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How Do Complainants Experience the Ombuds Procedure? Detecting cultural patterns of disputing behavior: A comparative analysis of users that complain about financial services

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How Do Complainants Experience the Ombuds Procedure?

Detecting cultural patterns of disputing behavior: A comparative analysis of users that complain about financial services

Naomi Creutzfeldt and Ben Bradford[*]

Abstract

Are systems we use for resolving disputes designed in a user-friendly manner? What motivates us to accept a decision handed down by an ombuds? There is scant empirical evidence to help understand what users of ombuds expect from them and what informs these expectations. Yet, in a recent wide-ranging study Creutzfeldt (2016) asked people who had just been through an ombuds procedure about precisely these issues. Exploring the importance of fairness perceptions for ombuds procedures, one of the findings of the project was that decision-acceptance (and trust) was linked to users being heard, having a voice, and especially their "first impressions" of the ombuds. Does this finding hold true across different jurisdictions, though? By focusing on users of the German insurance ombuds (Versicherungsombudsmann) and the Financial Ombudsman Services (FOS) in the UK, this chapter will explore how procedural justice matters in different ways in different legal cultures. The data reveal culturally distinct narratives about expectations towards ombuds, which we suggest is partially a result of the different legal socialization experiences of people in Germany and the UK. Having identified patterns within the private sector, lessons learned for the public sector are discussed. We conclude this chapter with some thoughts as to how this study might direct future understandings of user experience and future research.

INTRODUCTION

The ombuds model can be found in most countries around the world. This model has developed and adapted from its original roots to cater for, and adapt to, different sets of problems.[1] Not much is known about people's expectations of ombuds procedures, other than the data on customer satisfaction that the ombuds collect on a regular basis for their annual reporting. This data varies in ambition and methodology, which makes it impossible to make any meaningful comparisons. By contrast, the data that informs this chapter has been collected in a uniform way across ombuds and countries as we will explain below.

This chapter is guided by an interest in what people in two countries expect from ombuds, and the role that legal cultures play in shaping these expectations. As this is a very broad field of study we decided to narrow our focus to a comparison of two ombuds that offer redress for problems people encounter with financial services in Germany and the United Kingdom (UK). We chose the financial service sector for our

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[1] Linda Reif, "Transplantation and Adaptation: The Evolution of the Human Rights: The Ombudsman" [2011] *BC Third World LJ* 31: 269; Naomi Creutzfeldt, 'The role of the ombuds – a comparative perspective' in Maria Moscati, Michael Palmer & Robert Roberts (eds), *Research Handbook: Comparative Dispute Resolution* (Edward Elgar 2019). TO ADD CARL 2018

comparative analysis for three reasons. First, financial services is a EU wide regulated sector and deals with very similar types of complaints in the studied countries; second, there are established ombuds bodies specialized on financial services; third, by examining these two similar services we can more confidently attribute differences in people's expectations to legal/cultural differences rather than in the types of problems or issues the ombuds deal with. We examine how people, within two different legal cultures, common law (the UK) and civil law (Germany), experience the ombuds procedure. In the pages that follow we argue that expectations and experiences of ombuds' procedures are influenced by peoples' perceptions of (and experiences with) national legal systems. Building on our work in the UK context[2], we show how experiences of the informal dispute resolution system are shaped by national legal socialization. This, in turn, influences perceptions of procedural fairness.

Building on our data helps us understand ombuds users' in general and allows us to discuss potential implications for public sector ombuds. We argue that the insights into the expectations and perceptions of a private ombuds that the empirical data brings can be helpful in understanding expectations of public ombuds. Whilst there are various institutional and procedural difference between public and private ombuds, a shared desire from its users is to perceive a procedure as fair. We return to the transferrable lessons in part five.

The data used in this chapter was gathered for the project *Trusting the middle-man: impact and legitimacy of ombuds in Europe*.[3] Through a combination of qualitative and quantitative methods a large database was collected. For the purpose of this chapter we are using data relating to the German insurance ombuds (*Versicherungsombudsmann*) and the British Financial Ombudsman Services (FOS) as case studies.

Six parts form this chapter. First, procedural justice and the ombuds context are explored; second, our methodological approach of measuring peoples interactions with ombuds; third, the empirical data of user expectations; fourth, different traditions of law in Germany and the United Kingdom are discussed in relation to the data; part five looks proposes lessons for the public sector; part six concludes the chapter.

1. FAIR PROCEDURES AND FAIR OUTCOMES IN CONTEXT

Accessing justice in any given system demands assessment of processes as well as outcome. Research on the concept of procedural justice – people's judgements about the fairness of legal and other processes in which they are involved – first developed within social psychology[4] before being taken up by criminologists and others concerned with the way people relate to structures of power and authority.[5] The core

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[2] Naomi Creutzfeldt and Ben Bradford, 'Dispute resolution outside of courts: procedural justice and decision acceptance among users of ombuds services in the UK' [2016] *Law and Society Review* 50 4, 985-1016

[3] https://www.law.ox.ac.uk/trusting-middle-man-impact-and-legitimacy-ombudsmen-europe

[4] John Thibaut, and Laurens Walker, *Procedural Justice* (Hillsdale: Erlbaum 1975); E. Allan Lind & Tom Tyler, 'The Social Psychology of Procedural Justice (New York: Plenum, 1988)

