and formal investigation. Both methods can be equally appropriate, depending on

the degree of complexity of each case. The key concern in this point is that there is a lack of understanding amongst complainants in relation to the nature of informal procedures followed by the ombudsmen. There is also no clear view of the standards used by the ombudsmen, to decide whether to handle a complaint via informal process or an investigation. This situation might to some extent undermine citizens confidence of ombudsmen work. Therefore, more clarity is needed about the nature of informal process followed by the ombudsmen and the criteria used in their decision to use informal resolutions. We also found that in practice there is a trade-off between desirable goals such as speed and thoroughness, which in turn have an impact on the type of method used by the ombudsman to resolve complaints.

Procedural fairness: The ombudsmen are required to follow fair procedures in all the stages of handling complaints. These requirements should include fairness to both parties involved in the complaints. It essential to note here that the ombudsmen's fairness requirements differ from those operating in courts, due to the different types of procedures followed in each mechanism. In practice, the ombudsmen have discretionary power in applying all these requirements, which in turn might affect the fairness of their procedures. Therefore, the ombudsmen should ensure that their discretion and flexibility do not undermine their procedural fairness and impartiality. Another point discussed regarding the ombudsman's fairness is the complainants' and ombudsman watchers' views; they tend to have negative perceptions of its procedural fairness. Although their views might be affected by the outcomes of their complaints and to their misunderstanding of the nature of ombudsman's procedures, greater attention should be paid to this issue.

Speed: In theory, the speed of resolving and closing complaints informally should be faster than resolving them through full investigation. However, in practice, this distinction has not been made by the ombudsmen when reporting the speed of their performance. In general, based on the figures analysed in this chapter, it can be said that the speed of ombudsmen in handling and closing citizens' complaints is relatively acceptable, even though more efforts should be made to accelerate their procedures. It is important to add that a number of factors might reduce the speed of ombudsmen's procedures, such as the reduction in their budgets and the increasing demand for their services.

Cost: 'Is the ombudsman worth the cost of its operation?' is a difficult question to answer, due to the limited information available and the absence of a comprehensive method that can

cover all the contributions of ombudsmen's work. One of the methods used in this regard is the cost- per-complaint approach. However, this approach has been criticised, as it does not cover all the activities of ombudsmen's work, such as signposting, promoting good administration, training, and issuing guidance and principles. In general, the type of complaint handled, and the method used to resolve the complaint, are two fundamental factors that can affect the ombudsman's operating cost. It seems that handling health services complaints and the use of formal investigation might incur greater costs.

Accessibility: Based on the analysis provided in this chapter, we found that there are three concerns regarding ombudsmen's accessibility; these can be considered as obstacles that prevent citizens from resorting to the ombudsmen. First, there is no direct access to the PO, due to the existence of the MP filter. Second, the PHSO requires that the complainant submit his/her complaint in writing. The third concern applies not only to the PHSO, but to all the principal public sector ombudsmen in the UK: this is the level of public awareness of the ombudsmen's existence and their services. Hence, more efforts should also be made to increase citizens' awareness of the services provided by the UK ombudsmen. More broadly, it seems that the LGSCO and SPSO are more accessible than the PHSO. Therefore, in order to increase the PHSO's accessibility, the MP filter and the requirement of a written complaint should be abolished.

Effectiveness: Evaluating ombudsmen's effectiveness in making sound decisions is difficult, due to the limited data available, where these data might lack sufficient clarity to make an accurate judgment of ombudsmen's effectiveness. In an attempt to compare the performance of the PHSO, LGSCO and SPSO in a specific year, we found that this type of comparison tends to emphasise the difficulties of using such a method, rather than establishing accurate facts. Likewise, the comparison of the PHSO's performance over the years has not resulted in an inclusive conclusion. However, this comparison helps to track the changes in the PO scheme over the years, and to identify general patterns of their operations. However, in general, a citizen who complains to the ombudsman has a reasonable chance of obtaining a remedy.

In relation to ombudsmen effectiveness in providing the aggrieved person with an effective remedy, we found that they propose a variety of remedies. It is also clear that the ombudsmen are successful in seeing their recommendations implemented by public authorities, despite rare occasions of non-compliance.

Customer satisfaction: Based on the analysis provided in this chapter, we found that the PHSO has followed a distinctive approach to measuring its performance and customer satisfaction with its services. The Service Charter showed that there are two areas of concern related to the ombudsman's fairness, which should be addressed in order to enhance users' confidence in ombudsman's work. The LGSCO and SPSO conducted their own surveys to measure the quality of their services. However, we cannot rely on these to draw a firm conclusion about the level of customer satisfaction, due to the lack of independently gathered survey data.

In terms of the ombudsman's role in promoting good administration, there is no doubt that the principal public sector ombudsmen in the UK are able to identify systemic defects in public administration, however, the concern here is whether their work has led to actual changes in the quality of public services. Ombudsmen's official reports contain some useful materials and evidence of their achievements in promoting good administration. However, this evidence has not been fully reviewed by an external body. Similarly, although most academic commentators express positive views of the ombudsman's ability to improve the quality of public administration in practice, there is a lack of empirical research to support their arguments. The available empirical studies indicate that the ombudsmen in practice might have limited impact in improving the quality of public administration. Certainly, further empirical studies with large-scale inquiry are needed to explore the actual contributions of the ombudsman in this area.

Finally, in this chapter, the role of the SPSO as a CSA has been evaluated. Despite of the lack of enough evidence, it seems that this power has achieved some of its goals, as all the Scottish public organisations have adopted a simple and consistent complaints system, as proposed in the MCHPs. In contrast, the PHSO have not been fully successful in improving the internal complaints-handling system within the NHS in England.

Chapter 8: The potential impact of ombudsman transplant into Saudi Arabia

8.1 Introduction

In comparative law research, when suggesting a foreign solution, it is essential to consider two points: (i) has this solution succeeded in the country of origin? and (ii) will it work in the host country? (Zweigert & Kötz, 1998). The level of the ombudsman's success in the UK has been analysed in the previous chapter. Therefore, the main objective of this chapter is to answer the second question, whether the idea of the ombudsman as a solution to the problems of administrative justice will work effectively in Saudi Arabia. In other words, this chapter will concentrate on the potential impact of the ombudsman in Saudi Arabia, and analyse the different variables that can either lead to the success or failure of the transplanted ombudsman.

In order to predict the likely introduction of the Saudi ombudsman, it is essential to analyse the concept of legal transplant. However, analysing the idea of legal transplant is a complex task, as this concept involves different views regarding the definition, scope, value and success of the legal/institutional transplant. More complexity can be added when analysing this idea in the context of a religious country. As noted by Menski (2006, p.353), legal transplantation and modernisation in Islamic countries 'is a complex process of pluralist reconstruction, which inevitably involves difficult conflicts and tensions'. Therefore, ensuring the success of a legal transplant might be a more difficult task in religious countries compared to liberal countries.

Moreover, the comparative law literature that focus on the effects of legal transplant tend to examine this idea through historical context started by analysing the transplantation of the Roman law in Europe, and then examining legal transplants during and after colonization in Latin America, South Africa and East Asia. Although Islamic countries in the Middle East after the World War II have modernised their legal systems through the transplantation of Western rules and institutions, little has been done to examine the success of legal transplants in these regions.

The question here is how we can measure the success of the transplanted institution in the hosting country. Because of the complexity of this subject, several explanatory tools can be used to assess the success of legal transplant. One might doubt whether the terms 'success' and 'failure' are well-suited to describe the outcome of a legal transplant in a recipient

country. There is also an ambiguity about when can we consider a legal transplant successful, and what the concept of success means in the context of legal transplant (Nelken, 2001). According to Cotterrell (2001), the answer to these questions is connected largely to the conception of law, whether it is simply a positive rule, or a part of the broader social system, or if it is seen merely as tool to achieve specific objectives. The first conception of law as a positive rule assumes that there is no connection between law and the social context in which the societal problem in question exists (Watson, 1993). The success of a legal transplant based on this conception can be tested on the official enactment of the foreign rule/institution in the hosting country (Cotterrell, 2003). Conceptualizing the law as a part of the social system emphasises the vital role of society in either the success or failure of the transplanted law/institution. Based on this emphasis, in order to have a successful transplant, there should be a consistency between the foreign law and the culture, values, religion and traditions of the hosting society (Cotterrell, 2001). Lastly, the vision of law as an instrument to achieve certain goals focuses on 'law in action', therefore, the success of legal transplant will be evaluated based on whether the transplanted rule has achieved the intended goals of its transplantation (Cotterrell, 2001).

Cohn (2010) indicates that a legal transplant can be analysed based on the outcome of the transplantation. Based on this typology, the effects of a legal transplant can take several styles, such as full convergence, fine tuning, adaptation, distortion, mutation and rejection. The full convergence means that the borrowed law in the recipient legal system is identical to the original law. However, this form of outcome seems impossible as the importing country has its own political and legal system, which requires certain adaptations of the transplanted law to fits with its domestic context (Cohn, 2010). In the fine-tuning form, minimum adaptations have been made in the transplanted rule to fit with its new environment, with no changes in the substance of the original rule. In the other outcome forms, the substantive values of the original rule might be lost, because of the significant adaptations which occur (Cohn, 2010).

