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## Participation as a framework for analysing consumers' experiences of alternative dispute resolution

*This article argues that an analytic framework based on participation is useful for analyzing consumer experiences of alternative dispute resolution (ADR) and provides a complementary approach to analyses drawing on procedural justice theory. The argument is developed by applying McKeever's "ladder of legal participation" (LLP)<sup>1</sup> to a qualitative data set of 33 interviews with UK consumers. The article concludes that applying the LLP in the consumer ADR context results in novel empirical and theoretical insights. Empirically, it demonstrates that – despite low value and transactional disputes – consumers expect high levels of participation from ADR. Theoretically, the article argues that the LLP supplements existing approaches by: providing a unifying lens for studying consumer experiences, which goes beyond examining the relationships between process and outcome; emphasizing the importance of participation, not only as a process value, but also in shaping outcomes; and highlighting the distinction between genuine and tokenistic provision of consumer ADR.*

### INTRODUCTION

There is a need to develop novel theoretical approaches for understanding consumer experiences of ADR. In part, this is because recent evidence suggests that procedural justice theory – the dominant paradigm for analyzing user experiences of dispute processes – has limitations in this setting.<sup>2</sup> In particular, there are suggestions that outcome effects are especially important in relation to consumer disputes and that procedural fairness is less important in determining decision acceptance and legitimacy than in other settings.<sup>3</sup> There are also indications that consumer ADR may not be meeting consumer expectations<sup>4</sup> and that

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<sup>1</sup> G. McKeever, 'A Ladder of Legal Participation for Tribunal Users' (2013) Public Law 575.

<sup>2</sup> N. Creutzfeldt, *Ombudsmen and ADR: a comparative study of informal justice in Europe*. (2018).

<sup>3</sup> N. Creutzfeldt and B. Bradford, 'Dispute Resolution Outside of Courts: Procedural Justice and Decision Acceptance Among Users of Ombuds Services in the UK'. (2016) 50 *Law and Society Rev* 98; Department for Business, Energy and Industrial Strategy.(BEIS), 2018 *Resolving Consumer Disputes: Alternative Dispute Resolution and the Court System*.

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/698442/Final\\_report\\_-\\_Resolving\\_consumer\\_disputes.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/698442/Final_report_-_Resolving_consumer_disputes.pdf)>

<sup>4</sup> S. Gilad, 'Accountability or expectations management? the role of the ombudsman in financial regulation' (2008) 30 *Law and Policy* 227; N. Creutzfeldt, *ESRC Project Reports: Trusting the Middle-Man: Impact and Legitimacy of Ombudsmen in Europe* (2016); C. Gill, N. Creutzfeldt, Williams, S. O'Neil and N. Vivian, *Gaps, overlaps, and consumer confusion: A consumer perspective on the UK's alternative dispute resolutions (ADR) landscape* (2017),

consumers whose complaints are not upheld are less likely to view consumer ADR as legitimate compared to the courts.<sup>5</sup> Given the significant growth of ADR – recently accelerated as a result of the EU’s Directive on Consumer Alternative Dispute Resolution 2013/11/EU<sup>6</sup> – there is an increasingly pressing need to understand how consumers experience ADR and what accounts for the gap between what they expect and what they get from it. In this article, we explore the potential to throw light on these issues through the application of participation as an analytic framework.

Participation is the ability of individuals to take part meaningfully in decisions affecting them.<sup>7</sup> Why focus on participation? First, participation has traditionally been viewed as normatively and instrumentally desirable in both the formal and informal justice systems. Second, while participation features in procedural justice theory, an explicit focus on participation provides for additional insights which can complement and supplement procedural justice scholarship. Third, participation is strongly associated with increasing access to justice and has been seen as an important value in consumer contexts stressing consumer empowerment and self-efficacy. Fourth, and most importantly, participation emerged strongly as a theme in the interview data on which this article is based. Our findings suggest that participation is important to consumers, who expect high levels of good quality participation in their interactions with ADR bodies. Led by our data, therefore, we identified participation as a framework which meaningfully connects with the experiences of consumers who have used ADR and which is capable of providing an insightful and novel context in which to discuss those experiences.