[5] For example: Jason Sunshine, and Tom Tyler, 'The role of procedural justice and legitimacy in shaping public support for policing' [2003] *Law and Society Review* 37: 513-548; Kristina Murphy, 'Regulating More Effectively: The Relationship between Procedural Justice, Legitimacy, and Tax Non-compliance [2005] Journal of Law and Society 32(4): 562-589; Jonathan Jackson, Ben Bradford, Mike Hough, P. Quinton, A. Myhill and Tom Tyler, 'Why do people comply with the law? Legitimacy and

idea is simple: when people are interacting with those who have power, authority or influence over them they are closely attuned to the fairness of the processes concerned. 'Process' here does not necessarily mean 'procedure' or 'protocol' in a legal sense, but relates more to the quality of human interaction with power holders such as police officers, judges, tax officials or employers. A widely replicated set of empirical findings suggest that during such encounters people tend to value being treated with dignity and respect, having voice (that they are allowed to put their side of the argument), a sense that decisions are being made in a fair, unbiased and neutral fashion, and the development of trust between the parties concerned.[6] Experiencing procedural justice promotes an overall sense of fairness, and, indeed, research over a wide range of criminological contexts has shown that people are often more concerned with the quality of the procedure than the nature of the outcome, and that compared with distributive fairness and outcome favourability, process fairness is a more important predictor of outcomes such as satisfaction with the procedure, decision acceptance, trust in the authority and legitimacy.[7]

Despite the strength of some of the research on procedural justice, such research is not yet conclusive. The portability of procedural justice theory to non-Western contexts has been questioned,[8] although some studies have shown that even in the most challenging contexts procedural justice effects can be identified.[9] More importantly for current purposes in novel legal situations, or where notions of civil law rather than the criminal law are more relevant, the evidence for the trust, legitimacy or user satisfaction enhancing benefits of procedural justice is scarce.[10] Therefore we are

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the influence of legal institutions' [2012] *British Journal of Criminology* 52(6): 1051-1071; Tom Tyler, 'Why people obey the law (Princeton University Press 2006)

[6] For example: Jacinta Gau, 'The Convergent and Discriminant Validity of Procedural Justice and Police Legitimacy: An Empirical Test of Core Theoretical Propositions' [2011] *Journal of Criminal Justice* 39 6: 489-498; Jerald Greenberg & Robert Folger 'Procedural justice participation and the fair process effect in groups and organizations' in Paul B. Paulus *Basic Group Processes* (New York: Springer-Verlag 1983 pp. 235–256); J. D.Casper, T. Tyler & B. Fisher 'Procedural justice in felony cases' [1988] Law Soc. Rev. 22, 483–507; Mike Hough, Jonathan Jackson and Ben Bradford 'Legitimacy, Trust and Compliance: An Empirical Test of Procedural Justice Theory Using the European Social Survey' (March 16, 2013); Hough, M., Jackson, J. and Bradford, B. 'Legitimacy, Trust and Compliance: An Empirical Test of Procedural Justice Theory Using the European Social Survey', in Justice Tankebe, and Alison Liebling (eds.) Legitimacy and Criminal Justice: An International Exploration, Oxford: Oxford University Press. Jonathan Jackson & Jucinta Gau, 2015. 'Carving up Concepts? Differentiating between Trust and Legitimacy in Public Attitudes towards Legal Authority', in Ellie Shockley, Tess Neal, Lisa Pytlik Zillig and Brian Bornstein (eds.) *Interdisciplinary Perspectives on Trust: Towards Theoretical and Methodological Integration*. New York: Springer, pp. 49-69; Jackson, J., Bradford, B., Stanko, B., Hohl, K., 2012. Just Authority?: Trust in the Police in England and Wales. Routledge.

[7] Tom Tyler and Yuen J. Huo, '*Trust in the law: encouraging public cooperation with the police and courts'* (New York: Russell-Sage Foundation 2002); Lorraine Mazerolle, S. Bennett, E. Antrobus, & E. Eggins, 'Procedural justice, routine encounters and citizen perceptions of the police: main findings from the Queensland community engagement trial (QCET)' [2012] *Journal of Experimental Criminology* 8(4): 343–366; Belen V. Lowrey, Edward R. Maguire, and Richard R. Bennett, 'Testing the effects of procedural justice and over accommodation in traffic stops' [2016] *Criminal Justice and Behaviour*

[8] Anthony Bottoms & Justice Tankebe, 'Criminology: Beyond Procedural Justice: A dialogic approach to legitimacy in criminal justice' [2012] *J. Crim. L. & Criminology* 102: 119–1323

[9] Ben Bradford, A. Huq, Jonathan Jackson and B. Roberts, 'What price fairness when security is at stake? Police legitimacy in South Africa' [2014] *Regulation and Governance* 8(2): 246-268; Ivan Y. Sun et al., *Procedural Justice, Legitimacy, and Public Cooperation with Police: Does Western Wisdom Hold in China?* [2017] J. Res. Crime & Delinquency

[10] Although see: Kevin Cheng, 'Prosecutorial Procedural Justice and Public Legitimacy in Hong Kong' [2017] *British Journal of Criminology* 57 (1): 94-111; Ellen Raaijmakers, Jan W. de Keijser, P

proposing to address this omission and extend the inquiry of the relevance of procedural justice in the ombuds context.[11] More precisely, we are exploring the explanatory strength of theories of legal socialization and legal culture for procedural justice effects. Such theories seek to describe and explain 'relatively stable patterns of legally oriented social behaviour and attitudes',[12] as well as patterns of resistance to the law.

A legal system is made up of an operating set of legal institutions, procedures and rules. It is a broad term that defines the laws we have, the processes for making those laws, and the processes for making sure the laws are followed. The system within which we are embedded both reflects and shapes how we behave and how we expect people, organizations and governments to behave towards each other, and toward us. Within this system, legal culture is expressed and reproduced though institutions, authorities, and people that comprise and use it. In this chapter, we are interested in the influence of legal culture on peoples' approach to dispute resolution and what this means for their experience with the ombuds model.