Another typology suggested by Cohn (2010) to analyse the effects of legal transplant is the hosting community's stance towards legal borrowing. The attitude towards the foreign rule can involve full acceptance, acceptance with caution and consideration and lastly rejection (Cohn, 2010). This typology to a certain extent links between the types of community in which the foreign law is embedded and the success of the legal transplant.

Based on the above analysis, it seems that there is no consensus among legal scholars on a methodology to measure the effects of legal transplant. The general view is that the transplanted law/institution should be compatible with cultural, religious, administrative and legal systems in the hosting country. Therefore, a multidisciplinary approach is essential to analyse the likelihood of the introduction of the ombudsman in Saudi Arabia and its potential impact. A plethora of variables related to the administrative, religious and socio-political systems might influence the success or failure of the transplanted ombudsman.

As Saudi Arabia is a religious country, religion is the first factor that can play a significant role in either the success or failure of ombudsman transplant. The second factor includes the general social culture prevailing in the Saudi community and the political culture of the nation. The last cultural factor to analyse the likely introduction of the ombudsman in Saudi Arabia is the domestic administrative culture. Thus, in this chapter, we will firstly examine the extent which the idea of ombudsman fits with Sharia law. We will then analyse the social and political culture in Saudi Arabia as well as the culture of the Saudi bureaucracy, and clarify how these cultural factors might help to predict whether transplanting an ombudsman into Saudi Arabia is likely to be successful. With the same purpose, we will explore the experience of ombudsman transplantation in a number of countries. Finally, based on the analysis of the above elements, we will determine the potential impact of the Saudi ombudsman.

8.2 Sharia law and the ombudsman

There is no doubt that most of the literature on the ombudsman in European countries has analysed the institution in a secular context. However, in Saudi Arabia, where the main sources of Islam (the Quran and the Sunnah) are the constitution of the country, any legal idea or legal institution must not contradict the principles of Sharia law. Therefore, any proposal to introduce an ombudsman into Saudi Arabia must be examined in a religious context. Indeed, religion is one of the key factors to ensure the success of an ombudsman transplant into Saudi Arabia.

In this regard, it has been argued that a *community of belief* might strongly oppose the introduction of a foreign law/institution, especially if it conflicts with their belief and values (Cotterrell, 2001). The Saudi community can be classified as an Islamic community, because Islam is the traditions, beliefs and values that shape the culture of this community. The Saudi society has also been described as ‘a conservative and highly religious society’ (Biygautane,

Gerber &Hodge, 2017, p.115). The strong and deep-rooted Islamic values that bond the Saudi community means that it is fundamental to make the idea of transplanting an ombudsman into this community acceptable in Islamic terms in order to avoid any resistance or reluctance to this legal development.

As indicated in chapter 2, Sharia law is derived from the religion of Islam, which governs all aspects of the life of Muslims. In the religion of Islam, there are a number of principles and concepts that aim to enhance the common good and the wide concept of justice. Most of these Islamic concepts have not been described in detail, either in the Quran or the Sunnah; this has allowed these concepts to be adapted over the years, to meet the society's needs with no restrictions. In other words, there are several specific questions on which it is not possible to find a definite answer in the Quran or the Sunnah – especially issues that have arisen in modern times. In this case, these questions are answered by religious scholars, based on their interpretation of the main sources of Islam.

One of the Islamic concepts that can be seen as having similar goals to those of the ombudsman is the concept of *Hisbah*. This concept is concerned with promoting good behaviour and preventing wrongdoings and faults. According to the Oxford Dictionary of Islam, the term *Hisbah* refers to 'community morals; by extension, to the maintenance of public law and order and supervising market transactions' (Esposito, 2003, no page number). This concept has been mentioned in several verses of the Quran, and *Hisbah* also originates in the Quranic principle of 'commanding rights and forbidding wrongs'. It is important to mention here that there is no full description of the remit, jurisdictions, or the main tools that can be used to enhance this concept (Stilt & Saraçoğlu, 2015). For example, there is no definition of the 'rights' and 'wrongs' in the Quran or the Sunnah, which means that in practice the religious scholars have a wide discretion to interpret these terms.

The enforcement of *Hisbah* was traditionally the responsibility of the *Muhtasib*, who is a person appointed by the ruler of the Islamic state. In her article that aimed to analyse the link between the concept of 'Ombudsmanship' and other cultures, Jamieson (1993) found that in the Islamic culture, the *Muhtasib* has a similar meaning to ombudsman. In her description of the functions of the *Muhtasib* in practice, she stated that:

> 'the Mohtasib daily went through the city accompanied by assistants to assure himself that all officials were performing their tasks correctly and morally, settling disputes in towns and marketplaces, and ensuring customers were not cheated. The Mohtasib had the authority to undo an

> executive order which was unjust on religious grounds' (Jamieson, 1993, pp.635-636).

In theory, *Hisbah* as a doctrine can be considered as a form of accountability and justice that aims to monitor the activities of citizens, organisations, and the society as a whole (Ibrahim, 2015). As *Hisbah* is a religious concept, its implementation is comprehensive, given that it theoretically covers both the public and private sectors, in addition to ordinary individuals' behaviours. The goals of this concept are the enforcement of the provisions of Islam, and the promotion of fairness and justice (Ibrahim, 2015). In her article on the role of *Hisbah* as a means of ensuring accountability in Islamic management, Ibrahim (2015, p.184) found that 'the implementation of Hisbah in an efficient … manner guarantees transparency and the ability of the management to achieve its objectives'.

Most of the literature concerned with the doctrine of *Hisbah* has been written by religious scholars and jurists, in order to identify the nature, powers and jurisdictions of the *Muhtasib*. There are also a number of socio-legal studies concerned with the impact of *Hisbah* practices on society, with a particular emphasis on the role of *Hisbah* in the regulation of market and commercial matters. This type of research has been conducted to examine the contribution of *Hisbah* in the early years of Islam and during the era of the Ottoman empire. During these two periods, the *Hisbah* institution was a popular and successful accountability mechanism with a wide remit that covered the public sector, the private sector and individuals' behaviour.

From a socio-legal perspective, the effectiveness and success of this institution in these eras can be attributed to the fact that the society as a whole was less complex compared to the current situation. There is no doubt that the desire of a modern state in the 19th century, and the adoption of bureaucracy as tool to achieve this in the Islamic states, have affected the scope and shape of *Hisbah*. Furthermore, the complex bureaucracies, and the existence of a number of public authorities that perform accountability functions similar to those of the institution of *Hisbah*, have played a significant part in limiting the role of *Hisbah* in modern Islamic countries.

As mentioned earlier, there is no specific provision in Islam regarding how the concept of *Hisbah* can be implemented, or which authority should perform the functions of *Muhtasib*. Therefore, the doctrine of *Hisbah* as an Islamic principle can be used to legitimise the introduction of an ombudsman in Saudi Arabia. As there are no detailed provisions either in

the Quran or the Sunna on how the concept of *Hisbah* should be implemented, applying this concept does not seem to place any limitations on the proposed Saudi Arabian ombudsman. In fact, it is more likely that the concept of *Hisbah* can provide the proposed ombudsman with the necessary flexibility to perform the institution's functions effectively.

The establishment of the Wafaqi Mohtasib Ombudsman in Pakistan indicates the similarity between the *Muhtasib* as it existed in Islamic culture and the modern institution of ombudsman. The use of the term 'Mohtasib' in the title of the first ombudsman established in the Islamic Republic of Pakistan in 1983, might be considered as a symbol of the Islamic roots of the ombudsman in that country, although this ombudsman, according to its official website, performs the two main roles of a classical ombudsman: (i) redressing individuals' grievances against government organisations in cases of maladministration, and (ii) encouraging good administration (Wafaqi Mohtasib ombudsman Secretariat, 2020).

Furthermore, some researchers, such as Olalekan and Mohamed (2017) have gone further, to discuss the potential Islamic origins of the first ombudsman established in Sweden, and the role of cultural learning across cultures in this respect. In addition, when analysing the origin of the ombudsman, Frahm (2013) indicated that as the primary objective of the ombudsman institution is providing citizens with a route to seek justice against public administration by investigating citizens' complaints, a connection can be made between the ombudsman and other countries and cultures, including the Islamic system. It also has been noted that although the Swedish ombudsman has been considered as the first modern ombudsman in the world, the ombudsman concept finds its roots in the Islamic cultures, more specifically in the Islamic concept of Hisbah and the institution of Muhtasib, which existed in the caliphate period (Pickl, 1987 cited in Mauerer, 1996). Therefore, we can conclude that the institution of the ombudsman is compatible with Sharia law principles. In fact, the institution of ombudsman can be used as a modern mechanism to achieve the goals of the Islamic doctrine of *Hisbah*.

8.3 Culture and ombudsman transplant

The strong link between comparative law and sociology of law denotes that a particular institution can have different position, roles and contributions in different legal systems, due to the domestic factors existing in each culture (Nelken, 2001). Culture is an essential element to understand why a specific administrative and legal reform can operate differently in different societal cultures. In the context of administrative justice, administrative culture

can be considered as an explanatory factor to clarify the issues and deficiencies which occur in the administrative system (Thomas, 2021). It can be also the main cause of the failures and defects occur in this sector (Thomas, 2021). Therefore, culture is a fundamental variable to consider the potential impact of the ombudsman in Saudi Arabia.