On the face of it, a focus on participation in this context might seem counter-intuitive. Given the low value, high volume, and largely transactional nature of many consumer disputes, it might be expected that consumers will prefer low participation models of dispute resolution. This is one of these reasons why it is important to consider user expectations and experiences of participation in this context, as public policy (reflected in the design of ADR bodies) has tended to prefer a low participation model of dispute resolution. However, consumers who complain to ADR bodies are not typical consumers: they tend to be older, richer, educated, and

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<<https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Gaps%20overlaps%20consumer%20confusion%20201704.pdf>>.

<sup>5</sup> BEIS, op.cit., n.3, p. 48.

<sup>6</sup> Gill, et al, op. cit., n. 4.

<sup>7</sup> R. Moorhead, M. Sefton and L. Scanlan, ‘Just satisfaction? What Drives Public and Participant Satisfaction With Courts and Tribunals. (2007) *SSRN Electronic J.* at 44.

male;<sup>8</sup> they have a higher propensity to seek redress and a favourable attitude to complaining;<sup>9</sup> and they have overcome significant practical and emotional obstacles by complaining.<sup>10</sup> All of this suggests that consumers who do complain are strongly emotionally invested in their complaints and do not see them as transactional matters even if the original issue that led to a complaint could be described in that way. They may therefore be less accepting of a model of ADR that does not meaningfully involve them in the resolution of their complaints. Here, the article contributes not only by shedding light on experiences of particular ADR processes, but by examining a group of consumers (richer, older, more educated, and male) that is not often the subject of legal need studies.

In this article, we draw on and apply the participatory justice framework developed by McKeever<sup>11</sup> in the context of tribunals – the ladder of legal participation (LLP). There are two reasons for selecting the LLP. The first is that this is a participation model that has been developed specifically for use in understanding user experiences of disputing. As such, it is better adapted to considering dispute resolution contexts than more generic participation models. The second is that there are important similarities between tribunals and consumer ADR as fields of disputing: both are designed to provide less formal, non-court settings for the resolution of disputes; both deal with areas of disputing where there are large power imbalances between the parties; and both operate in areas that involve high volumes of specialized disputes. There are of course differences between the settings – such as in the demographic of typical tribunal and consumer ADR users – but there are sufficient similarities between these settings to make the LLP an attractive and potentially relevant model to apply to understanding consumer experiences of ADR.

To test the utility of the LLP in this context, the article uses the LLP as a framework for the secondary analysis of a qualitative data set consisting of 33 semi-structured interviews with UK consumers who have used ADR. Our findings show that participation is important to consumers, who expect high levels of good quality participation in their interactions with ADR

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<sup>8</sup> Creutzfeldt, op. cit., n. 4, pp. 47-49; BEIS, 2018, n. 3, p. 4; and B. Hubeau, 'The Profile of Complainants: How to Overcome the 'Matthew' effect' 259 in *Research Handbook on the Ombudsman* ed. M. Hertogh and R. Kirkham (2018) 259.

<sup>9</sup> M. Richin, 'Negative Word-of-Mouth by Dissatisfied Consumers: A Pilot Study' (1983) 47 *Journal of Marketing*, 68; J. Singh, 'The Determinants Of Consumers' Decisions to Seek Third Party Redress. (1989) 23 *J. of Consumer Affairs* 32; J. Chebat, M. Davidow and I. Codjovi 'Silent Voices Why Some Dissatisfied Consumers Fail to Complain' (2005) 7 *J. of Service Research* 328.

<sup>10</sup> J. Chebat and W. Slusarczyk, 'How Emotions Mediate the Effects of Perceived Justice on Loyalty in Service Recovery Situations: An Empirical Study. (2005) 58 *J. of Business Research* 664; B. Tronvoll, 'Negative emotions and their effect on customer complaint behaviour' (2011) 22 *Journal of Service Management* 111; Consumer Focus Scotland, *Facing up to Legal Problems* (2012).

<sup>11</sup> McKeever, op.cit., n. 1.

bodies. The low value and apparently transactional nature of their claims do not appear to lower these expectations. Indeed, most interviewees in the sample were highly invested in their complaint – financially and emotionally – and had explicit expectations around participation.

