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# Cultural patterns of disputing behaviour?

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**Abstract:** This essay builds on my previous comparative work on Ombuds users and develops the notion of cultural patterns, and attitudes, towards disputing in Germany and the UK (Creutzfeldt & Bradford 2018, Creutzfeldt 2016). I argue that expectations of Ombuds processes are grounded in our socialization of legal or legal-adjacent processes. I explore, through the lens of legal consciousness, the role that legal culture plays in our interactions with the Ombuds in two countries. I do this through drawing on evidence from my existing empirical datasets. Then, I discuss the impact of the pandemic on the developed notion of cultural disputing behaviour in Germany and in the UK and I posit that we have to reimagine legal consciousness in the online justice space, which claims its own hegemony. For instance, an indication of the things which shape, or problems which arise out of, or are enhanced by, the digital space shaping our legal consciousness. The essay concludes by suggesting new ways of thinking about our patterns of online disputing, detached from our national cultural context, embracing an emerging *digital legal consciousness* with an enduring impact on our expectations from a justice system and the Ombuds process.

**Zusammenfassung:** Dieser Artikel baut auf meiner früheren vergleichenden Forschung über Ombudsnutzer:innen auf und entwickelt den Begriff der kulturellen Muster und Einstellungen gegenüber Streitigkeiten in Deutschland und Großbritannien (Creutzfeldt & Bradford 2018, Creutzfeldt 2016). Ich argumentiere, dass die Erwartungen an Ombudsprozesse in unserer Sozialisation von rechtlichen oder rechtsnahen Prozessen begründet sind. Ich untersuche durch die Linse des Rechtsbewusstseins die Rolle, die die Rechtskultur in unseren Interaktionen mit den Ombudsleuten in zwei Ländern spielt. Dabei stütze ich mich auf Erkenntnisse aus meinen bestehenden empirischen Datensätzen. Anschließend erörtere ich die Auswirkungen der Pandemie auf das entwickelte Konzept des

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kulturellen Streitverhaltens in Deutschland und im Vereinigten Königreich und stelle die These auf, dass wir das Rechtsbewusstsein im Raum der Online-Justiz, der ihre eigene Hegemonie beansprucht, neu konzipieren müssen. Ein Beispiel hierfuer sind Hinweise auf die Dinge, die unser Rechtsbewusstsein prägen, oder Probleme, die sich aus dem digitalen Raum ergeben oder durch ihn verstärkt werden. Der Aufsatz schließt mit einem Vorschlag für neue Denkweisen über Formen von Online-Streitigkeiten, losgelöst von unserem nationalen kulturellen Kontext, unter Einbeziehung eines entstehenden digitalen Rechtsbewusstseins mit nachhaltigen Auswirkungen auf unsere Erwartungen an ein Justizsystem und das Ombudsverfahren.

**Keywords:** comparative legal culture, legal socialisation, legal consciousness, ADR and Ombuds

## Setting the scene: Ombuds[1] in Germany and the UK

The Ombuds institution can be found in most countries around the world. It provides alternative (to the courts) dispute resolution (ADR) and offers redress for complaints against public bodies (brought to a public sector Ombuds) and against a business (brought to a private sector Ombuds). Ombuds can be understood as intermediaries that give a voice to citizens/consumers in a dispute. An Ombuds has several aims, some of them are to maintain public confidence in administration (e. g., investigate maladministration, guarantee citizens' and consumers' rights), in a particular sector, or in an individual institution or business (Creutzfeldt 2020). An Ombuds has the potential to process a high proportion of unmet legal needs for certain types of problems that fall within its jurisdiction. For example, complaints about maladministration of public bodies in the public sphere; and complaints about faulty goods and services in the private sphere. Influential studies from the US have shown that while many problems are common, it is not common to go to a lawyer or to a court to seek redress for those problems (Sandefur 2016, 2014). Here, the Ombuds offers a process that consumers/citizens can use (usually at no cost) to address problems they are not likely to go to a court for. The procedure an Ombuds offers usually takes place through their website portal (secure contact forms), emails and sometimes on the

**1** I use *Ombud* as a gender-neutral term to talk about individuals and *Ombuds* to refer to the institution.

phone. On occasions people can go to an Ombuds office and be helped by a caseworker. Before a person can bring a complaint to the Ombuds they have to have exhausted the internal complaint process of the public body or company they are complaining about (Kirkham & Gill 2020). The Ombuds model draws its strength from its variety of contextual and conceptual adaptations (Carl 2012). Some scholars argue that the Ombuds model was imported into the national justice systems to strengthen the existing legal order (Buck et al 2011: 10) by providing additional pathways to solve problems. In many countries the public Ombuds forms part of the expansion of the administrative justice sector (Heede 2000).