One dimension of difference between different societal cultures is the extent to an individualist or collective approach to life is adopted. The core difference between collectivism and individualism is in their perception of the basis of society, whether it is based on groups or individuals (Triandis, 1995). In the context of public administration, each of these two cultures encourage a different relationship between bureaucracy and citizens. In an individualist culture, there is no strong relationship between individuals as each person is autonomous and self-reliant (Raadschelders, Vigoda-Gadot & Kisner, 2015; Triandis, 1995). Therefore, individualism is often accompanied by democracy, effective bureaucracy and economic development. On the other hand, the collective culture focuses on family relationships, social cohesion, loyalty and kinship (Triandis, 1995). Therefore, in this culture, an individual has an obligation to support the members of the in-group (Triandis, 1995). This type of social culture has been linked with corruption and nepotism, because family ties takes precedence over objective and legal standards (Harbi, Thursfield & Bright, 2017). The collective culture dominates in most Arab countries (Jabbra & Jabbra, 1998). The social culture prevailing in Saudi Arabia is the collective culture along with the Islamic norms (Alanazi & Rodrigues, 2003).

There is no doubt that individuals play a vital role in the implementation of public policies, and thus have a role in the success of administrative development plans. Active citizens and groups that cooperate and engage with bureaucracy are fundamental to drive development in the public sector. However, in Saudi Arabia, public apathy towards bureaucracy has been considered as one of the obstacles in implementing development plans (Al-Mizjaji, 2001). In his empirical research on citizens' attitude towards bureaucracy in Saudi Arabia, Al-Mizjaji (2001, p.283) found that:

> 'The Saudi citizens are apathetic towards the bureaucracy because they are not getting quality services and, moreover, they are not being fairly treated by the bureaucrats and not receiving from them enough concern for their needs'.

In analysing the public administration landscape in the Middle East, it is essential to note that 'the authoritarian tradition remains the hallmark of the way government treats citizens'

(Mallat, 2020, p.101). Unlike the UK bureaucracy, in Saudi Arabia, based on the absolute monarchy system followed, 'a ruler dominated bureaucracy' has an important role in shaping the administrative and political systems (Farazmand, 1999, p.225), with little role for citizens to participate in this process. Moreover, based on this political system, the bureaucracy in Saudi Arabia is over-centralised with an authoritarian approach to decision-making. One of the common characteristics of the Saudi public sector is informal communication and decision-making. Certainly, social groups and informal networks have their influence on the Saudi bureaucracy instead of rational, formal and structured bureaucracy (Farazmand, 1999).

Strong family ties, kinship, tribal culture, lack of accountability and over-centralization are the dynamics that frame the Saudi administrative system, and also the constraints that prevent development in this sector. Several scholars regard the cultural norms in Saudi Arabia as a constraint on achieving developments and improvements, in both the public and private sectors (Harbi, Thursfield & Bright, 2017; Idris, 2007). Therefore, this collective culture is more likely to resist legal and administrative development, including the idea of ombudsman.

Another explanatory tool that can be adopted to predict the potential impact of the Saudi ombudsman is the typology developed by Kirkham (forthcoming). By using grid-group cultural theory (GGCT) and its four cultural models, Kirkham (forthcoming) develops a typology, which classifies the ombudsman into four models, based on the administrative culture in which an ombudsman has been introduced. The aims of this typology are to understand the different adaptations occurred in the ombudsman sector, and to speculate the potential challenges and opportunities for each cultural models of the ombudsman (Kirkham, forthcoming).

The GGCT is a common explanatory tool utilise to explain different phenomena in public policy and public administration. This theory focuses on two social dimensions: 'grid' which refers to the level of regulation and prescriptions imposed in a society, and 'group' which refer to 'the extent to which individual choice is constrained by group choice, by binding the individual into a collective body' (Hood, 1998, p.8; Thompson, Ellis & Wildavsky, 1990). By recognising the interaction between these two dimensions, along with their degree (high or low) in a society, four cultural biases have been identified, which labelled: individualism (low group and low grid), hierarchy (high group and high grid), egalitarianism (high group

and low grid) and fatalism (low group and high grid) (Douglas & Wildavsky, 1982). According to Kirkham (forthcoming), 'each of the cultural biases indicating a preference for a distinct adaptation of the ombud institution'. Based on Kirkham's typology, there are four cultural models of the ombudsman:

- Consumerist ombudsman (in individualistic culture),
- Constitutional ombudsman (in hierarchical culture),
- Democratic ombudsman (in egalitarian culture), and
- Tactical ombudsman (in fatalist culture).

In order to use Kirkham's typology as a basis to predict the form of ombudsman adaptation that might occur in Saudi Arabia, it is essential to identify the cultural bias that dominate in Saudi Arabia. In this regard, it is essential to distinguish between the cultural bias that prevails in the community in general, and the cultural bias exists in public administration. Indeed, according to the GGCT, the four cultural biases are not exclusive, and a particular community can have a mix of cultural biases (Mamadouh, 1999).

As indicated earlier, the Saudi community is a collective society. However, this collectivism applies only to family, kinship, tribe and friends' groups, and outside these bounds there is no strong membership or boundaries between individuals. For example, in government organisations, there is no collective culture that influence the users of public services or public officials working within the administrative system. Indeed, public apathy towards bureaucracy is one of the characteristics of public administration in Saudi Arabia (Al-Mizjaji, 2001). It seems that the Saudi administrative system has low cohesion and consistency, but with rigid imposed rules. Therefore, the fatalist culture is likely to be the prevailing cultural bias in government organisations in Saudi Arabia.

In a fatalist culture, there is a lack of community cooperation, participation and collective action (Hood, 1998). There is also no role for the public in holding government organisations into account (Hood, 1998). The widespread perception in the fatalist society is that bureaucracy is corrupt, and there is no trust or belief in the ability of public administration to serve the public's needs or the common good (Hood, 1998; Kirkham, forthcoming; Halliday & Scott, 2010b). Uncertainty, randomness, unpredictability and apathy are the common observations of public management in fatalism (Hood, 1998; Halliday & Scott,

2010b). It can be argued that these characteristics of public administration in the fatalist culture mirror the situation in the Saudi administrative system.

In Saudi Arabia, individuals as users of the public services, have no voice or engagement in the public sector, which means that there is no relationship between citizens and the providers of public services. The nature of the public sector is a top-down approach, due to the strong central government, that follows authoritarian decision-making, and has direct control on implementing public policies. Thus, unlike the British system, the administrative justice system in Saudi Arabia is not a customer-oriented system. Although there are several administrative reforms in Saudi Arabia inspired by the Western notion of the new public management, these reforms have not yet achieved their goals.

The ombudsman adaptation that may occur in the fatalist culture is the tactical ombudsman (Kirkham, forthcoming). This cultural model of the ombudsman is unlikely to be a successful and effective model due to the strong executive branch in the fatalist culture (Kirkham, forthcoming). In this model, the ombudsman might lack the ability to play a robust role in holding government organisations to account, or to resolve systemic maladministration occurred in the public sector. The tactical ombudsman might be reluctant to engage in extensive investigations into systemic failures with the purpose of securing implementation of its recommendations (Kirkham, forthcoming), and have difficulty maintaining a cooperative relationship with public authorities. Therefore, the complainers might have no trust in the tactical ombudsman as a redress mechanism. However, this model of ombudsman might be able to play an effective role if it is supported by the legislative or executive branch (Kirkham, forthcoming). The implication of the above analysis on the proposal of transplanting an ombudsman into Saudi Arabia will be discussed further in section 8.5.

8.4 The experience of ombudsman transplant in different countries

One of the striking features of the ombudsman concept is its adaptability, as the institution has been transplanted into both developed and developing countries. The ombudsman in developed countries generally appears to perform its functions with apparent success without any major concerns. On the other hand, ombudsmen in developing countries may face a number of risks and problems that can undermine their effectiveness (Abedin, 2013). Although there is a number of studies that examine the effectiveness of the ombudsman in developing countries, most of these studies have focused on ombudsmen in democratic

political systems (Abedin, 2013; Ayeni, 2018). Little has been done to examine the effectiveness of the ombudsman in non-democratic and non-liberal countries.

It might be true that an ombudsman in developing countries might face several challenges and have a number of inadequacies that affect its ability to make positive contribution to the public sector, but there is evidence that it has had some impact. As Rowat (1985, p.170) says, even if the ombudsman in developing countries 'is not very well equipped for hunting lions. But it can certainly swat a lot of flies'. For example, ombudsmen in Africa (despite the challenges they have faced) have had appreciable success in enhancing good governance in the continent, taking into account the differences in the ombudsman model adopted and the unique socio-political and administrative cultures in each country in Africa (Ayeni, 2018). As noted by Ayeni (2018), the flexibility of the conception of the ombudsman's roles has helped policy makers in Africa to adapt the institution to resolve their own problems, and to specify the values that the ombudsman should enhance.

Pakistan and Turkey are to certain extent countries with similar social and religious cultures to Saudi Arabia. In all three, the dominant religion is Islam and public administration in these countries is also problematic and corrupt (Husain, 2011; Karasoy, 2015). Therefore, analysing the ombudsman's effectiveness in these two countries might help to predict the degree of success an ombudsman might have in Saudi Arabia.

