

# Palgrave Socio-Legal Studies

**Series Editor**

**Dave Cowan**

**University of Bristol Law School  
Bristol, UK**

“Naomi Creutzfeldt breathes new life into ADR scholarship, and in particular into our understanding of the limits, and potential, of the ombud institution. Combining ground-breaking empirical research in the UK and Germany with startling theoretical insight, she cogently demonstrates how our perceptions of what counts as fairness in an ADR context is decisively shaped by national legal culture. Local legal consciousness and socialization are thereby exposed as the determinants of trust, and national conceptions of legality as the conditions of informal justice. This formidable study stands, therefore, as an exemplar of the interdisciplinary approaches and methodological pluralism the author herself advocates if we are to identify new forms of legal consciousness, more trustworthy forms of ADR, and, despite national differences, a genuinely transnational ADR space. Law’s conceptual empire, though still bedecked in much of its formal majesty, will rest less securely as a result of this searching interrogation of the informal ways and means of eluding its grasp.”

—Dr. Nick O’Brien, Hon. *Research Fellow, School of Law and Social Justice,  
University of Liverpool, UK*

“Dr. Creutzfeldt is the undisputed expert on ombuds practice in Europe. Her pioneering research combines qualitative and quantitative analysis to provide tremendous insight into the ways in which individuals experience the ombuds system, as well as the broader implications of their experiences. This book is a must-read for anyone interested in the present and the future of ADR systems.”

—Professor Rebecca Hollander-Blumoff, *Washington University, St. Louis, USA*

“The ADR Directive created a legal guarantee for consumers to access an ‘informal justice system’. The aim is to increase consumer confidence in the market and to contribute to the standardization of the European internal market. This book addresses a shortcoming in the legislative process: it provides empirical data on consumers’ knowledge of alternative dispute resolution and their assessment. The country comparison also shows how social, cultural and legal peculiarities affect the willingness to use ADR. The author’s carefully designed fieldwork, as well as the lessons learned and conclusions, make a substantial contribution to understanding the importance and necessary development of alternative legal protection—issues that are also relevant in the context of Brexit.”

—Prof. Dr. Günter Hirsch, *Insurance Ombudsman, former President of the Supreme Court of Germany and former Judge of the European Court of Justice*

The Palgrave Socio-Legal Studies series is a developing series of monographs and textbooks featuring cutting edge work which, in the best tradition of socio-legal studies, reach out to a wide international audience.

More information about this series at  
<http://www.palgrave.com/gp/series/14679>

“Consumer ADR remains under-researched and especially empirical insights are missing. This leads to the omission of important themes in the discourse. It is thus determined by unrealistic fears rather than actual experiences. Naomi Creutzfeldt sheds some light into the dark with her study. The design of her study is impressive and the amount of responses allows for valuable insights: around 3,500 consumers reported their experiences with 14 different ADR providers. The differentiated results are of great value for practitioners for two reasons. First, they offer important feedback for the improvement of procedures and second, they offer convincing arguments for consumer ADR and its acceptance. Creutzfeldt’s study provides a new quality of discussion to be had about consumer ADR and is highly recommended for both practice and academia!”

—Dr. Christof Berlin, *Head of Aviation, Conciliation Body for Public Transport*

“How people experience Alternative Dispute Resolution processes is likely to become an increasingly important question in the coming years, as social complexity and constraints on public funds necessitate the search for alternatives to existing legal frameworks. In this timely, comprehensive and accessible book, Dr. Creutzfeldt explores the wants, needs and assessments of the users of Ombudsman services in Germany and UK. Yet she does much more than this. By drawing out the links - and tensions - between two major bodies of theory and research, procedural justice theory and the concept of legal socialization, she shows how the seemingly universal concern for fair process among the users of legal services is mediated and moderated by first, a strong concern with outcomes, and second the legal culture within which people are socialized and which shapes their understandings of the processes and procedures used by legal actors. This book should be of interest to scholars working in both these fields, as well as practitioners across the whole range of public and private bodies seeking to improve existing, or institute new, ADR structures.”

—Ben Bradford, *Professor of Global City Policing, UCL Jill Dando Institute of Security and Crime Science*

“Naomi Creutzfeldt is a fine scholar whose research has relevance and resonance across the academic/practitioner divide. Her pioneering work on public attitudes to public trust in a range of ombudsman services is characterized by rigour, accessibility of style, and strong comparative analysis. It is rare for scholarly work to be enthusiastically debated in ombudsman circles, but Creutzfeldt’s writing constitutes an important set of considerations for the ombudsman and administrative justice communities.”