The Ombuds model, in the public sphere, was introduced as an administrative oversight institution (originating in Sweden 1809) and has since developed and grown beyond its originally intended functions (Reif 2004, Creutzfeldt 2018, Seneviratne 2002, Rowat 1973). The historical development and transplantation of the Ombuds model has been discussed elsewhere (Creutzfeldt & Bradford 2018). A distinction to make here, however, is that between *public* and *private* Ombuds. As mentioned above, public sector Ombuds, those operating in the public sphere, deal with problems people encounter with public bodies; whereas private sector Ombuds deal with problems consumers encounter with goods and services. While there are two public sector Ombuds in England, there is no real equivalent in Germany.[2]

In relation to the *type* of Ombuds, my overarching argument is that people are not sure of what to expect from an Ombuds process and do not make a distinction between public and private, generally speaking. Additionally, general legal understanding (Balkin 1993), relating to expectations itself, justifies not distinguishing between various Ombuds for the purpose of this paper. In other words, although both Ombuds deal with different types of problems, I am claiming that the institution is understood by its users not within the differentiation of *public* or *private* but rather as 'Ombuds'. Users see the Ombuds as an institution to help them sort out grievances and will experience them on that premise. The data I draw upon here includes public and private Ombuds in the UK[3] and private Ombuds in Germany.[4]

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**2** In Germany there is the *Petitionsausschuss* (https://www.bundestag.de/petitionen), which is described as a seismograph that detects the mood of the population measured in their petitions (complaints).

**3** *Public*: Local Government Ombudsman and Parliamentary and Health Service Ombudsman; *private*: Ombudsman Services energy, Ombudsman Services Telecom, Financial Ombudsman Services.

**4** Schlichtungsstelle Energie, Ombudsmann fuer Versicherungen, Schlichtungstelle fuer den oeffentlichen Personenverkehr e.V., Bundesnetzagentur.

Guided by the question: *how do citizens/consumers experience the Ombuds process and what makes them attribute fairness to the process?* I argue that peoples' relationship with law and authority plays a driving role in determining their interactions with, and expectations of, Ombuds. I argue further that this relationship is shaped by legal culture, negotiated through legal socialisation, and expressed or reshaped through our legal consciousness. I draw upon literature on legal consciousness (Ewick & Silbey 1998) and legal socialisation (Trinkner & Tyler 2016) to explore how people are socialised towards certain expectations that come to the fore in encounters with Ombuds in Germany and the UK. Generally speaking, I find that in Germany the legal system (courts) enjoys a high level of trust and the Ombuds are set up to mirror the formality of a court, and, therefore are accepted by their users. In contrast, in the UK the courts do not enjoy strong public trust, the Ombuds set themselves apart by providing an informal (not court-like) process.

I explore this argument in three parts: First, I look at users' expectations of Ombuds in two countries, Germany and the UK. Second, I discuss legal culture as a lens through which to examine how people formulate expectations towards Ombuds. Third, I propose that the COVID-19 pandemic has created a shift in our expectations, to then conclude the essay by offering a framework (digital legal consciousness) through which we might understand users' future engagement with the Ombuds model (and the online justice system more general).

## Expectations of the Ombuds in two countries

In this section I draw upon previously gathered data from a comparative project on Ombuds users (Creutzfeldt 2016[5], 2018). In the project I compared the levels of engagement with, and trust in, public and private Ombuds in France[6], Germany[7] and the UK[8]. In particular, my focus was to understand better the relationship between decision-making by Ombuds and perceptions of procedural justice and levels of trust by their users. My choice to apply procedural justice theory (Tyler 2006) to make sense of how people think about Ombuds is because Tyler, for example, has asked questions about 'why people obey the law' and designed measures (see below) to explore, and conclude, that there are connections between public trust and institutional legitimacy of the authority in question. I

**5** https://www.law.ox.ac.uk/sites/files/oxlaw/ombuds_project_report_nc_2.pdf
**6** Le Mediateur des communications electroniques, Le mediateur national de l'energie.
**7** See 3 supra
**8** See 4 supra

applied this, for the first time, to the Ombuds context (Creutzfeldt 2018). Now, I have been prompted to return to my data to explore what it was saying about the link between experiences, culture, and expectations.