In 1983, the first ombudsman in Pakistan: the Federal ombudsman (Wafaqi Mohtasib) was established, and since then other federal and provincial ombudsmen have emerged. It has been observed that the ombudsman in Pakistan 'has proved to be resilient and has lived up to its reputation in the eyes of many people in the country' (Husain, 2011, p.236). These ombudsmen have also been considered as robust accountability mechanisms, albeit there is a room for further improvements and achievements (Husain, 2011). Although the statutory roles of the ombudsmen in Pakistan include both handling individuals' grievances and investigating the systemic roots of maladministration and corruption, these ombudsmen have in practice concentrated on the first role, and they have seemed reluctant to recommend solutions to tackle the roots of corruption in public administration (Husain, 2011). There are also some concerns about the ombudsmen's independence in aspects related to appointment, staffing and funding (Husain, 2011). Furthermore, the implementation of ombudsman's recommendations by government organisations was a problem in the early years of the first

ombudsman in Pakistan. However, this situation has improved over the years (Husain, 2011).

Similar to the ombudsmen in Pakistan, the ombudsman in Turkey has been both praised for its contributions and criticised for its limitations. The Turkish ombudsman is a relatively new institution (as it was established in 2012), which means that it is difficult to evaluate its effectiveness. However, some general insights into its performance have been inferred. According to Karasoy (2015), the main contributions of this ombudsman include enforcing the rule of law and ensuring that public authorities follow lawful procedures. Although the Turkish ombudsman has started to make its own contribution to improving bureaucracy in Turkey, there are some areas of concerns (Karasoy, 2015). These concerns are generally related to the social and administrative culture in Turkey. The lack of separation of powers has also been considered as problem that can undermine the effectiveness of this ombudsman (Karasoy, 2015). As public administration in Turkey follows a centralised approach to management, Karasoy (2015) suggests that this type of management, along with the domestic administrative culture might indicate that government organisations are more likely to resist any changes or innovations recommended by the ombudsman. Compliance with the ombudsman's recommendations was a serious problem in the first three years of the Turkish ombudsman. According to Bayan (2021), the percentage of implemented recommendations in 2013 was only 20%. However, this rate has increased gradually in the following years, and has reached 76% in 2020 (Bayan, 2021).

From the above analysis, it seems that one of the fundamental elements in analysing the effects of ombudsman transplant is the time dimension. In both Pakistan and Turkey, the compliance with ombudsman's recommendation was a problem in its early years, but this issue has improved after a period of time. Similarly, the performance of these ombudsmen seems to be developing, and more time is needed to expand their effectiveness.

In this regard, Graziadei (2009, p773) poses an essential question in the context of legal transplants: 'what is the proper time frame to pass judgment on whether something foreign really "fits in" the local ambience?' whether it is years, decades or even a century? Certainly, there is no general answer for this question, as this depends on the precise rule and society in question. In some circumstances, after a period of time, the foreign roots of the transplanted rule/institution might eventually become 'invisible', and then this rule/institution will become part of the culture of the hosting society. (Graziadei, 2009)

In the process of ombudsman transplantation, it is essential to be cautious and not to assume that the transplanted institution will achieve a high level of success immediately after its creation. As noted by Abedin (2010, p.245), the empowerment and effectiveness of the transplanted ombudsman in developing countries will 'evolve slowly, gradually and over a long period of time'. There is no doubt that the ombudsman enterprise relies largely on its reputation and relationship with stakeholders to make contributions to the administrative justice system. Therefore, a period of time is required to build a good reputation and strong relationship with citizens and government organisations. This statement can be applied to the concept of ombudsman in general in both developed and developing countries.

As we found in this thesis, the first ombudsman in the UK started as a sort of small claims court between citizens and the executive (Harlow & Rawlings, 2009), and then the role of the ombudsman has expanded to cover other functions, which mainly related to good administration and administrative justice. Moreover, the PO in the early years of the establishment was subject to several criticisms about its actual contribution, and its ability to secure implementation of its recommendations. However, this perception about the PO's effectiveness has changed gradually over the years, as the office now has proved its position as one of the key institutions in the administrative justice system. We might also predict more potential from the UK ombudsmen, that can be derived from a change in the administrative culture, or a new public policy that may emerge in the future. Hence, from the above analysis, it seems that the passage of a period of time is an essential requirement to make a judgment on the success of an ombudsman transplant.

8.5 Possible effects of ombudsman transplant into Saudi Arabia

Several societal, legal, political and economic factors can be considered as motivations to introduce an ombudsman in Saudi Arabia. In the social context, although the Saudi community can be regarded as a community of belief, recently the possibility has arisen of a change in the nature of this community, as a result of the ambitious national development plan (2030 Vision) launched by the Crown Prince in 2016. To achieve the full aims of 2030 Vision, this will require a radical legal, social and cultural change. In this context, several political, legal, administrative and economic reforms have been made in the last few years, which might change the culture of the Saudi community. Although we cannot reliably predict whether at this early stage the 2030 innovation will change the nature of the Saudi community, it is possible that it might change from a community with a particularly strong

emphasis on the requirements of Islam and little awareness of the importance of law which is nor religiously inspired to a community in transition away from these attitudes. Saudi Arabian culture may move towards a position in which Islam plays a somewhat less central role in society, and in which there is an increasing awareness of the importance of the role of state laws in strengthening the political and economic position of Saudi Arabia, at both the national and international levels.

The drive to reform the economy stems from the fact that the oil industry has been the main source of wealth in Saudi Arabia. However, the decrease in the oil price in recent years has caused a government budget deficit, which has forced the Saudi government to follow an austerity policy and cut public spending. From an economic perspective, it has been argued that because of the budget deficit, the Saudi government 'is under particularly serious pressure to reform its bureaucracy' (Biygautane, Gerber & Hodge, 2017, p.99). Indeed, there is an urgent need to refashion and improve the Saudi public sector, especially with the widespread financial corruption that has occurred in this sector.

In the political and administrative sphere, the political agenda in Saudi Arabia set by the 2030 Vision is to focus on enhancing the rule of law, achieving good governance, preventing corruption and administrative deficiencies, and achieving economic efficiency. Although public administration in the Middle East including Saudi Arabia has tended to be corrupt, static and rigid (Al-Mizjaji, 2001), unlike other countries in the Middle East, Saudi Arabia has the financial capacity and political stability that could enable the government to improve the administrative system. The development and modernisation of public administration are on the political agenda, and receive high political attention. One of the innovations in this regard was the establishment of the National Anti-Corruption Commission in 2011. The aims of this commission, according to Article 3 of the National Anti-Corruption Commission Law 2011, are to promote integrity, enhance the concept of transparency, and fight all forms of administrative and financial corruption. In this area, it can be suggested that a cooperation between this commission and an ombudsman with an anti-corruption mandate might help to tackle and prevent this issue, with an overall aim of enhancing the goals of administrative justice.

Therefore, all the factors analysed above might encourage the establishment of the ombudsman as a solution to the deficiencies that have existed in the Saudi administrative system. They also can provide the appropriate environment for the transplanted ombudsman

to make a greater contribution to the Saudi administrative justice system. However, this does not mean that the office and its functionality will be automatically successful once the institution has been established. Based on the experience of ombudsman transplants in different countries, we can predict that the Saudi ombudsman might not be entirely successful in the early years of its establishment. The compliance rate of ombudsman's recommendations might also be problematic in this period. This problem can exist for a longer period, if the Saudi ombudsman is not supported by the Council of Ministers, or if the institution fails to build its reputation in the eyes of citizens and government organisations.

In this regard, it is essential to note that one of the challenges that might face the Saudi ombudsman (in both the short and long terms) is how to secure compliance with its recommendations. As seen in the UK model, the strong relationship between the PHSO and the Parliament has helped the office to strength its position, and to put pressure on government organisations to implement its recommendations. Therefore, the absence of similar relationship between the Saudi ombudsman and the legislator, might limit the contribution of the office. More concern can be added when analysing the theory of separation of powers in the Saudi context. As analysed in chapter 2, the Council of Ministers has both legislative and executive powers. The concern here, is whether the Saudi ombudsman will be able to compel public authorities to implement its recommendations given the absence of separation of powers. This issue can also create a concern about the ombudsman's independence, which in turn can affect the impartiality and fairness of the office. Thus, it is fundamental that the Council of Ministers is aware of the important role of the ombudsman in holding government organisations to account, and providing justice to the users of public services. This recognition is a fundamental factor for an ombudsman's success in Saudi Arabia.

In the long term, the administrative culture prevailing in Saudi Arabia, and the widespread corruption are the main challenges that might confront the Saudi ombudsman, which in turn might affect the success of the institution, or limit its ability to perform its functions effectively. There is no doubt that the environment in which the ombudsman operates is a vital element for its success. According to Rowat (1984), an ombudsman cannot be successful in an environment where there is corruption or other major administrative deficiencies. Rowat (1984) also found that the existence of corruption and favouritism have in practice limited the effectiveness of the ombudsmen in developing countries.