We are directed by a wide-ranging definition and understanding of legal culture. Guided by Nelken[13] and Michaels[14], we understand legal culture as something that is at the intersection between law and culture without clear boundaries. 'Legal culture represents that cultural background of law which creates the law and which is necessary to give meaning to law'.[15] Legal culture therefore must include the legal system, its institutions, procedures, and rules. Our legal culture forms how we relate to the actors in the legal system, authority, and institutions.

Adopting this theoretical approach, we predict in our ombuds context that cultural differences will mean that people in Germany, with a civil law heritage, will approach the ombuds with expectations that emphasize the outcome, as well as a focus on the extent to which it is delivered by an authoritative and respected representative of the law (e.g. judge, lawyer). In the UK, on the other hand, socialization in an adversarial, common law context (where, not least, the quality of the outcome is considered dependent on the process through which it was arrived at) will mean that the fairness of the process is likely to be relatively more important.

This hypothesis that procedural justice is valued highly in the UK is not to say that the outcome will, therefore, be unimportant in the UK. Indeed, we have already reported that among users of UK ombuds services 'outcome favourability' *and* procedural justice are key factors shaping decision acceptance, and indeed our research showed that outcome favourability has a more important weighting in the ombuds context than is often the case in other studies, for example of policing.[16] One possible explanation for the relatively greater importance of outcome favourability in

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Nieuwbeerta & Anja J.E. Dirkzwager 'Criminal defendants' Satisfaction with Lawyers: Perceptions of Procedural fairness and Effort of the Lawyer, Psychology' [2004] *Crime & Law* 21(2): 186-201

[11] Naomi Creutzfeldt and Ben Bradford, 'Dispute resolution outside of courts: procedural justice and decision acceptance among users of ombuds services in the UK' [2016] *Law and Society Review* 50 4, 985-1016

[12] David Nelken, 'Using the concept of legal culture' [2004] *Australian journal of legal Philosophy* 29:1

[13] Ibid.

[14] Ralf Michaels, 'Comparative Law' in Juergen Basedow, Klaus Hopt, Reiner Zimmermann (eds) Oxford Handbook of European Private Law (Oxford University Press 2011)

[15] Ibid:2

[16] Naomi Creutzfeldt & Ben Bradford, 'Dispute resolution outside of courts: procedural justice and decision acceptance among users of ombuds services in the UK' [2016] *Law and Society Review* 50 4, 985-1016

this context might be found in consideration of the place of the ombuds in people's value systems. We suggest that people are unsure about what an ombuds, a relatively novel legal actor, can do for them, and are uncertain about the way the process works. They will therefore find it harder to form expectations and judgements about this process, and will revert to outcome favourability as the primary factor in overall judgement formation. We might also note that in this context it will usually be clear what a favourable outcome is (e.g. money refunded, faulty goods replaced), in contrast to many interactions people have with, for example, the police (when for example they may have contacted officers about a victimization they did not really expect them to *solve* but about which they wanted 'something done').

The above analysis seems likely, *prima facie*, to be true in both Germany and the UK. But more widely, since people's knowledge of the norms and values pertaining to the informal system are likely to be poorly developed – if they have any knowledge of it at all – it is also likely they will draw upon their existing legal values, developed in relation to the formal system and with authorities within it, when thinking about the ombuds. Culturally specific narratives and values will also influence, therefore, the way in which an individual relates to and interacts with an ombuds. For example, the legalistic and hierarchical understanding of, and approach to, the law in Germany (and hence the informal justice system), is one reason to suspect that ombuds users in Germany are unlikely to place great value on procedural justice. This is because culturally citizens in Germany do not expect to be involved in the process as active agents but see themselves rather as passive recipients of judgements arrived at via the application of specialist knowledge (usually managed through a lawyer).[17] The adversarial system in the UK, however, positions people as more active participants in legal processes – a claim tempered of course by a realization that the criminal process remains a 'dispute between two parties stolen by the State'.[18] They therefore have more of a stake in the procedures used, making people in the UK relatively more focussed on process fairness.

MEASURING PEOPLES INTERACTIONS WITH OMBUDS

The dataset

To test the hypothesis that different legal cultures in Germany and the UK may explain the different responses to ombuds, we analysed a part of the empirical dataset that was collected for a project on impact and legitimacy of ombuds in Europe.[19] The main tool for data collection was a consumer satisfaction survey. The surveys were sent out by post and email by the ombuds between September 2014 – March 2015. The distribution of letters and emails was chosen to represent ombuds users' habits for the individual schemes studied in this project. The survey was sent out to people who had recently been through a complaints procedure with an ombuds. The study included fourteen ADR providers in total, from the UK, Germany and France. The dataset for this chapter, as mentioned above, are the Financial Ombudsman Services

[17] More on German and UK comparisons: Liora Lazarus, Contrasting Prisoners' Rights: A Comparative Examination of England and Germany. Oxford Monographs on Criminal Law and Justice [2004] Oxford, NY: OUP

[18] Nils Christie, 'Conflicts as Property' [1977] *British Journal of Criminology* 17, 1-19.

[19] https://www.law.ox.ac.uk/trusting-middle-man-impact-and-legitimacy-ombudsmen-europe

(FOS) in the UK with a sample size of n=195 (response rate 15 / 57 per cent)[20] and the German insurance ombuds (VO) with a sample size of n=514 (response rate 35 per cent). The sample was weighted (to balance out the differences in sample-size) and is representative.