The original methodology included the design of a comprehensive anonymous survey[9], to test for procedural justice measures, that was sent out by the participating Ombuds to their users. I also conducted interviews and held focus groups. In this essay, I discuss the German and UK survey data upon which I build my argument here, namely the measures of public trust and institutional legitimacy through users' interactions and expectations of Ombuds processes. ***Public trust*** in Ombuds was measured through (1) being treated with dignity and respect; (2) fairness of decisions made; (3) competence to take a decision; and (4) being heard (Tyler 2006). ***Institutional legitimacy*** was measured through (1) obligation to obey; (2) legality; and (3) moral alignment (Beetham 1991). I argue that the way people reflect on their experiences of using Ombuds, within the research I have conducted, demonstrates that the relationship people have with an Ombuds are shaped by their experiences and socialisation with how the legal system and authorities are supposed to behave.

My work has since developed and led me back to my data, looking for answers to slightly different questions. To enable me to develop this, I will discuss two relevant data points drawn from my datasets, to support my argument about distinct cultural patterns; these are peoples' *motivations to complain* (table 1) and the *willingness to accept a decision* (table 2) (Creutzfeldt 2018:81). I choose to discuss these datapoints in this paper as they show differences between German and UK respondents, and thus allow for a more in-depth analysis exposing patterns of attitudes.

**Table 1:** measures for motivations to complain

| **Measured through** | |
|---|---|
| *procedural justice related concerns* | – getting someone to listen |
| | – getting an apology |
| | – being treated with respect and dignity |
| | – to get an impartial view |
| *Outcome related concerns* | – resolving my problem |
| | – getting my money back |
| | – to get what is lawfully mine |
| *Change related concerns* | – changing the process |
| | – preventing others from having the same problem |

**9** The survey can be found in the Annex pp. 161–168 of Ombudsmen and ADR (2018)

**Table 2:** measures for willingness to accept a decision

| **Measured through** | |
|---|---|
| *Outcome favourability* | – outcome favourable |
| | – outcome partially favourable |
| | – outcome not favourable |
| *Fairness of the procedure* | – procedure fair |
| | – not sure |
| | – procedure unfair |

For UK respondents, three out of four procedural justice-related concerns were most important (56 % *getting someone to listen to me;47 % to be treated with respect and dignity; 28 % getting an apology)*.[10] It was important to get an *impartial view* for both German (61 %) and UK (57 %) respondents. German respondents placed more value on *getting their money back* (74 %) and to *get what was lawfully theirs (68 %)*, whereas respondents from the UK did not place much value on these options.[11] The motivation to complain for UK respondents was to *change the process and to prevent others from having the same problem as themselves (53 %)*. In turn, for German respondents this was not important. The data showed that procedural justice measures seem more important for UK respondents when raising complaints than for German respondents. Whereas German respondents valued most to be given a *monetary outcome*, based on what they felt was their legal right.

The dataset showed differences between German and British respondents in their willingness to accept a decision. Overall, German respondents reported a higher willingness to accept the Ombuds decision than UK respondents. For the most part, the German respondents were willing to accept the decision if the outcome of their case was partially in their favour, as opposed to UK respondents. Over a third of German respondents were also willing to accept a decision if the outcome of their case was not in their favour, whereas only 12 % of the UK respondents were willing to do so. In sum, German respondents are more likely to accept a decision if the outcome of their case is *partially* or *not in their favour* than UK respondents.

I concluded elsewhere (Creutzfeldt 2018), that the data tells a story about emerging patterns of disputing behaviour, which prompted the arguments develop further this paper. The way in which respondents view the Ombuds process is informed by their assumptions about legality, which stems from their

**10** Ibid p. 81
**11** Ibid p. 82

legal socialisation (Trinkner & Tyler 2016). Building on that body of literature, and my interview data, I bring legal consciousness into my argument to help uncover cultural specificities in disputing behaviour (Merry 1990; Ewick & Silbey 1998; Halliday & Morgan 2013; Morgan & Kutch 2016). The next part brings these approaches together to then make sense of cultural patterns in disputing behaviour I have identified in my research.