To ensure the functionality of the ombudsman, there should be a cooperative relationship between the ombudsman and public administration. Indeed, this requirement is one of the main pillars of the ombudsman's effectiveness, for several reasons. First, the ombudsman follows an inquisitorial approach to settle disputes. Based on this approach, public authorities are required to provide the ombudsman with all documents and information required for the investigation. The failure of public authorities to adhere to this requirement will certainly limit the ombudsman's ability to handle complaints in a professional manner. Second, as the ombudsman lacks the power of enforcement, a cooperative relationship is important to ensure that government organisations comply with the ombudsman's recommendations. A system of public administration that is seriously defective might not be able to build such a relationship with a watchdog institution.

Other potential practical difficulties that might face the ombudsman, particularly in a fatalist administrative culture, might include poor communication between the ombudsman and public authorities, delay by government organisations in responding to the ombudsman's requests (especially access to official documents), insufficient recording management by government organisations, refusal of public authorities to implement the ombudsman's recommendations, and misunderstanding of the role of ombudsman by both citizens and government organisations.

In Saudi Arabia, due to the absence of separation of powers, the strong executive branch, and the dominated administrative culture, the Saudi ombudsman at least in its early years might focus only ensuring the rule of law, and providing remedies for maladministration occurring in public administration, and might avoid the investigation of the systemic roots of maladministration or high profile issues. However, for the Saudi ombudsman to succeed in the long term, requires modernising the bureaucracy so that it focuses on rationality, rule of law, formal decision-making and transparency, similar to bureaucracies in European countries. Therefore, to ensure the success of the ombudsman transplant in Saudi Arabia, there should be a plan to transform the administrative culture which currently dominates in the administrative system, in addition to the social culture in general. Culture is not static, and several variables can change the culture (Jreisat, 2011). Although changing culture is not an easy task, it is not impossible and can conduct through a very slow process. Constant support and efforts from the political and legal elites are also required to achieve certain cultural changes in the long term, and thus provide a proper environment for the Saudi ombudsman to grow and develop. Without such cultural change and the availability of a

robust support from the Council of Ministers, the transplantation of the ombudsman into Saudi Arabia might not be successful.

8.6 Conclusion

In order to predict the potential impact of the ombudsman as a solution to the administrative justice problems in Saudi Arabia, this chapter began by analysing the theory of legal transplants. It found that there is no agreement on a methodology or a tool to measure the success of legal transplant in the hosting country. There is also no consensus on the variables that can encourage the success of a legal transplant, or lead to its failure. However, religion and culture can be regarded as fundamental variables, that can be adopted to measure the possible contribution of the ombudsman in Saudi Arabia.

In relation to religion, this chapter found that the idea of ombudsman is compatible with Sharia law, and can be used as a modern institution to implement the Islamic doctrine of *Hisbah*. It also found that that the social and administrative cultures in Saudi Arabia are the main constraints that prevent development in the public sector, which means that they can be the main variables that might lead to the failure of the transplanted ombudsman. Therefore, we suggested that there should be a plan to change the administrative culture prevailing in the Saudi public sector, in order to provide the ombudsman with the appropriate environment to perform its function effectively.

By exploring the experience of ombudsman in a number of countries, this chapter found that the passage of a period of time is an essential factor to evaluate the success of ombudsman transplant. Ombudsman in both developed and developing countries might not be successful in its early years, and compliance with its recommendations might also be a problem in this period. Therefore, we predicted that the Saudi ombudsman might not be successful in the first years of its establishment. However, after the passage of a period of time, along with the cultural change suggested, and the availability of the Council of Ministers' support, the Saudi ombudsman might be capable of making a considerable contribution to the administrative justice system.

Chapter 9: Findings and recommendations

9.1 Introduction

One of the main aims of this thesis is to examine the possibility of transplanting into the Saudi legal system an ombudsman that is mainly inspired by the British system. The purpose of this institutional transplant is to overcome certain deficiencies in the Saudi administrative justice system. A further concern of this thesis is to understand the operation of the public sector ombudsmen in the UK, determine their main functions, and identify their position within the wide system of administrative justice. Therefore, in this thesis, particular attention has been paid to the UK ombudsmen from three main perspectives; normative, descriptive and empirical. The combination of these three elements has helped to provide a clear and comprehensive view of the public sector ombudsman scheme, its functions, and its actual contributions. This comprehensive view will be utilised in this chapter to make a proposal for a Saudi Arabian ombudsman.

This chapter will firstly summarise the gaps and shortfalls in the administrative justice system in Saudi Arabia, to which the ombudsman might be the appropriate solution. It will also provide a summary of all the lessons learned from reviewing the public sector ombudsmen in the UK. These lessons will be used as standards to construct a proposal for a Saudi ombudsman.

9.2 Administrative justice issues in Saudi Arabia

As indicated in chapter 2, there are two mechanisms for seeking a remedy against the decisions and actions of public administration in Saudi Arabia: the Board of Grievances and the quasi-judicial committees. The Board of Grievances, as the administrative judiciary in Saudi Arabia, is concerned with the legality of decisions and actions made by government organisations. Similarly, the committees have been established to settle disputes resulting from the application of specific laws. No reference has been made to maladministration as a ground for judicial review via the Board of Grievances, or for settling disputes within the jurisdiction of the committees. This means that these two redress mechanisms are only concerned with the legality of public administration practices.

As discussed in chapter 2, the system of public administration in Saudi Arabia suffers from several administrative defects. Although there is a lack of information on the extent of these

deficiencies, some of them can be considered to be forms of maladministration. Thus, we can say that maladministration is one of the problems in the public administration system in Saudi Arabia. In addition, the structural issues in Saudi public administration, especially over-centralisation, might in practice cause some forms of maladministration and difficulties in accessing public services. Therefore, the users of public services who have suffered injustice caused by poor administration might not have an accessible mechanism to seek a remedy. Nevertheless, it is essential to stress here that there are very limited data available on the scale of the problem of maladministration in Saudi Arabia.

As the Board of Grievances and the committees are only concerned with the legality of government organisations' decisions and actions, there is an urgent need for a mechanism to remedy injustice and maladministration that occurs in the public sector. An ombudsman might be an adequate solution and a suitable institution to address this issue. An ombudsman could also safeguard justice in the public sector, and hold public authorities to account.

There might be some areas in which there is a potential overlap between the concept of legality and that of maladministration. In this situation, although the Board of Grievances might have a remit to handle this type of case, an ombudsman might be the appropriate means of resolving these complaints. There is no doubt that one of the goals of establishing an ombudsman is to overcome any limitations in the judicial system. As discussed in chapter 2, one of the limits of the Board of Grievances is the aspect of the long time taken to settle a case, due to the Board's heavy workload. Another possible limitation of the Board of Grievances is the dimension of cost. Although currently there are no court fees in the Saudi judicial system, a draft bill for introducing court fees has been approved by the Consultative Council in June 2020. If court fees are introduced into the Saudi judicial system, a number of vulnerable categories might face financial difficulties in accessing the courts, in spite of the legal aid system suggested in this bill. Therefore, an ombudsman might help to provide a more accessible and cheaper route to justice, compared to the courts. Moreover, the ombudsman might potentially help to ease the heavy caseload of the Board of Grievances.

In theory, the Board of Grievances might contribute to promoting good practices in the public administration context; but there are no available data that indicate whether this function is being performed, or which enable us to evaluate it. However, the Board of Grievances follows adversarial procedures to settle disputes between citizens and public authorities. Also, it is purely a reactive mechanism that provides redress for citizens'

grievances; thus, it is unlikely to contribute greatly to promoting good practice in public administration. Therefore, in theory, an ombudsman, with its inquisitorial approach, might help to shed light on undiscovered practical defects in the public administration system.

In Saudi Arabia, there is not a sophisticated system of administrative justice. Indeed, there is no recognition of the importance of a system of administrative justice that aims to improve the quality of initial decision-making and provide a variety of redress mechanisms. A number of approaches are required to establish such a system in Saudi Arabia, and it is necessary that citizens have a variety of mechanisms available to complain against public authorities' actions. According to Buck, Kirkham and Thompson (2016), the existence of various means for redress in the public sector is a trend in several countries around the world. Thus, the introduction of an ombudsman can provide a form of alternative dispute resolution in the Saudi public sector, which mainly aims to promote justice. More broadly, the introduction of an ombudsman into Saudi Arabia, can be considered as a first step towards a developed system of administrative justice.

9.3 Lessons learned from reviewing the UK ombudsmen

The primary objective of this section is to summarise all the lessons that can be learned from analysing the public sector ombudsmen in the UK. In other words, this section aims to explore the strengths of the UK ombudsmen that contribute to their effectiveness. It also aims to address their shortcomings, which to some extent have negatively affected their performance. Thus, both the strengths and weaknesses of the UK ombudsmen can help to identify a rational proposal for an ombudsman in Saudi Arabia.

These lessons will be categorised based on substantial distinctions and issues, as follows: the nature and role of the ombudsman; the structure and scope of the ombudsman; arrangements for appointment and dismissal; scope of the ombudsman's intervention; grounds for the ombudsman's intervention; access to the ombudsman; the ombudsman's methods; remedies recommended by the ombudsman; and monitoring of the ombudsman and reporting tasks.