Both ombuds deal with very similar types of problems that consumers of financial services may encounter. In 2001 the FOS was set up by law as an independent public body. Its job is to resolve individual disputes between consumers and businesses – 'fairly, reasonably, quickly and informally'. The FOS states that: 'Fairness isn't only about making sure our answers and decisions are *technically* right. It's also about wanting to make what we do *feel* right. And we do this by listening, thinking and explaining.'[21] If the FOS decide someone's been treated unfairly, they have legal powers to put things right. In 2015/2016 the FOS received 219,996 new complaints about insurance – including payment protection insurance (PPI). This was slightly lower than the previous year and represented 65per cent of new complaints received as a whole. Looking across insurance generally, the primary issue resulting in complaints remains the quality of communication between insurers and their customers. This applies whether a complaint is about how an insurer sold a policy, how they administered it, or how they dealt with a claim.

The VO[22] is an independent and accredited ADR provider that is free of charge for the consumer, set up in 2001. The VO helps consumers navigate and understand the disputes resulting out of complex insurance contracts. German insurance companies agreed to form the ombuds for two reasons; first, to protect consumers and second, to prevent disputes with their customers from being brought to a court. In 2015 the VO received 20,827 complaints, of which 18,942 were about businesses; 336 about intermediaries; and 1,548 other.[23]

Detecting cultural narratives

Respondents were generous in sharing their experiences, which means that we had a dataset of 709 opinions. The open-ended questions posed in the satisfaction survey were: *what did you expect the ombuds to do for you* and *how satisfied were you with the ombuds process*. The survey additionally provided, as well as options after some of the closed tick-box questions to allow respondents to elaborate upon their experiences. These options provided a rich set of narratives. The qualitative narratives support and expand upon the overarching argument of this chapter, that peoples' expectations of the informal system of dispute resolution provided by ombuds are influenced by the national legal culture. In previous work the culturally distinct expectations of ombuds have been identified, starting with individuals' attitudes towards an ombuds, and then exploring narratives of similarities and differences.[24] Building upon this work, the

[20] The FOS ran two large online customer satisfaction surveys as part of their own regular consumer surveys (n=22,924). After each survey was completed, a random sample of those who had taken part and who had indicated a willingness to engage in further research were re-contacted to ask if they would participate in the current study; n=1,334. Links to an on-line survey were emailed to those who responded positively (n=343), resulting in a response rate of 15% based on first contact and 57% based on links provided.

[21] http://www.financial-ombudsman.org.uk/about/aims.htm

[22] http://www.versicherungsombudsmann.de/home.html

[23] Life insurance, legal protection, car insurance, building insurance, accident, home, general, work, credit.

[24] Naomi Creutzfeldt, 'What Do We Expect of Ombudsmen? Narratives of Everyday Engagements with the Informal Justice System' [2016] *International Journal of Law in Context* 12 (4)

same methodological approach has been applied to this dataset. The next part will present and discuss our data.

EXPECTATIONS AS A JUSTICE-SEEKER

The following offers some examples of variation in the way German and UK residents thought about their use of ombuds services and how they experienced the processes concerned. We present two sets of analyses. First, we consider what motivated people to complain to the ombuds service, whether this was achieving a resolution to their problem (justice via restitution); obtaining an apology and/or a sense of voice (justice via fair process); or attempting to change the behaviour of the service provider concerned (justice via organizational change). Second, we consider the correlation between respondents stated willingness to accept the decision of the ombuds in their case with perceived outcome favourability, on the one hand, and the perceived fairness of the process, on the other. Throughout we contrast the views of the German and UK residents, and hypothesize that German respondents will be more concerned with outcomes than UK respondents, and less concerned with procedural justice.

Motivations for the complaint

Table 1 shows that the German respondents were indeed somewhat more outcome focussed compared to British respondents. They were consistently more likely to rate 'resolving my problem' (85 per cent), 'getting my money back' (65 per cent) and 'getting what was lawfully mine' (61 per cent) as a most important concern.[25] Note that a small but meaningful proportion of British respondents rated these concerns as the *least* important factors behind their complaint.

----- Table 1 about here -----

By contrast, Table 2 shows that compared to the German sample, the British sample tended to be more focussed on procedural justice concerns. Most notably, over half (52 per cent) of British respondents indicated that being treated with dignity and respect was most important in informing their decision to complain, compared with just over a quarter (28 per cent) of German respondents. An exception to this pattern was that getting an impartial view was equally important to both German and UK respondents, with over two-thirds in each case indicating this was a most important concern.

----- Table 2 about here -----

Finally, Table 3 reveals that the British respondents were also much more concerned with changing the system and protecting others from having the same problem as them (56 per cent). This finding is a little more difficult to explain, but it may relate (a) to a more widespread understanding in the UK that service providers can be forced to change their practices as a result of informal legal procedures and/or (b) a stronger

[25] Note that respondents to the survey could select as many issues as they liked, outcome or process based, as a 'most important' factor shaping their complaint – they were not forced to select just one.

sense in the UK that informal legal procedures can be of collective as well as personal benefit.

----- Table 3 about here -----

Willingness to accept the ombuds' decision

Turning to aspects of the experience that might be associated with people's willingness to accept the decisions of ombuds, Table 4 first shows that, in both the German and UK samples, when respondents thought the decision had gone in their favour decision acceptance was almost total. However German respondents were over twice as likely as their British counterparts to accept *unfavourable* outcomes (42 per cent). One explanation here might be that people socialized in a civil law system (i.e. the German respondents) are more inclined to accept the outcomes of procedures that go against them when they perceive those procedures as properly constituted in a formal sense – and perhaps also because the decisions of authorities are seen as non-contestable. People socialized in a common law system, by contrast, may be more questioning and more willing to assert their rights or interests in the face of institutional decision-making – making decisions more open to contest.

----- Table 4 about here -----

By contrast there was little variation by country in the association between decision acceptance and perceptions of the fairness of the process (Table 5). In both Germany and the UK people who thought procedures are fair were very likely to accept the outcome, while those who thought procedures were unfair were very unlikely to accept the outcome; those who were uncertain about the fairness of the produce were relatively evenly split.