## Legal culture

To make sense of what people expect from an Ombuds we have to look at the socio-cultural environment of the legal culture they are part of. I use Friedman's definition of legal culture as a starting point: 'the values and attitudes which bind the system together, and which determine the place of the legal system in the culture of the society as a whole' (Friedman 1969:34). Legal culture then, shapes peoples' perceptions towards the law and towards the institutions that represent and protect the law. My question here is about how people engage with the Ombuds institution as an authority.

Generally, the Ombuds is not as well-known as a court or tribunal as a place to turn to for resolving grievances. Although Ombuds exist in most countries around the world, they are not as well used as they could be as people do not know about them (Galdin 2000, Creutzfeldt 2018). This has many reasons, one of them might be attributed to national legal culture and public awareness (as related to attitude) of legal institutions. I expand on Blankenburg here, who explains differences in legal cultures through institutional availability (Blankenburg 1985, 1998). For example, German legal culture is shaped by authority and hierarchy as reflected in the institutional infrastructure (ibid). He argues, by comparing Germany with the Netherlands, that the German legal culture has less of an established network of avoidance infrastructure (ADR) – to avoid the courts (Blankenburg, 1994: 20).

Applying this argument to the UK-Germany comparison, the 'avoidance infrastructure' of ADR providers in the UK is well developed as part of the justice system.[12] For example, the EU ADR directive 2013/11/EU required Member States to implement ADR bodies for most consumer complaints, in the UK (population of 67.886.004) there are 58[13] registered ADR providers and in Germany (population of

**12** For a debate on legal culture in the German literature, between Blankenburg and Rottleithner, see: Rasenhorn 1986.

**13** https://www.tradingstandards.uk/consumer-help/adr-approved-bodies/

83.190.556) there are 28[14]. Following this line of argument, in the next part I show how the institutional set-up of Ombuds in the UK and Germany vary to fit within their national context, in relation to the courts.

## Cultural patterns of an Ombuds set-up

Distinguishing and understanding legal cultures through institutional availability and their set-up is applied to the German and UK context by way of three examples. First, through the role of the Ombud, second through staffing of Ombuds and third through the acceptance of the institution within the framework of a national legal culture, in relation (or comparison) to the courts.

In Germany, Ombuds tend to be retired judges and all of their staff, who engage in dispute resolution, are trained and qualified lawyers (Creutzfeldt 2018). This accentuates the legalistic process that German Ombuds provide, despite offering alternative dispute resolution without legally binding recommendations as outcome. I suggest that the Ombuds are set up this way as a mirror to the court system, to obtain credibility and acceptance from the public. In the interviews with Ombuds, it was mentioned that formalities and structures in the process, contribute to perceptions of credibility. Arguably, the levels of formality the institutional setup of the Ombuds in Germany offers is closely aligned with a German legal culture of hierarchy and thus fosters the acceptance of the model (Creutzfeldt & Bradford 2018: 292). In other words, expectations towards the Ombuds model (ADR) are informed by peoples' expectations of, and experiences with, a court (formal dispute resolution). I argue here that institutional infrastructure and peoples' expectations of these institutions are related to each other and are an expression of legal culture.

I suggest that we take Blankenburg's theory of institutional availability as a starting point. The fact that institutions are available to bring your complaints to shape not only peoples' disputing-behaviour but also their expectations of these institutions. However, Blankenburg did not explore expectations towards the institutions he studied (Nelken 1997). Here, I argue that we can draw a connection between peoples' relationship towards the courts, as a formal dispute resolution pathway, and the Ombuds, as an informal dispute resolution 'avoidance' pathway. My claim is that people take the knowledge and expectations they have formed about a court (legal system) and translate this into their expectations of an Ombuds. For example, the courts in Germany are, generally speaking, trusted and

**14** https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2

this translates into acceptance of the Ombuds due to their similarity in institutional setup (Rottleuthner 1985, Grosskopf 2008, Creutzfeldt 2018, Vanberg 2005, Vorlaender & Schaal 2002).