—Rob Behrens, *Parliamentary and Health Service Ombudsman*

Naomi Creutzfeldt

# Ombudsmen and ADR

A Comparative Study of Informal Justice  
in Europe

palgrave  
macmillan

Naomi Creutzfeldt  
University of Westminster  
London, UK

Palgrave Socio-Legal Studies  
ISBN 978-3-319-78806-7 ISBN 978-3-319-78807-4 (eBook)  
<https://doi.org/10.1007/978-3-319-78807-4>

Library of Congress Control Number: 2018937860

© The Editor(s) (if applicable) and The Author(s) 2018

This work is subject to copyright. All rights are solely and exclusively licensed by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

The publisher, the authors and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, express or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

Cover credit: Digital Vision iii/Alamy Stock Photo

Printed on acid-free paper

This Palgrave Macmillan imprint is published by the registered company Springer  
International Publishing AG part of Springer Nature  
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

## Foreword

In this important book, *Ombudsmen and ADR: A Comparative Study of Informal Justice in Europe*, Naomi Creutzfeldt has provided us with one of the first efforts to understand the meaning of “justice” in non-judicial settings across different legal systems. In seeking to understand how “alternative” (or as we say now, “appropriate”) dispute resolution processes are being utilized in consumer disputes in Europe, in the forms of both public and private Ombudsmen, Naomi Creutzfeldt has learned that attitudes toward informal justice are inextricably connected to how we are socialized in our home jurisdictions to expectations of legality and justice. Her data and conclusions in this book will have far-reaching impacts on the socio-legal study of dispute resolution and how ordinary people understand their possibilities in seeking legal redress and also on policy initiatives and dispute system design as Europe continues to attempt to perfect a single market consciousness for trading across borders.

In a study that combines quantitative and qualitative measures, Naomi looks at how users of Ombudsman services in private sectors (telecom, energy, financial services, transport) and public settings (health care, public services) view the efforts of non-legal third-party dispute “resolvers” to help them manage disputes about billing, delays in services, and other disputes. Ombudsmen, originating in an older Scandinavian form of dispute resolution for management of grievances for governmental maladministration, has now been expanded to include neutral, third-party “helpers” of consumers, of both public services and private products and services in freestanding institutions of consumer redress. These newer Ombudsman institutions (some sector based; others more general) are one prominent form of dispute

resolution (ADR) that has emerged from the Directives of the European Union requiring member states to provide expeditious forms of dispute resolution for transborder consumer transactions (EU Directive 2013/11 on consumer ADR and EU Regulation No. 524/2013 on ODR; see also EU Directive 2008/52/EC on use of mediation in cross-border commercial transactions).

The data presented in this book demonstrate that differences in the legal systems of the UK and Germany have marked efforts to create dispute systems outside of the legal system. We learn that in Germany the Ombudsmen services are hierarchical, managed by judges and lawyers, while those in the UK are more flexible and employ staff who are not necessarily legally trained. Users of the Ombudsman services demonstrate their expectations are based on their socialization within their own legal systems. Germans value fair outcomes and want payment and redress. Users from the UK value process fairness and want to express their “voice” in efforts to prevent bad things from happening to other people.

The data and the arguments presented in this book draw on well-established and traditional concepts in socio-legal studies, procedural justice, legal consciousness, and legal socialization, but their application to the new processes of “ADR” presents important new findings. Procedural justice may not be the controlling value in one-off, briefer encounters in seeking legal redress. When dispute resolution is by telephone or now, increasingly online, *outcome*, not “fairness, being heard” *process*, may be more important in some settings. This is an important finding and a direct challenge to many conventional claims about the importance of “procedural justice.” As any good socio-legal scholar can recognize, settings and processes may change what is valued. It is the variations, as well as the “uniformities,” in human behavior that we are interested in studying.

The findings of this superb research project have enormous implications for how we are currently reimagining how dispute resolution and legal redress may be achieved. Naomi Creutzfeldt reveals that measuring the “justice” in ADR settings may not be the same as user satisfaction or experiences of “justice” in the court system—if outcomes matter more than process, what might that say about dispute system design? Further, if ordinary users of Ombudsman services bring their expectations of what they want from such a system, from their home legal systems, what does that say about efforts to create transnational dispute resolution mechanisms?

This book poses some important challenges for scholars and policy makers alike—does “ADR” need its own *raison d’être* and claims for legitimacy and acceptability, separate from the formal legal system? How can such a

“culture” of ADR be achieved across so many different processes (e.g., mediation, arbitration, Ombudsmen and other hybrids) and across different legal cultures in the European Union? Will ODR (online dispute resolution) suffer the same issues as being deracinated from particular legal systems, or will buying online create a new world of “settling online” without any need for grand theories of justification and legitimacy? If ADR and ODR have both been created to improve access to justice for those who cannot afford the formal legal system, do they reintroduce their own troubles in providing access to justice—digital literacy and tech/computer access (see Ken Loach’s 2016 movie I, *Daniel Blake*)?