Intriguingly, levels of uncertainty about process fairness were significantly higher in the German sample (24 per cent of German respondents reported being uncertain about the overall fairness of the process, compared with 13 per cent of British respondents), while people in the UK sample were significantly more likely to have judged the process unfair (26 per cent did so, compared with 11 per cent of German respondents). One interpretation of these figures is that people in Germany were in general more uncertain about the process, and, perhaps, on what basis to judge *un*fairness in this novel ombuds context.

----- Table 5 about here -----

The data presented in the tables above suggest clear differences in expectations between respondents in the two countries. British respondents put more emphasis on procedural justice and helping sort out the problem to prevent future grievances, whereas German respondents appeared more outcome focussed – they were even more concerned than their British counterparts with getting back what they felt was owed to them. Perhaps slightly counter-intuitively, though, Germans appeared more ready to

accept decisions that went against them; even though they entered into the ombuds process very concerned with outcomes, when these were not favourable, people in Germany were more acquiescent to the decision reached.

These findings indicate a clearly different public stance toward the ombuds service in the UK compared with Germany. In the former context people appear more relational or interactional, entering into the process more concerned with procedural justice and reforming the service provider, and less willing to accept decisions that go against them. People in Germany appear to be more rule and outcome obedient – they are more focussed with what the ombuds can give them in terms of restitution, and they are more ready to accept the decision, whatever it is. These findings are supported through the narratives the data provided (see below).

Other large-scale surveys evaluating national legal cultures have found national differences in values and attitudes towards the law. Here it must be remembered that the methodology used and the measures tested to answer the research objective are different. The general findings, however, are similar. Gibson and Caleidra[26] found that significant differences between EU member states in the legal values held by citizens. This is of course a very general claim, and it obviously elides differences *within* countries; although Germans are different from the British in average, not all Germans, or all British, are similar. Yet interest in how legal culture shapes (or does not) legal and political systems and the actions of individuals remains strong.[27] The concept of legal culture forms part of an explanation for why people in different contexts have different patterns of behaviours and attitudes towards authority.

Examples of cultural narratives

Building upon the themes identified in the quantitative analysis above, culturally distinct narratives support the findings.

German narratives[28]

The VO dataset provided a range of responses that responded to the question of expectations with very legalistic language. The set-up of the VO might influence this: the Ombud, Prof Hirsch (there is only one, unlike in the UK FOS where there are many ombuds), is a retired judge, and all the employees working on complaints are fully trained lawyers. This means that the whole process takes place within a formal setting, and utilises equally formal language. Another interesting distinction to the UK is that the German respondents direct their expectations towards the Ombud (Prof Hirsch), they address clear expectations of 'him', rather than of the procedure or of his staff in general. This in itself is an expression of the legal culture, as it is unlikely a private sector system in the UK would ever be set up in this way.

This is closely linked to the focus of the respondents on outcomes:

> "I expected the ombuds to clarify the damage (financially) to my benefit"

> "I want him to enforce my contractual rights"

[26] James Gibson & Gregory Caldeira, 'The Legal Cultures of Europe' [1996] *Law & Society Review* 30: 1, 55-86

[27] Ibid:78

[28] The German data was translated by the authors into English.

> "I want him to get more money for me, similar to the recent spectacular judgement in the *XXX* case or the banking judgment in the BGH [*Bundesgerichtshof*]."

We also find narratives that suggest why German respondents were more likely to accept the decision even if it is not in their favour. Respondents talked about the need to obey the authoritative set up of the ombuds institution, and about their trust in a lawyer or judge to provide fair outcomes.

> "Clarifying the legal position and helping me enforce my rights"

> "The realization that a normal citizen cannot understand the insurance contracts and details, even if it's repeated often."

UK narratives

The FOS dataset revealed narratives reiterated the importance for the UK respondents of the procedures involved, and of the potential for change to improve the lot of others in the same position as themselves.

Examples of procedural justice related narratives:

> "I expect the ombuds 'to keep you informed all the way through and to give clear reasons for their decisions"

> "I did expect co-operation, maybe some communication to clarify issues, and then common sense supported."

> "I felt the mortgage company would not listen to me or offer me an explanation of why they made this mistake. I felt that once the ombuds was involved then the company would have to explain why and when they had made the mistake"

Some narratives supporting the change claim included:

> " [The] Financial Ombudsman is the common man's last resort. They should be decisive and timely while acting on a case. In some instances they can refer a case to a small claim court where the culprit like the Bank is failing to live up to her error. People should not be broken while all efforts are made protecting culpable institutions. In the very least those people at the helm of affairs when things went wrong should be made to pay - forgo their earnings or at least be made to face consequences of the actions. How can they be eating fat salaries while individuals are trodden upon and desperately toiling to make a living - the little they saved being used to feed some Bank chiefs and thieves [...] It's wrong!!!"

> "I expected the Ombudsman to look at my case independently to fully understand the full extent of my claim. Because what I understood is the main purpose of the XXX's claims investigator is to figure out how to manipulate a claim towards his purpose. Now I am not a solicitor if I was I would not have ask you to look at my case I am honestly sure the XXX has got it all wrong and

no one can convince me otherwise, but I am powerless. I also don't want this to happen to other people like me."

2. A CULTURAL APPROACH TO DISPUTE RESOLUTION

Taking our cue from theorising on legal cultures, in this chapter we have sought to explore a cultural approach to dispute resolution, through empirical research. Bringing together the quantitative data with the narratives obtained in our study helps understand the cultural divide between the users of financial ombuds in Germany and the UK. Our relationship with authority is mediated through the legal culture in which we live, amongst other things. This influences our expectations of institutions and their procedures for delivering dispute resolution. It also has an effect on what motivates us to bring a complaint to an ombuds, and on what we anticipate from the process.