In the UK, I claim, the opposite is the case: the [public-facing] institutional setup and the people working as and for Ombuds vary. There is no expectation, as there is for German Ombuds, to be legally qualified or to have a law background. Although some Ombuds are lawyers, usually, people are trained in the specific area of law they are working on and come from a range of professional backgrounds. This makes the Ombuds, and the process that it offers, less legalistic and more focussed on providing an alternative experience and process to the formal courts. The acceptance and spread of this Ombuds model are mediated through the British legal culture. In other words, I argue that the fact that Ombuds are not seen to be court-like makes people in the UK more likely to approach them and accept their decisions. In contrast to Germany, where the Ombuds decisions are more readily accepted because they are seen to be court-like.

Returning to the procedural justice findings above, a key to effectiveness of legal authorities lies in creating and maintaining the public view that authorities are functioning fairly (Tyler 2000: 989). This, I think, has been translated into practise through setting up the Ombuds models in Germany and the UK in different ways. The Ombuds model is set-up in Germany aligned to the court system, as a mirror of the trusted legal system and its administrators. This inherently provides levels of institutional trust and acceptance. In contrast, low levels of trust that the British show towards courts (Hansen 2017, Creutzfeldt 2018) are a measure of the success of an Ombuds as they are set up not to be like courts, rather to provide a less formal and alternative avenue to dispute resolution. For a more nuanced explanation of why German and British people might be drawn to accept Ombuds in these different ways I go on to discuss legal socialisation and legal consciousness.

## legal socialisation and legal consciousness – the cultural turn

I bring together here theoretical concepts that build upon each other, starting with legal culture. I understand legal culture as an organising principle to think about legal socialization and legal consciousness. Put differently, legal culture is a macro phenomenon of how law exists within society; whereas legal consciousness relays micro level social action and traces how law is experienced by people as they engage, avoid, and resist the law (Silbey 2001). I set out in previous work how these notions can be useful to help think about our behaviour towards, and expectations of, Ombuds institutions (Creutzfeldt 2018, Gill & Creutzfeldt 2018).

For the purpose of this essay, I will briefly outline my reasoning to then apply it to the discussion of culturally distinct patterns of disputing behaviour.

The way in which we come to expect how legal institutions make decisions, how these institutions ought to treat us, and where the boundaries of legal authorities lie is influenced by our legal socialization. Our attitudes and beliefs about the law, legal authorities and our relationship with the law are formed by our legal socialization (Tapp & Levine 1974). These attitudes typically develop within a country-specific cultural context. To make sense of a nuanced culturally specific influence, I tease out a more nuanced understanding of legal socialisation by drawing upon the literature on legal consciousness. Studies exploring legal consciousness focus on peoples' encounters with the legal system and their reactions to it (Merry 1990; Ewick & Silbey 1998), as mentioned above. The complex interactions between power, resistance and deference are a central theme in legal consciousness research.

More recently, socio legal scholars found that we cannot separate the social or cultural from the legal (Chua & Engel 2019). Hence, legal consciousness research often finds the absence, as well as the presence, of law in people's understanding of the world and their place in it (ibid: 2). This, among other things, illustrates that we are all part of networks of relationships (Harding 2017). These relationships can be thought of to have cultural significance, I build upon the suggested *relational legal consciousness* research (Chua & Engel 2019) that focuses on the cultural turn within the field of legal consciousness.

*Relational legal consciousness*, as Chua and Engel (2019: 14) argue, is emerging as a promising turn in legal consciousness work. This is based on the findings that worldviews, perceptions, and decisions develop relationally, and it is often impossible to disentangle the consciousness of any one person from those of family members, fellow villagers, or other intimate associates (ibid: 16). In other words, this conception of legal consciousness is a fully collaborative phenomenon, which brings me back to legal cultures.

Legal culture and legal consciousness are terms used to emphasize analytically ways in which formal legal institutions and everyday social relations intersect and share cognitive resources. What Ewick and Silbey (1998) did, was to demonstrate the connection between the micro phenomenon of legal consciousness and the macro institution of law by showing how the multiple forms of legal consciousness expressed in three stories of law ('before the law', 'with the law' and 'against the law') exist simultaneously and together sustain legality as a durable structure of social action. This popular understanding of law, I argue, forms part of peoples' legal culture and can be empirically explored through a collection of people's attitudes. Ewick and Silbey's intellectual motivation was to expose the hegemonic power of law (see Silbey 2005). I believe that, for the

purpose of this essay, a combination of these understandings of legal consciousness is true, as seen in themes from my data that form patterns of behaviour in Germany and the UK.