9.3.1 Nature and role of an ombudsman

From a historical perspective, the purpose of establishing the ombudsman in the UK was to provide citizens with an approach for redress against the increasing bureaucratic powers. This approach aimed to some extent to avoid the imbalance of powers between the two parties: citizens and the state. This was reflected in the ombudsman's core role of providing remedies for individuals' grievances caused by poor administration. However, changes in the shape of public administration and in the way in which public services were delivered encouraged the ombudsmen to play a more proactive role. It also has been noted that the consequences of the developments of the UK ombudsmen's roles over the years 'have been something of a hotchpotch' (Gill, Mullen & Vivian, 2020, p.798).

In this thesis, we found that in practice, there are two main functions of the UK public sector ombudsman: namely, handling individuals' complaints and promoting good administration. The latter function includes the role of the ombudsman as a CSA. However, some functions of the UK ombudsmen are not explicitly included in the ombudsmen legislation. For example, the SPSO has a statutory power in relation to monitoring complaints-handling standards, which in practice shows signs of success. Unlike the SPSO, there is no explicit provision in the PHSO legislation in relation to this power, although the PHSO in practice performs a similar function. There is also no explicit provision in the PHSO legislation for the ombudsman's role in promoting good administration.

Thus, there is not a clear statutory foundation for some of the functions that are in fact performed by the PHSO. Although this situation has provided ombudsmen with the flexibility to perform their functions in an effective manner, more clarity in legislation might be beneficial. As noted by several legal scholars, government organisations, and by ombudsmen themselves, the legislation concerning ombudsmen in the public sector – especially in England – can be regarded as outdated. Hence, several reforms are required to enhance the clarity of different aspects of an ombudsman's work, in relation to its functions, powers, procedures and remit. Therefore, it has been suggested by Kirkham and Gill (2020) that ombudsman legislation should clearly state the various roles that the office is intended to perform, as this will help to avoid any ambiguities in relation to its functions, in the eyes of both public authorities and citizens. It is important to stress here that the suggested statement of the ombudsman's functions in the legislation should be formulated in manner that does not impose restrictive standards on its work. This is mainly because the

ombudsman should have discretionary power in performing its main functions, and regarding the level of emphasis that the office places on each of its functions depending on the circumstances (Kirkham & Gill, 2020). Accordingly, in order to enhance the PHSO's effectiveness in improving the quality of public administration, and to remove any possible doubt as to the scope of its functions, the function of promoting good administration should be clearly embedded in the ombudsman legislation. In addition, the power of the ombudsman to perform as a CSA should also be enshrined in legislation, along with the necessary tools to regulate the internal complaints-handling procedures within public authorities.

According to the above analysis, consistency should be achieved between the ombudsman's flexibility in performing its functions and the legal basis of the ombudsman's work in legislation. This should add greater coherence and clarity regarding what citizens and government organisations can expect from the ombudsman. It also can provide a clear view of the types of contribution that the ombudsman is capable of achieving.

In the UK, based on the empirical evidence analysed in Chapter 7, it appears that there is a gap between the actual functions of the ombudsman and what the public expects from it. Clearly, individuals lack a full understanding of the exact functions and goals of the ombudsman. This situation might to some extent undermine citizens' confidence and trust in the ombudsman's work. As citizens – or more specifically, the users of ombudsmen's services – can be considered as one of the main pillars of ombudsman schemes, in recent years the UK principal public sector ombudsmen have taken a more consumer-focused approach to enhancing citizens' experiences, with an overall aim of increasing the effectiveness of the ombudsmen.

The ombudsman, as an alternative dispute resolution mechanism, should pay more attention to the stakeholders; particularly citizens. Furthermore, Creutzfeldt (2020, p.110) has shed light on the value of 'building a more user-centred approach into the ombud model'. She indicates that citizens' experiences and views can play a part in the process of improving the ombudsman sector (Creutzfeldt, 2020).

In practice, the use of informal and speedy procedures with the possibility of cost effectiveness, as tools of the concept of alternative dispute resolution by the ombudsmen, have affected the ombudsman's work in the public sector. In other words, treating the users of ombudsmen's services as consumers, and the influence of the private sector's values and practices on ombudsman schemes, have encouraged the UK ombudsmen in the current

decade to adopt a managerial approach (Gill, Mullen & Vivian, 2020). From a theoretical perspective, this model of the ombudsman places more emphasis on consumers' satisfaction, in relation to both ombudsman services and public services in general. Based on the analysis in Chapter 7, we found that the PHSO used a variety of methods to measure customer satisfaction with its services, such as customer surveys, a service charter and performance indicators. This focus on the consumer – in addition to the shift from using formal investigation towards informal procedures, with the overall aim of speeding up ombudsmen's work, enhancing citizens' experience, and promoting good administration – can be considered as a further step towards managerialism.

What can be concluded in this regard is that the statutory provisions governing the UK ombudsmen have not in practice restricted them in developing the institution's functions in the manner they think best. In fact, the wide latitude given to the holder of the office has helped the ombudsman to expand the institution's functions to cover a number of roles. This situation has led to the constant debate amongst legal scholars regarding the appropriate role of the ombudsman, or at least the level of emphasis that the ombudsman should place on each of its roles.

In practice, several values and concepts have influenced ombudsmen's work in the UK, such as managerialism, consumerism, the idea of alternative dispute resolution, and the concept of administrative justice. The ombudsmen's ambitions to achieve the goals of all of these concepts and ideas have significantly influenced the current nature of their work. Moreover, the scope in which an ombudsman operates also has an impact on the nature of its work. Based on the analysis provided in this thesis, it can be stated that the scope of ombudsmen's work covers three main areas: the administrative justice system, the public administration system, and the society. Both the administrative justice system and public administration have been subject to several changes and development over the years, in relation to their structure and the main values that these systems adhere to. There is no doubt that all these changes have played a role in the development of the ombudsman's functions and the main goals of the institution.

9.3.2 Structure and scope of an ombudsman

As an alternative dispute resolution mechanism, the ombudsman should fulfil a number of requirements in order to perform its core role effectively. A good design or structure is a fundamental requirement for an effective ombudsman. From analysing the public sector

ombudsmen in the UK, we found that ombudsmen in devolved government, in particular the SPSO, perform their functions with minimum concerns, compared to the PHSO. This to some extent is related to the structure of the institution, as the devolved ombudsmen are integrated ombudsmen. The jurisdictions of the ombudsmen within devolved government cover all devolved public services, including health care services, social security, housing services and local government. In contrast, there is not an integrated ombudsman in England. The main public sector ombudsmen in England are the PHSO, the LGSCO and a number of specialised ombudsmen. These ombudsmen have been developed in an incremental manner, and it seems that less attention has been paid to the overall structure of the public sector ombudsmen in England. Therefore, these ombudsmen should be harmonised within a unified scheme, to enhance the effectiveness of the public sector ombudsman in England.

There is no doubt that the unified ombudsman model (or the 'one-stop-shop' ombudsman) can have several benefits. First, the cost of operating an integrated ombudsman might be less than that of operating several ombudsmen, where there is duplication of certain functions. Moreover, a unified public services ombudsman can reinforce the accessibility of the institution, which means that it will be easier for ordinary citizens to use the institution. The integrated ombudsman is also the best solution to avoid any potential practical issues. Undoubtedly, this ombudsman design can help to avoid any potential overlaps or gaps in jurisdiction that might exist in the absence of a unified ombudsman scheme. The lack of cooperation between ombudsmen is another practical problem that might occur with a number of ombudsmen existing in the public sector. This issue is partly related to the accountability arrangements for each ombudsman. In England, for example, the PHSO and the LGSCO have different accountability arrangements, with no unified or centralised public body to enhance the coordination between them. In practice, the PHSO and the LGSCO have a cooperative relationship regarding cases which fall within the jurisdictions of the two offices, by conducting joint investigations; nevertheless, a more systematic and unified scheme is needed.

Furthermore, an integrated ombudsman can give the office-holder a comprehensive view of public authorities' practices and policies, and therefore, provides greater opportunities to discover deficiencies in the public sector. Evidently, each government organisation within an ombudsman's jurisdiction provides the citizens with specific public services. However, these government organisations cannot carry out their tasks in isolation without any cooperation. This means that routine interactions and cooperation between different

government organisations are essential for delivering public services. Any systemic defects in this procedure can cause maladministration and injustice to the users of public services; and such defects are more likely to be discovered by a unified ombudsman with a wide remit, rather than a specialist ombudsman with a limited remit over a specific type of service.

It is reasonable to suppose that an ombudsman with a specific mandate will have more expertise in a specific subject, and thus have greater ability to highlight administrative shortcomings and defects. This means that one of the potential limitations of a generalist ombudsman is potentially having insufficient expertise in a specific field. However, this limitation can be overcome by hiring staff with specific expertise in a variety of fields, which reflect the integrated remit of the unified ombudsman. In this way, the structure of the unified ombudsman can be divided into a number of units, and each of which has a remit over a specific sector.

Consequently, the existence of a unified ombudsman model might play a more effective role in improving the quality of public services provided to the citizens. Lastly, improving the quality of justice provided to the complainants can also be considered as a general benefit of adopting this model of ombudsman. Therefore, the integrated ombudsman can reinforce the institution's effectiveness in its functions of both complaints-handling and promoting good administration.