We tested three examples in this context, exploring whether people who approached an ombuds were motivated by (a) achieving a resolution to their problem (justice via restitution); (b) obtaining an apology and/or a sense of voice (justice via fair process); or (c) attempting to change the behaviour of the service provider concerned (justice via organizational change).

The German data suggests a deeply rooted instinct towards procedures developed within a civil law system: a hierarchical view of (state) authority. This notion translates into the acceptance of decisions that are handed down by properly appointed authorities, and a focus on the outcome. In the UK the common law tradition, on the other hand, with its populist democratic understanding of the state and its authorities, encourages people to put a greater emphasis on process and procedure, and the desire to make systems and processes better for the wider public.

Of course, we are not suggesting that legal cultures are the sole drivers of peoples' encounters with, and expectations of, authorities. There are many other influences on our attitudes and interactions with authorities. Our claim is merely that the underlying legal culture has an influence on what people expect from a process of informal dispute resolution. Based on our findings above, we offer a culturally–focussed lens for viewing how people interact with ombuds in different countries, which presents civil and common law as two distinct cultural approaches in the development of national law.

Civil law and common law

Although the basic purpose of the rule of law is a consistent feature of social orders, the design detail varies. Broadly speaking there are two different heritages of legal systems in Europe[29], the common law and the civil law traditions.[30] The common law tradition developed in the Middle Ages in England and was transplanted into the British colonies**.** The civil law tradition developed across Europe and into the colonies

[29] Peter Stein, 'Roman Law, Common Law, and Civil Law' [1992] *Tulane Law Review,* Vol. 66 1591-1604;
Jerome Frank, 'Civil Law Influences on the Common Law - Some Reflections on "Comparative" and "Contrastive" Law' [1956] *University of Pennsylvania Law Review* 887

[30] Mathias Siems, 'Common Law and Civil Law' in his *Comparative Law* (Cambridge: Cambridge University Press, 2004 41- 70); Thomas Glyn Watkin, *An Historical Introduction to Modern Civil Law* (Ashgate 1990)

of the European imperial powers'. There are many differences and similarities between the two traditions, however for current purposes the most noticeable divergence can be found in the way that the two legal cultures have developed their approaches to understanding the law and dispute resolution. A central, productive, feature of this difference is the fact that civil law is codified and usually relies on a written constitution; whereas common law, on the other hand, is un-codified. This means that it is largely based on judicial decisions on similar cases (precedent). These precedents are collated in collections of case law.

These differences are visible in the framework of the legal system and have an influence on how we, as users, relate to a legal system and its institutions. Papadopoulos[31] argues that one cannot assume that the content of the law is separate from the basic cultural parameters. This makes cultural differences an important, if not essential, consideration in relation to understanding different approaches to law and dispute resolution. Generally speaking, common law is a tradition that focuses on processes that are made up of adversarial battles between lawyers. The civil law tradition, on the other hand, is more focussed on political discourse, the public interest, and the state. The written law has supremacy in the civil law tradition whereas the common law tradition, the law can ideally be found in the regularity of social practices.[32] Focussing on the relationship we have towards authority and applying this line of reasoning to our studied context, common law can be seen as premised on a populist democratic view of state authority. In contrast, following Damaska's claim, civil law procedure is based on a hierarchical bureaucratised view of state authority.

The absence of a written constitution has determined how political and legal institutions have evolved in the UK. Without a tradition of revolutions or major upheavals the notion of the *state* had no need to be distinct from the nation.[33] The UK's common law system has been produced (by the state), therefore, by adapting to situations, exploring and leaning from mistakes. Policing, for example, has developed in a local, decentralized and unarmed form, and is framed by an ideology that sees police as part of the people rather than part of the government.[34] This notion of accessible authority forms part of British commitment to the principles of equal justice for all is its publicly funded legal aid system, an offspring of the nation's Welfare State (although this system has become highly attenuated in recent years).[35]

The post WWII German *Grundgesetz* united social justice and democratic values that oblige the state to go beyond providing a legal framework. 'It obliges the German state to set societal values of what is right, what is wrong and what is just. […] The continued proliferation of complex German laws in all areas of human interaction has led to the expansion of the German social justice state and the expectation amongst disputants that the paternalistically interventionist State will set

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[31] Ioannis Papadopoulos, 'Introduction to comparative legal cultures: the civil law and the common law on evidence and judgment' (oral presentation of the book by Antoine Garapon & Ioannis Papadopoulos, Juger en Amerique et en France : Culture judiciaire française et common law [2004] Cornell law faculty working papers http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1016&context=clsops_papers

[32] Mirjan Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, New Haven & London 2009)

[33] Kenneth Dyson, 'The State Tradition in Western Europe' (Colchester: ECPR Press 2010) puts it Britain is 'stateless in lacking the idea of the state…'

[34] R. Reiner, *The politics of the police* (4 ed.) (Oxford: Oxford University Press 2010).

[35] Nicholas Timmins, *The Five Giants: A Biography of the Welfare State* (Harper Collins 1995)

and enforce norms'.[36] This development goes hand in hand with an effective and efficient court system and highly regulated legal profession.

What does all this mean for the way people in this two countries approach dispute resolution? Recall our claim that socialization within either of the two legal systems will influence what people expect from the informal system (ombuds, for example).[37] In Germany citizens are used to authority based on notions of order, hierarchy and bureaucracy. The ombuds in Germany follow this institutional structure, which increases public acceptance and provides users with a familiar sense of trust as people align their expectations with the formal character of the (informal) ombuds body. The data reflects those patterns: German respondents were much more willing to accept an outcome if it was not in their favour (table 4) because they believed it had been handed down by a properly constituted authority. In the UK, by contrast, people are more inclined to consider authority as something that is *earned* through action rather than *granted* by status, making them more attentive to processes of interaction. The procedures have to be experienced as fair for the outcome to be accepted.