As argued above, the attitude towards an Ombuds is formed by people's cultural expectations and experiences towards the legal (court) system. I argue that this translates into specific behaviours in each country; in Germany, where the court system is generally trusted for its efficiency in speed and outcome, the Ombuds is accepted because it is set up to provide the same legalistic gravitas (hegemony) and thereby creates trust in its users. In the UK the opposite is the case; there is little public trust in the court system (van de Walle 2009) and the Ombuds are set up to be very different from the courts, which, in turn, fosters trust in them by the British public.

These patterns of trust and acceptance of the Ombuds model are, of course, much more nuanced, and complex as I set out here. What I argue here is that there is a culturally specific and ingrained legal consciousness that influences how we make sense of a justice institution, in this case, in comparison to the courts. There are a range of other elements that influence our attitudes towards an Ombuds. Here, I focussed on the culturally distinct elements drawn from my empirical work on justice perceptions and showed how they differed in two jurisdictions. In the next part I build upon this and explore the insights the pandemic has brought in thinking about culturally distinct patterns of disputing behaviour online. I posit that the notion of legal consciousness is not sufficient to allow us to understand expectations and experiences in the online dispute-resolution space. To understand how people make sense of the online justice space we have to take other factors into consideration.

## The COVID-19 pandemic

In 2020, the covid-19 pandemic radically changed many aspects of our everyday lives. One of those was the way in which we engage with the justice system. I argue in this part, building on and developing the findings in part one, that the radical shift to online procedures has influenced our expectations of the justice system (Susskind 2019, Rule 2020).

The shift to working from home and administering the Ombuds process remotely put a great pressure onto the institution (PHSO 2020 b, LGSCO 2021, Bankenverband 2022). Despite the Ombuds mainly offering online procedures, the pandemic forced staff to work from home with no access to their offices. This created many challenges that affected the smooth running and access to the

institution. For example, not all staff had the necessary computer equipment at home; home telephones were not connected to work systems; some could not easily log into the work servers and case management system; mail was piling up in the offices and had to be collected and then scanned. All of this required extra arrangements and funding, in the midst of the pandemic, to get the process up and running. Meanwhile citizens were left without access to the Ombuds and had to deal with long delays in their claims being dealt with. Further, those people who might seek help to find an Ombuds through an advice organisation as intermediary, could not do so during the pandemic as they were also struggling to set up their services remotely (Creutzfeldt & Sechi 2021).

The barriers to accessing justice the pandemic had created are now crumbling as advice services and Ombuds are returning to business as usual. A new work culture is emerging, learning lessons from the pandemic. This includes hybrid forms of access. However, the lack of access was temporary for some and remains challenging, if not impossible, for others. The pandemic brutally exposed the reality of the access gap (Teremetskyi 2021). A group of people that has fallen off the *access radar* are those who are digitally excluded or less savvy, those who are legally less capable of knowing where to seek help (Ragnedda & Ruiu 2021, JUSTICE 2018, Creutzfeldt 2021). I posit that the pandemic has reinforced the need for society to be both digitally and legally capable to be able to access justice when services were online. Because of that, we can observe a shift in our disputing behaviour (see Rabinovoch-Einy & Katch 2017).

## A shift in peoples' disputing behaviour and our expectations

I suggest that the pandemic has created a change in peoples' expectations of the justice system in general, and of an Ombuds process in particular. I built my argument based on data I collected on peoples' perceptions of the Ombuds process before the pandemic. I found that, through the lens of legal culture and legal consciousness, people made sense of the law and authority. I argued that, through a specific cultural lens, the reference point in relation to an informal Ombuds process was a formal court process. Building on more recent work of exploring how people (do not) access the Ombuds and justice systems online (OECD 2020; World Justice Project 2021) I will outline my reflections on a shift in disputing behaviour in the following, in three themes. These are: a new pandemic normal (exploring the reality of digital justice); deepening the divide (those who get left behind); and a post-pandemic normal (what we have learnt). These themes form

fertile ground for future (empirical and theoretical) inquiry and development to explore in more detail how we make sense of the online justice system – beyond our national legal culture.

## A new pandemic normal

During the COVID-19 pandemic most people had to get used to an online space in which we had to do our daily transactions (if we had not chosen to do so already), yet there was no choice but to bring a complaint online and to resolve disputes. Online Dispute Resolution has experienced many teething problems across the world (e. g., CoE 2020, PHSO 2020a).