9.3.3 Arrangements for appointment and dismissal

The UK public sector ombudsmen are appointed by the Queen, on the advice of the relevant parliament. The ombudsman can be either relieved of office by the Queen at his/her request, or removed by the Queen on the ground of misbehaviour. These arrangements of appointment and dismissal have secured the independence and impartiality of the ombudsmen in the UK, which in turn helps the office to perform its function in an effective manner.

9.3.4 Scope of ombudsmen's intervention

To achieve the substantial purpose of the ombudsman's establishment, which is to limit the negative impact of bureaucracies, a general criterion to identify the remit of the ombudsman should be adopted in legislation. This criterion should take into account changes in the nature of governance in public administration: in particular, the new public management approach,

and the increased use of privatisation as tool to deliver services. The UK method of determining the bodies within an ombudsman's jurisdiction is to list them in a schedule attached to legislation. This has the advantage of clarifying which organisations are subject to investigation; however, adopting this method alone seems inappropriate, due to the frequent changes that typically occur in the public administration landscape in the modern state – such as the creation of a new public body, or the abolition of a government organisation. Therefore, to avoid the need for constant amendment to ombudsman legislation, a general definition of an administrative organisation would be useful. Hence, the most effective way to determine the ombudsman's jurisdiction would be a combination of both a general definition and a list of specific bodies.

9.3.5 Grounds for ombudsmen's intervention

One of the distinctive features of the UK public sector ombudsmen is the grounds for their intervention. Maladministration, service failure and injustice are the criteria used by the ombudsmen to handle individuals' complaints. The adoption of these criteria has increased citizens' opportunity to seek remedies against unfair decisions and actions taken by government organisations. The effectiveness of the ombudsman can be attributed to some extent to its flexibility in interpreting the concept of maladministration broadly, to cover a variety of grievances occurring in the public sector.

9.3.6 Access to ombudsmen

In order to underpin the quality of justice provided by the ombudsman, and to enhance users' experiences in using the service, direct access to the institution is a fundamental basis for a its success. From reviewing the UK public sector ombudsmen, we found that one of the most controversial features of the PO's scheme is the existence of the MP filter. Several recommendations to abolish this filter have been made over the years. The MP filter seems to conflict with the intention of establishing the ombudsman, which is to provide citizens with an accessible and simple venue to complain against the administration. Therefore, citizens should have direct access to the ombudsman, without any barriers or filters that might discourage them from recourse to the institution.

9.3.7 Ombudsmen's methods

In general, the ombudsman follows an inquisitorial approach, in the sense that it has the power to obtain official information relevant to the complaint, and to interview the complainant and any public servants involved in the complaint. In practice, the ombudsman can use formal investigation or informal procedures to resolve complaints.

Through evaluating the performance of the UK ombudsmen in practice, we found that the ombudsman has wide latitude to perform its function and achieve the institution's goals. This latitude can be observed from analysing the emphasis of the ombudsman's work and the methods used to handle the institution's work over the years. We found that the emphasis of the ombudsman's work has changed over time to meet the *de facto* needs of complainers, or as result of the trade-off between two values: speed and thoroughness. This fact, along with the absence of a clear legislative specification of the method that should be used by the ombudsman, has led to complainants being unclear as to the ombudsman's methods and procedures. To prevent this situation, the statutory duty of the PHSO in conducting formal investigation and then reporting should be changed. The ombudsman legislation should state clearly that the institution can use a variety of formal and informal procedures in handling complaints, based on the ombudsman's discretion and the unique circumstances of each complaint. In this area, it is necessary for the ombudsman to develop and publish a set of standards, which the office can rely upon to determine the appropriate type of method for handling a complaint.

It is important to mention here that one of the main obstacles that prevent an ombudsman from achieving more improvements in public administration is the absence of own initiative power. Based on this power, the ombudsman can start an investigation without waiting for a complaint's submission, if it appears that there is systemic maladministration.

There are several arguments that can justify the introduction of own initiative power. First, one of the common views in the administrative justice system is that the scale of grievances handled by the different redress mechanisms in the public sector, including the ombudsman, represents only a small proportion of the actual amount of grievances occurring in public administration. This is due to the fact that a high percentage of citizens do not complain when they experience unfair decisions. Therefore, the own initiative power is fundamental; not only in the sense that it can lead to more improvements in the public sector, but also as an approach to provide justice to specific groups of citizens who are unlikely to complain,

such as vulnerable individuals and ethnic minorities (Gill, 2020). Moreover, this power can also be used to increase the distinctive contribution of the ombudsman in the administrative justice system (Gill, 2020). Another argument in favour of the own initiative power is that this power can be used to pay more attention to issues of public interest, which are linked to the fairness of the public sector (Gill, 2020).

9.3.8 Remedies

One of the goals of the ombudsman is to remedy the injustice caused by maladministration. Although there is no explicit provision in ombudsman legislation regarding the types of remedies that the ombudsman can recommend, it can offer a number of remedies such as apology, financial compensation, review of a decision, and review of a procedure or policy. This range of remedies recommended by the ombudsman seems appropriate to remedy citizens' grievances.

The recommendations made by the ombudsman are not enforceable. The common view among legal scholars and ombudsmen themselves is that the lack of enforcement power is one of the essential elements of an ombudsman's work, as it helps the office to construct a cooperative relationship with public administration, and therefore, make a greater contribution in the administrative justice system. This feature has also been considered as a safeguard against any improper intervention in public administration that might reach high policy matters.

9.3.9 Monitoring of ombudsmen and reporting tasks

Given the wide discretionary power and flexibility given to the ombudsmen, a robust accountability arrangement is essential to provide oversight and scrutiny of their work. The UK ombudsmen are subject to several forms of accountability, which include Parliament and the courts via judicial review; along with other procedures that might impose a looser form of accountability on their work, such as internal review, external review, and critiques raised by ombudsman watchers. However, the current accountability framework for the ombudsman has been criticised for being 'outdated', and because it provides insufficient oversight of ombudsmen's operation (Kirkham & Gill, 2020). Therefore, more efforts should be made to strengthen and ensure the consistency of the ombudsman's means of accountability, as this is fundamental for building citizens' trust on its work, and to ensure the quality of ombudsman services.

Another aspect that connects to some extent with ombudsmen's accountability is reporting tasks. There is no doubt that official reports published by the ombudsman are an essential tool to ensure the transparency of the institution. Complaints data are also an essential tool that enable the ombudsman to promote good administration; although the approach of learning from complaints can involve a number of risks (Gill, Mullen & Vivian, 2020). However, from analysing ombudsmen's data with the aim of evaluating their actual performance, we found that the ways in which the different ombudsmen collect and report complaints data are neither sufficiently systematic nor consistent. The main cause of this situation is the absence of formal standards for collecting and reporting complaints data. Therefore, it has been suggested that the reporting requirement be embedded in ombudsman legislation, with more detailed specification of the nature of information that should be collected and reported; and that, as far as possible, these requirements should be comparable (Kirkham & Gill, 2020; Creutzfeldt, 2020). It is also vital that the ombudsmen's adherence to these reporting standards is scrutinised by an external accountability body.

Based on the normative, descriptive and empirical analysis of the UK principal public sector ombudsmen provided in this thesis, we found that there are some areas that require further analysis. The first area that requires in-depth examination is the method that can be used to evaluate the ombudsman's performance, and whether the ombudsman achieves the main purposes of its establishment. In other words, more research is needed to identify a comprehensive evaluation methodology that can cover the multiple roles of the public sector ombudsmen. It would also be valuable to identify the main grounds that justify the existence of the ombudsman, as part of the evaluation methodology. In Chapter 7, we found that although several ombudsmen and legal scholars have the view that ombudsmen have an effective role in improving the quality of public administration, there is not enough evidence to support this claim. Therefore, more research is needed to develop a new methodology that can measure and evaluate the ombudsmen's contribution in this area.

There are also two further issues that require further examination. The first area is the fairness of the ombudsman's procedures, which is an essential component of the institution's effectiveness. More research is needed to identify the main requirements of procedural fairness, and how this can be achieved in practice. It is also vital to examine how the government can assure that the ombudsmen follow fair procedures during the process of handling citizens' complaints. Analysing this point led to the second area, which is ombudsmen's accountability. A normative study is needed to examine the extent to which

the accountability mechanisms might intervene in the ombudsmen's work. It is also essential to identify how the accountability mechanisms can ensure the quality and fairness of ombudsmen's work, without affecting its independence or the degree of flexibility that the institution enjoys in performing its functions. In other words, in-depth analysis is required to determine the optimal balance between two priorities: accountability on one side, and independence and flexibility on the other. If the research suggested on these topics is carried out, it may generate conclusions that can be applied to other ombudsman systems including a future Saudi Arabian ombudsman.

9.4 A proposal for an ombudsman in Saudi Arabia

This section represents the core contribution of this thesis, which is a proposal for an ombudsman in Saudi Arabia. The following paragraphs will set out a rational proposal for a Saudi Arabian ombudsman based on the UK experience. This proposal will cover the main elements of the ombudsman institution, which include its title, appointment and dismissal, jurisdiction, remit, methods, functions, and accountability.