We are arguing, therefore, that legal culture plays a role in explaining our expectations, understanding and acceptance of an ombuds and our attitude towards dispute resolution. Sceptics of this broad approach might suggest competing explanations for the identified differences. For example, rather than focusing on the general concept of legal culture, we could look at more specific, local determinants as alternative explanatory factors. This shifts the debate to an institutional level. To explore this in detail is beyond the scope of this chapter but we offer a few thoughts nevertheless. Focussing in the following on two differences, we look at the ombuds styles and the national availability of ombuds (or ADR providers).

We set out in this chapter to understand what people expect from a financial ombuds process in two different countries. We chose the financial sector because it is a regulated sector and the two countries have had an ombuds for the same amount of time. These ombuds deal with similar cases in the respective countries and therefore provide a fertile ground for comparison. Both ombuds, although available and regulated (consumer ADR directive) in European justice systems, are also in their infancy, and still 'finding their place' in the national justice system. European legislation leaves it up to national legislators to decide upon the details of the institutional implementation. This produced a variation of styles and institutional arrangements of the ombuds.[38] This development, we posit, has happened in close connection to the national legal culture.

This leads to the second point, the space ombuds occupy within the justice system. They do not exist in a vacuum; they are part of a national dispute resolution system. Looking at the private sector ombuds we can say with confidence that they have become part of the national justice system without most people noticing. The lack of awareness of ADR bodies in general poses a significant obstacle to accessing them. For those people who do find and make use of ombuds, it is a novel experience, which means users expectations of the specific process involved are not well formed.

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[36] Nadja Alexander, 'What's Law Got to Do with It – Mapping Modern Mediation Movements in Civil and Common Law Jourisdicitons' [2001] Bond L Rev 13: i

[37] Elsewhere will be explored the notion that this is happening because the informal system has not experienced a 'socialization process' of its own, and that people's experiences of it are therefore mainly informed through their expectations of, and experiences with, the formal legal system (Creutzfeldt *2018*).

[38] Christopher Hodges, Iris Benoehr and Naomi Creutzfeldt 'Consumer ADR in Europe' (Hart Publishing 2012)

This seems, in turn, to lead to people engaging with the ombuds with high and mostly unrealistic expectations.[39] These expectations are generated in a variety of ways. One channel is prior interaction with the legal system (if positive or negative); another is the route that people have to take before engaging with an ombuds (broadly speaking, unsuccessful attempts to sort out the problem with the provider that caused it), for example. Expectations are further fuelled by emotions built during the individual complaint journey. An ombuds, therefore, has to handle these incoming waves of expectations and manage them accordingly. This is an institutional challenge; usually the least well-trained staff – those who handle phone lines and respond to emails – have to deal with these initial contacts, meaning there is a relatively high risk that first impressions will be poor. Here it might be advisable to provide front line staff with better training to be able to manage consumers' expectations from the outset, providing the consumers with a sense of acceptance and control over the process.

Unlike the private system, public sector ombuds have been around for some time.[40] How, if at all, does a pre-existing exposure to a public sector ombuds shape the expectations and interactions with a private sector ombuds? We suspect that people who have been involved in a public sector complaint or have heard about them in the media, will have formed specific opinions about the public ombuds. These are then likely to be added into the mix of expectations from the private sector ombuds.

Various elements of the ombuds process may be puzzling or difficult for users. It is not straightforward to grasp the notion that a private ombuds can make final decisions – but does not necessarily follow up to see if the company has actually acted upon the decision. Consumers can take the case to a court if they feel it has not been resolved fairly, while a public sector ombuds decision can be challenged through judicial review (which needs expert legal help). All of these options include more time, effort, and energy spent for the individual. Our data show that in both countries experiencing a fair process is a key element for an individual going through an ombuds process. Although the outcome matters, the route to this outcome is equally important. How then, can user-experience be maximized to enable them to accept the outcome and feeling that they had a good experience? Further, how much can we learn and translate from the more recent private sector into the public sector?

3. LESSONS FOR THE PUBLIC SECTOR

Preparing the legislation and subsequent implementation of the ADR directive was achieved in record time. Driven by a political demand for increased access to justice and improved access to the common market, a debate emerged as to how best achieve those aims through the national ADR landscape. To date, however, the Directive has failed to deliver the hoped for impact. This is likely to take time. A more immediate outcome however, is that a debate about quality and provision of services has emerged. This very debate allows us to critically examine the efficiency of the public ombuds and consider lessons to be learned. Riding on the wave of existing political interest, and other longer-term developments, the UK has revisited its public service ombuds and significant changes are underway in form of a public services ombudsman bill.[41]

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[39] Naomi Creutzfeldt, 'What Do We Expect of Ombudsmen? Narratives of Everyday Engagements with the Informal Justice System' [2016] *International Journal of Law in Context* 12 (4)

[40] Carl 2016

[41] Cabinet Office, 'Draft Public Service Ombdusman Bill' [2016]

The intersection of private and public led to important questions about the purpose of ombuds being revisited in general. Alongside this, a shift in the purpose of the public service ombuds has been identified. As O'Brien[42] suggests, the consumer ADR directive 'might constructively encourage the reinforcement of consumer rights […] any such tendency towards consumerism in the development of the ombudsman institution should be balanced by respect for the distinctive qualities of public-sector ombudsmen as agents of a form of participatory democracy (p. 1).' O'Brien further argues that a shift has taken place in which the ombuds is no longer 'focussing on the imbalance of power or the restoration of values such as liberty and equality but the consumerist notion of 'quality of services'.[43] Is the public sector ombuds experiencing a consumerist turn?[44]

Interpreting the consumerist turn as petitioning for an improvement of the quality of services then we can look to our data from the private sector and suggest the following. We found that people who perceive the process by which an ombuds reaches a decision to be fair, they will be more acceptant of the outcome. The quality of the service can be improved by responding to those identified consumer- citizen needs. We think that monitoring the customer experience is a crucial lens into a smooth and effective functioning of an ombuds process in general. If conducted properly, monitoring consumer satisfaction can also expose culturally distinct patterns that can be provided for. This can then benefit the ombuds to improve their processes and make them more customer-friendly.