The Ombuds process is mainly online already in the UK (in Germany Ombuds can be contacted through their website, by post, and by telephone) however, for this to run smoothly there are Ombuds staff at the other end of a computer to deal with complaints. During the pandemic this posed practical obstacles, e. g., letters sent by post and paper documents being left unattended in offices during the lockdowns, which added to a delay in processing cases. Then there was the challenge of working from home (e. g., with other family members present, home schooling, caring responsibilities, sub-optimal internet connections, lack of adequate IT equipment at home) as well as catching COVID-19 and being unwell (AJC 2021), making the delivery of justice challenging.

We all had to get used to a new normal. At the beginning of the COVID-19 pandemic there was an overwhelming sense of shared suffering and unchartered territories, which allowed for a tolerance and acceptance of processes being delayed and not easily accessible (Creutzfeldt & Sechi 2021). Further down the line, this changed, and people became more sensitive towards delays, lack of information or even lack of access altogether. This nurtured dissatisfaction, frustration, and lack of access to justice in times where people were fed up with being locked up in their homes (Byrom et al. 2020). I argue that this will have influenced expectations of the justice system in general, and of the Ombuds process in particular.

Peoples' experiences of accessing justice influenced their legal consciousness and with that, their expectations and behaviours towards (online) disputing. Beyond the question of access and IT literacy and how the online processes themselves might shape expectations opens a debate about legal processes and the justice system more generally which I explore elsewhere. I boldly suggest here, that having been forced to either bring complaints through an online platform, or not to be able to bring them at all, has produced a new way of thinking about disputes.

The above outlined disputing behaviour, framed by legal culture, understood through the lens of institutional availability and access, has transformed into a

non-negotiable online-only option (even if only temporarily) during the pandemic. This has created new patterns of engagement with the online space which need to be empirically investigated to better understand them. For many years scholars and Ombuds have noted how the Ombuds process is not well known by the general public (PHSO 2020 a, Samuel 2022, Gadlin 2000, Kempf & Mille 2022) which means that arguably those people who do find an Ombuds online might be more empowered by navigating (and trusting) the online space. This, in turn, could have a positive effect on expectations of Ombuds as our engagement with, and acceptance of, the digital justice space develops. However, we are talking here about those people who are able to navigate the online space. On the other side of this argument, we see how the pandemic has made more visible the absence of access to justice for certain groups of people.

## Deepening the divide

I found in a previous study that the demographic accessing an Ombuds is typically male, middle-class, middle-aged and educated (Creutzfeldt 2016). Ombuds are supposed to provide access to all groups in society. During the pandemic the divide between access and non-access has become more apparent. The sudden closing of the buildings that people were used to going to for advice and support, left those who are vulnerable invisible to the justice system. It takes certain IT skills, a working device, credit on that device and an internet connection to be able to access the online justice system. This raises many questions and concerns, about how to make sure that all people are able to benefit from the Ombuds institution. Important lessons can be learned here for post-pandemic access to justice.

Stantcheva (2022) points out that inequalities take many forms and can be multidimensional in nature. These can be issues that intersect between income, consumption and savings, job security, remote working facilities, gender, childcare, and geography, for example. The pandemic has created a plethora of complex burdens. This holds true for most countries around the world; those people who are already struggling are affected much more by the pandemic and its aftermath. It is important to note that access to justice and access to Ombuds was not without its challenges before the pandemic. I am not suggesting that the pandemic created an access to justice crisis, but rather that the pandemic brutally showed us how many people fell off the radar of the already overstretched justice system. It exposed an existing divide within our justice systems and societies.

We need to take seriously this online space in which we conduct most of our everyday lives, transactions, and communications. The online space needs to be considered through concepts, beliefs, and considerations – apart from the offline

space. Legal consciousness scholars draw on law's hegemony. Hertogh (2018) proposed a 'secular approach' to legal consciousness, one that is removed from the hegemonic force of the liberal states legal system. I would agree with this approach and take it further to suggest that we do this by considering the *hegemony* of the online justice space, beyond the state.