Title: As clarified in the previous chapter, an ombudsman in Saudi Arabia fits well with the Islamic doctrine of *Hisbah*. Therefore, an ombudsman in Saudi Arabia could be named either '*Hisbah*', which refers to the Islamic concept, or '*Muhtasib*', which refers to the person who ensures the enforcement of *Hisbah*. This term can be used to symbolise the Islamic basis for an ombudsman in Saudi Arabia. This term, with its Islamic nature, can also legitimise the existence of the institution in the eyes of the public, which in turn can encourage them to submit their complaints to this mechanism. Using this title might also help to ensure citizens' understanding of the functions and goals of the proposed institution, due to the similar functions and essence of *Hisbah* and the ombudsman. Therefore, it is preferable to use the terms *Hisbah* or *Muhtasib* in the title of the ombudsman in Saudi Arabia, as Saudi citizens are familiar with them, instead of the term ombudsman, which is a non-Arabic word.

Appointment and dismissal: The proposed ombudsman should be appointed by the King as the head of the state. The ombudsman should also be appointed for a specific term enshrined in legislation. Inspired by the UK ombudsmen, the term of the proposed ombudsman should be seven years, and should not be renewable. The legislation should state that the ombudsman can be removed from the office only if relieved by the King at the ombudsman's request, or removed by the King on the grounds of misconduct or failure to

perform the duties of the office. These guarantees are designed to ensure the independence of the office.

Jurisdiction and remit: The main purpose of introducing an ombudsman into Saudi Arabia is to provide an additional route for citizens to complain against public administration. Hence, the ombudsman's jurisdiction should cover all situations in which the government interacts with citizens. The jurisdiction of an ombudsman can be determined based on four elements. First, given that Saudi Arabia is a unified monarchy and most government functions are performed by central government, an integrated ombudsman would be the appropriate design for the institution. Based on the experience of the UK public sector ombudsmen, this institutional design of the ombudsman can provide several benefits compared to the existing of several specialist ombudsmen in the public sector.

The integrated ombudsman in Saudi Arabia should cover the full range of public services provided to citizens, such as health care, social security, housing, education and municipal services. The second aspect is that the remit of the ombudsman should cover all public authorities and government organisations. Therefore, a general criterion or term such as 'public authorities' or 'government organisations' should be used in legislation to identify the jurisdiction of the ombudsman. A list of public bodies within the ombudsman's jurisdiction can also be attached to the legislation, to add additional clarity to the ombudsman's remit. The third element is that the jurisdiction of an ombudsman in Saudi Arabia should be based on the concepts of maladministration and injustice. It essential to stress here that these two concepts should not be defined in the legislation, in order to allow the ombudsman to interpret them flexibly.

The fourth element is related to exemptions from jurisdiction. As public administration is the main concern of the ombudsman's work, a number of areas should be excluded from the remit of the ombudsman. The ombudsman should have no remit over the judiciary, as the core object of ombudsman control is the executive branch. This exemption of judiciary is the norm not only in the UK, but also in many countries around the world (Frahm, 2013). However, the administration of courts, or more broadly the administration of justice in the judiciary branch, can be included in the ombudsman's remit, as the actions and decisions made in this area are administrative in nature. Another exemption is decisions and actions taken by the King as the head of the state. Moreover, conducts and decisions made by

ministers in relation to their work as part of the legislative branch in the country should be excluded from the ombudsman's jurisdiction.

Other areas that should be excluded from the ombudsman's jurisdiction are commercial, contractual and employment matters. Based on the experience of ombudsmen in several countries, and the time dimension discussed in the previous chapter, the researcher suggests that these areas should be excluded from the remit of an ombudsman, at least in the early years of the establishment of the institution, to allow the ombudsman to focus on the activities between public authorities and citizens. Once the ombudsman has developed and proved its position as one of the main disputes resolution mechanisms in the public sector, the case for adding these areas to its remit can be considered.

Functions: In chapter 8, based on ombudsmen's experience in several countries, we found that the passage of a period of time is essential for the ombudsman to succeed, therefore we suggest that the functions of the proposed ombudsman in Saudi Arabia, should be divided into two categories. The first includes the functions of the office in its early years of establishment, while the second category includes the expanded role of the office after a long period of existence. The role of the ombudsman when first introduced should include investigating individuals' grievances caused by poor administration, and encouraging good administration. From reviewing the UK ombudsmen, we noted that the first ombudsman was subject to several criticisms regarding its performance and effectiveness as a redress mechanism. However, over the years the UK ombudsmen become one of the key institutions in the administrative justice system. Therefore, it is vital that the ombudsman in Saudi Arabia has sufficient time to develop its core functions effectively. In this period, the ombudsman can build a cooperative relationship with public administration, it can also raise both citizens' and government organisations' awareness of the role and contribution of the institution. In this period, the ombudsman can also enhance citizens' confidence and trust regarding the institution. This period will also allow the ombudsman to train its staff to become professionals who can deliver high-quality services, and are able to cope with the potential expansion of the ombudsman's roles.

The second period should start when the ombudsman has proved its success as an effective institution, and as one of the main mechanisms in the country that provide justice against public administration. Once the ombudsman has demonstrated its success and effectiveness, its role can be expanded to include monitoring and standardising internal complaints

procedures within public authorities. The ombudsman's role can also be broadened to cover the prevention of corruption within public administration. Therefore, the suggested roles of the proposed ombudsman can be developed in an incremental and gradual manner over the years, based on the actual capabilities of the office.

Methods: The proposed ombudsman should be able to use formal investigation and informal procedures according to the discretion of the office-holder and the unique circumstances of each complaint. However, the standards that the ombudsman relies upon to make this decision should be published by the ombudsman and should be available to the public. The ombudsman should also be granted an own initiative power, as this power will help the office to achieve a better contribution in promoting good administration and in providing justice to citizens.

Accountability: As the ombudsman has a wide discretion in certain aspects of its work, it is essential that the institution is accountable. There should be a body with the responsibility of holding the ombudsman to account and scrutinising its performance. This body can also provide proper support for the ombudsman in cases where government organisations ignore its recommendations. Despite the absence of separation of powers in Saudi Arabia, the Council of Ministers, as the highest authority in the country after the King, can provide a robust back-up to the ombudsman, and can strengthen its position in a manner that enables the office to perform its functions effectively. Therefore, a distinct commission within the Council of Ministers should be established, with the responsibility of scrutinising the ombudsman's performance. In order to ensure that this commission has sufficient authority, it should be headed by a minister.

The above proposal of the Saudi ombudsman is mainly inspired by the British model, with several adaptations, to increase the functionality of the office, and to ensure that the transplanted institution can fit with the religious, legal and cultural systems in Saudi Arabia. However, as indicated in chapter 8, in order to ensure the success of this suggested institutional transplant, there should be a plan to change the social and administrative cultures in Saudi Arabia, as they are more likely to resist the introduction of the ombudsman, and can limit its ability to make a contribution in the administrative justice system. Furthermore, the Council of Ministers' support is a key factor for ombudsman' success, as it will provide the institution with the necessary support to develop and extend its contribution. The Saudi government should see the ombudsman as a central institution that

provides justice to citizens and promotes good administration. Thus, the essential requirements for the Saudi ombudsman to succeed are the recognition of the importance of the ombudsman by government and policy makers, the cultural change suggested, and the Council of Ministers' support.

This thesis suggests that there is a need for an ombudsman in Saudi Arabia, to fill certain gaps in the administrative and judicial systems. I will conclude by suggesting two areas for research into the new institution. The first suggestion stems from the fact that the ombudsman will be introduced into an existing set of administrative justice remedies. Therefore, it would be worth researching the ombudsman's relationship with other redress mechanisms in Saudi Arabia's administrative justice system.

In Saudi Arabia, there is an absence of legal research concerning the system of administrative justice. Similar to the administrative justice system in the UK, the mechanisms that provide redress to aggrieved individuals against public administration in Saudi Arabia have been developed in an incremental and fragmentary manner. Therefore, it will be valuable to analyse the concept of administrative justice in the Saudi legal context, and to identify the mechanisms available in Saudi Arabia to achieve the goals of administrative justice. A suggestion for research in this area is a normative study that involves a comparison between the structure and design of the administrative justice system in a unified judicial system, and in a dual judicial system. It is also crucial to identify how the goals of the concept of administrative justice can be achieved in a dual judicial system, where there is a separate administrative judiciary system. Another question that might be considered in this area is whether the Board of Grievances, as the administrative judiciary system in Saudi Arabia, is an adequate tool to perform as a centralised body that supervises the administrative justice system – or whether a separate body might be more appropriate to handle this task.

Inspired by the comprehensive approach towards administrative justice in the UK, it is fundamental to analyse the Saudi government's agenda regarding 'getting things right first time' in a public administration context. Such research requires a full analysis of the tools used to enhance the quality of initial decision-making in the public sector, in addition to the internal and external means for redress.

The second suggested area for further research is a socio-legal analysis of the functions and practices of the *Hisbah* institution in the Islamic state, compared to the institution of ombudsman in the modern welfare state. This research could focus on the potential

contributions of the *Muhtasib* in the public sector, and the actual tools used for 'commanding rights and preventing wrongs' in this sector. Little attention has been paid in legal studies, at least in Saudi Arabia, regarding the doctrine of *Hisbah*'s possible contribution to public administration in the modern welfare state.

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