Private and public sector ombuds deal with different types of problems that affect peoples' lives in different ways. This means that the processes offered, the outcomes, and the time they take differ too. We fully appreciate the complexity these differences raise, however we propose a shift in the way a procedure is experienced for the users of a system. In other words, whilst there are many differences in institutional purpose and structure, also across countries, what our research uncovered is that it is important for all of us to perceive a procedure as fair. This might mean different things in different contexts – which allows for sector or culture specific alterations.

For example, some practical measures that can be directly transferred from the findings in the private sector are the following. A public sector ombuds might shift some of the case handlers and more senior staff to assist in the early stages of a complaint. This would have the following benefits. First, the user would feel that someone from the ombuds team who can take decisions is dealing with their case and thus manage expectations and build trust early on in the process. Second, the complainant is more likely be willing for the process to take more time to resolve, as long as they are kept in the loop of progress of their case. These might seem very small alterations to procedures, but as our research suggests, they can have an immense impact on fairness perceptions and outcome acceptance.

Of course, realistically there are always budgetary constraints, internal institutional limits, and political considerations that will influence the scope of development and improvement of the ombuds procedures. The public sector ombuds, unlike its private counterpart, comes with a long institutional history and is rootedness

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https://www.gov.uk/government/publications/draft-public-service-ombudsman-bill, accessed 28 August 2017

[42] Nick O'Brien, 'The Ombudsman as Democratic "alternative": Reading the EU Consumer ADR Directive in the Light of the PASC Reports' [2015] *Journal of Social Welfare and Family Law* 37 (2): 274–82

[43] Blogpost: https://ukaji.org/2015/01/27/human-rights-the-ombudsmans-natural-habitat/

[44] See Hodges, chx (2018)

in different national contexts. We argue that any change is likely to take more time not only to implement but also to reach users awareness. Change in procedures go hand in hand with staff training, institutional cultural change, and raising awareness of the change. However, harnessing the consumerist turn as a driver for change, learning from the procedural justice effects, we suggest it is a worthwhile endeavour to restructure and improve procedures to make them more accessible and perceived as fair by its users.

Further, picking up on some of the responses to the consultation on a single public service ombuds for the UK[45], themes emerged that could be implemented by means of the above suggestions. For example, improving the 'fragmented nature of ombudsmen services [that] can cause frustration and confusion' (p. 8). Providing clearer timescales and procedural standards with inbuilt accountability measures along the way (progress reports, regular updates) would hugely contribute to transparency in decision-making and to users experience. Improving complaints-handing overall would assist building a system of accountability, trust, and to help users manage their expectations. The consultation suggested to improve complaints handling through the 'creation of a of a "complaints culture" in which the learning from complaints is disseminated widely and built upon while allowing those delivering public services to remain in control of, and accountable for, the design of their own complaints systems (p. 16). The idea of a system to constantly check on itself and use the data it is producing to improve is a good one, in theory. The challenge remains to ensure that the highest procedural quality standards are sustained and don't get sacrificed on the way to efficiency.

4. CONCLUSIONS

In this chapter we developed our argument that experiences and expectations of ombuds procedures are formed by peoples' understandings of (and experiences with) national legal systems. This, in turn, has an effect on perceptions of procedural justice. We discussed how people, in two different legal traditions, common law (the UK) and civil law (Germany), experience the ombuds procedure. We found distinct cultural approaches to ombuds procedures in the data, which suggest that national legal culture has a strong influence on the way in which people engage with ombuds. We are not making the claim that the national legal culture is the only influence, however. There are a multitude of alternative explanations.

The implications of our work will vary depending on the context. In this chapter, we discussed some of the implications our findings can have on the public sector ombuds in the UK. The proliferation of private sector ombuds has raised many questions as to the purpose of an ombuds in general. At the intersection between private and public sector, at this point in time where the landscape in the UK is undergoing a significant shift, we propose some lessons to be obtained. First, with an emphasis on consumer rights and human rights, process and outcomes an ombuds can deliver might be restructured. A more accessible procedure with clear and understandable messages of what an ombuds can and cannot do, and equally clear messages about the remit and objectives would be advisable. Second, harnessing the discussion on quality of service, the public ombuds could adjust and update procedures to incorporate our procedural justice findings, as suggested above. This

[45] fn 40.

would enhance user experience, satisfaction, and build trust in the institution. Change does not happen overnight. Although the distinction between public and private remains an important one, understanding procedures from the perspective of the user offers practical lessons that can be applied to procedures of both public and a private ombuds. Some of which we discussed in section three.

We suggest that future research could explore further the intersection between different culturally driven values and expectations of dispute resolution processes. Recognizing these values and how they impact upon the expectations of complaints procedures will help identify those parts in existing approaches that need an update. Here one might also use the collected empirical data to inform a better design of the procedures for both public and private ombuds. Being sensitive to users needs might mean some short-term additional investment into staffing and training. In the longer term, it is likely to improve user experience and overall perceptions of the service. Of course, we are not suggesting that these changes can happen in isolation of the individual institutional circumstance. We do believe, however, that paying attention to users needs (within their cultural context), alongside other procedural improvements, will assist in providing a service that is generally more trustworthy and transparent.

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