## Hegemony of the online justice space

When thinking about the form the online space brings to people, in comparison to the formality of the law, the question of hegemony arises. The legal consciousness scholarship discussed above, re-enforces law's hegemonic power both empirically and theoretically (Halliday & Morgan 2013: 3). Ewick and Silbey (1998) suggest that law draws its hegemonic power from competing cultural narratives about the character of the law. Their identified narratives of legality create consent for the law and thereby underline its hegemony (Halliday & Morgan 2013). I posit that the online (justice) space creates its own hegemony, which our *digital legal consciousness* (Creutzfeldt 2021)[15], in its different emerging iterations, responds to. Halliday and Morgan (2013) advocate a counter-hegemonic struggle (2013: 29), as a perception of law apart from the state (in the offline space). There is a need for research into the hegemony of the online justice space and how our digital legal consciousness is shaped and develops in relation to that space. In other words, returning to the argument developed above of German and UK legal cultures exposing different disputing behaviours – I contend that the emerging online justice space creates a *supra-national* hegemony and thus calls for a new research agenda of disputing behaviour within it.

Within this new research agenda, the Ombuds process lends itself to closer investigation. I am starting to do this in a current Nuffield foundation funded research project on '*delivering administrative justice after the pandemic*'.[16] We are examining the effect of rapid digitalisation on the delivery of justice, identifying the effects on access for marginalised groups and exploring how trust can be built and sustained in parts of the justice system affected by the pandemic.

**15** I develop the notion of digital legal consciousness elsewhere and am exploring if it is a useful concept to grasp the way in which we navigate and make sense of the online justice space. I argue that to be able to navigate online dispute resolution we must have both digital and legal capabilities. This poses a challenge to the access to justice debate – we experienced this in relation to the pandemic– as well as to the consideration of creating an online system that is experienced as fair.
**16** https://www.nuffieldfoundation.org/project/delivering-administrative-justice-after-the-pandemic

As we transition out of the pandemic, we enter into a new dispute resolution territory where hybrid approaches are becoming the norm. This new space provides the choice (if capable and able to do so) of resolving disputes online or offline which creates new challenges for access to justice. I argue elsewhere (Creutzfeldt 2021) that we need to think about our behaviour and engagement with the digital justice space through the capabilities we are required to have to negotiate it. These are digital and legal; in other words, we are required to combine our attitudes and capabilities towards the law with our attitudes and capabilities towards the digital.

### A post-pandemic normal?

The pandemic has created a shift in how people think about the justice systems and about Ombuds. I develop the argument above about how people are steered by culturally rooted behaviours towards disputing when they encounter an Ombuds. Now, this argument has been broadened by embracing the online justice space people had to harness and develop legal and digital capabilities that are negotiated, and held to account, through an evolving online hegemony. The online justice space, I posit, is setting its own authority that people engage with on different levels, depending on what they are accessing it for. There is a plethora of emerging literature (Susskind 2019, Chou et al. 2016, Rule 2020) and a lot of exciting research to be done on dispute resolution in the online justice space. We are somewhat liberated from national boundaries of legal culture when we engage in online spaces, they are global. If we choose to, or must, engage with the online *justice* space, we are still bound by our national legal systems (Ombuds, Courts and Tribunals). However, the ways in which we engage with them and navigate the online justice processes is starting to shape a new form of legal consciousness – appropriate for its medium– digital legal consciousness.

## Conclusion

In this essay I covered a lot of ground and discussed some of the challenges we are facing when accessing the Ombuds and the justice system. I built on my previous work and discussed the ways in which an Ombuds complaints procedure is perceived by its users and what motivates people, who use these procedures, and the acceptance of the process and outcome an Ombuds provides. I started by showing how my data on peoples' complaint behaviour showed patterns that I

make sense of through drawing on legal culture in Germany and the UK. I developed an argument of culturally specific disputing behaviour by discussing the respective legal cultures, and the role our legal consciousness plays, in how we engage with Ombuds. I argue further that the pandemic has forced us to revisit our disputing behaviour and to renegotiate it in the online space. Further, the online justice space has made it necessary to redefine our disputing patterns through the lenses of being both digitally and legally capable. To explore in more detail the connections between legal culture and our legal consciousness towards Ombuds, it is interesting to understand how the online space influences our attitudes and perceptions of this dispute resolution pathway. I further suggest that the online justice space is creating its own hegemony which needs to be empirically and theoretically explored. Considering that, I suggest the concept of digital legal consciousness (through our legal and digital capabilities) is a fruitful starting point to explore our patterns of online disputing behaviour.

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