In my own work, I have argued for recognition for *process pluralism*, an acknowledgment that “one size will not fit all” disputes and remedial possibilities. Naomi Creutzfeldt has given us one of the first rigorous studies of how one form of dispute resolution, varied across geographical and subject-matter spaces, is actually perceived by its users. Whether the users see Ombudsmen as a new or better process or just another part of the larger inaccessible legal system remains to be seen. This important book suggests dispute system designers must study their systems empirically and consider whether new designs are actually meeting access needs, or merely recapitulating, in a new form, older forms of dissatisfaction with justice-granting institutions. As Naomi Creutzfeldt suggests, perhaps “justice” is too big a concept for a quick and simple settlement or readjustment of an energy bill or miscredited charge account. As she suggests in this book, ADR (and ODR) will have to create their own story and justifications from “inside out.”

Irvine, CA, USA

Carrie Menkel-Meadow  
Chancellor’s Professor of Law  
(and Political Science)  
University of California  
Irvine School of Law

# Acknowledgements

I would like to thank the ESRC FRL for generous funding of my three-year research project (grant number ES/K00820X/1). It provided the space, time, and resources for me to be able to go out and continue to explore the world of ADR in Europe. This book is one of the outputs. Many thanks also to the Law Faculty in Oxford, the Centre for Socio-Legal Studies, and the Programme for Civil Justice Systems for institutional support.

Huge thanks are due to the many Ombudsmen and their teams who supported my project. Their trust in me and in my research methods opened up a space that had not been empirically explored by academics before. I was therefore able to understand people's encounters with ADR across sectors and countries better. Findings along with practical recommendations from my project report have since been implemented into Ombudsmen procedures.

I thank Ben Bradford for his support in making sense of the quantitative dataset and his willingness to stretch his expertise on procedural justice to Ombudsmen. The survey was developed with input from Ben, Nigel Balmer, and Rebecca Hollander-Blumoff. I thank them for their interest in, and support of, my project.

In keeping me on track with my writing, I thank Kirsten McConnachie. Her thoughtful feedback on many draft chapters as part of our writing exchange kept me accountable and motivated.

Marie Selwood I thank for being such a wonderful and flexible editor and for being encouraging.

Carrie Menkel-Meadow is an inspiration and amazingly supportive, thank you.

**x      Acknowledgements**

From the bottom of my heart, I thank Ian Loader for making me laugh and for taking the time to patiently engage in discussions about justice & ADR and for probing my arguments.

Finally, being able to find “extra time” to write this book, I have to thank Samuel for being a superstar and clocking far too many hours on devices.

# Contents

<b>1</b>	<b>Ombudsmen and Informal Justice</b>	<b>1</b>
<b>Part I Setting the Scene</b>		
<b>2</b>	<b>Europe's Justice Systems</b>	<b>11</b>
<b>3</b>	<b>Models of Ombudsmen</b>	<b>29</b>
<b>4</b>	<b>Procedural Justice and Legal Consciousness: Questions of Theory and Method</b>	<b>53</b>
<b>Part II Empirical Discoveries</b>		
<b>5</b>	<b>Expectations and Perceptions of Ombudsmen in a Cross-National Comparison</b>	<b>73</b>
<b>6</b>	<b>Everyday Assumptions about Ombudsmen</b>	<b>95</b>
<b>Part III The Future of Informal Justice Systems</b>		
<b>7</b>	<b>A European Informal Justice System?</b>	<b>119</b>
<b>8</b>	<b>Growing Informal Justice (from the Inside-Out)</b>	<b>139</b>

<b>9 Conclusion: Paths for Theory and Research</b>	155
<b>Annex</b>	161
<b>Bibliography</b>	169
<b>Index</b>	185

# List of Figures

Fig. 2.1	Justice systems—a basic overview placing informal dispute resolution into context	12
Fig. 5.1	Public–private divide: outcome-related	88
Fig. 5.2	Public–private divide: legitimacy	88

# List of Tables

Table 3.1	Public and private ombudsmen in this study	32
Table 3.2	Trust in justice	32
Table 4.1	Ombudsmen annual reports on overall satisfaction and outcome	55
Table 4.2	Overview of ADR providers and responses	59
Table 5.1	Motivations for the complaint—procedural justice-related concerns	77
Table 5.2	Motivations for the complaint—outcome-related concerns	77
Table 5.3	Motivations for the complaint—change-related concerns	78
Table 5.4	Willingness to accept the decision—outcome favourability	78
Table 5.5	Willingness to accept the decision—fairness of the procedure	79
Table 5.6	Willingness to accept the decision	79
Table 5.7	Ordinal logistic regression models predicting judgement of the overall fairness of the procedure (high scores = more fair)	80
Table 6.1	Normative roles that people expect of ombudsmen	99