Testing the LLP against this qualitative data allows us to reach a number of conclusions about the utility of applying a participatory framework in the context of consumer ADR. Our principal conclusion is that, as a framework for analysis, the LLP provided a theoretically rich approach, because it emphasizes that participation is important in both procedural and substantive terms. This shifts the focus from the relationship between process and outcome (the mainstay of procedural justice theory) to considering the underlying and unifying concept of participation as a lens to understand consumer experiences. The LLP provides, therefore, a complementary and supplementary approach to procedural justice and is particularly well suited to qualitative work, where the focus is on developing rich descriptions of people's everyday experiences of justice. In addition, the application of the LLP to the consumer ADR context offers some practical insights about how ADR can meet consumer expectations in relation to participation and avoid tokenistic or non-participative approaches.

This paper is in three parts. Part 1 sets out the theoretical context and contains four sections. Section 1 provides contextual background on consumer ADR in the UK. Section 2 examines procedural justice theory and notes that it has less explanatory power in the context of consumer ADR than in other fields. Section 3 makes an argument for the value of using participation as a complementary framework to analyze consumer experiences of ADR. Section 4 considers the LLP and suggests that it is well suited to being used in relation to consumer ADR. Part 2 then applies the LLP to a qualitative data set and shows that the framework can be successfully deployed in the context of research into consumer experiences of ADR. Part 3 then discusses the implications of the case study, focusing on a series of empirical and theoretical insights that can be derived from applying the LLP in the consumer context, and reflecting on what it adds to existing scholarship and how it might be used in future research.

## **THEORETICAL BACKGROUND**

### *1. Consumer ADR in the United Kingdom*

Consumer ADR schemes are organisations, other than the courts, through which consumers can seek redress from a trader. Recent research has found an expansion in the number of

schemes in the UK (in part due to the implementation of the EU's Directive on Consumer Alternative Dispute Resolution 2013/11/EU – the Directive), with 147 schemes now operating across a wide range of sectors.<sup>12</sup> However, despite an increase in the number of schemes, the landscape is more complex and confusing than ever. ADR coverage remains low in some non-regulated markets that feature significant consumer detriment.<sup>13</sup>

The Directive does not prescribe a particular form of ADR and various types of consumer ADR scheme are available in the UK: ombudsman offices, adjudication, arbitration, and conciliation schemes.<sup>14</sup> While the development of consumer ADR has been *ad hoc*<sup>15</sup> it does share some common features: it is industry funded and free for the consumer; legal representation is not required; the processes used are more informal and inquisitorial than the courts; and the final stage is likely to be adjudicative.<sup>16</sup> There is an assumption that ADR will also be quicker, cheaper, and more user-friendly than courts. In any case, the low value of many consumer disputes means that these disputes are unlikely to reach courts. Since the alternative in this case is no justice at all, consumer ADR fulfils an important function facilitating access to justice.<sup>17</sup>

Despite their apparent advantages, studies have highlighted a gap between what consumers expect and what they get from ADR, which suggests a need for further research into consumer experiences.<sup>18</sup> In addition, some academics have voiced concerns that consumer ADR privatizes justice for consumer disputes and represents an inferior form of justice.<sup>19</sup> Such concerns echo classic criticisms of ADR,<sup>20</sup> particularly in the consumer context, where Nader has argued that third party complaint bodies are “particularly well suited to divert and pacify

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<sup>12</sup> Gill et al., *op. cit.*, n. 4, p. 16.

<sup>13</sup> Gill et al., *op. cit.*, n. 4, pp 14 – 31.

<sup>14</sup> Office of Fair Trading, 2010. *Mapping Consumer Redress: A Summary Guide to Dispute Resolution Systems*, (2010); Gill et al. n. 4, pp 441-42.

<sup>15</sup> C. Gill, J. Williams, C. Brennan, and C. Hirst, ‘Designing Consumer Redress: a Dispute System Design (DSD) Model for Consumer-to-Business Disputes’ (2016)36 *Legal Studies* 438 at

<sup>16</sup> C. Hodges, I. Benohr and N. Creutzfeldt-Banda 2012. ‘Findings and Conclusions.’ in: *Consumer ADR in Europe*, ed. C. Hodges, I. Benohr and N. Creutzfeldt-Banda (2012) 398.

<sup>17</sup> Hodges, Benohr and Creutzfeldt, *op.cit.*, n. 18, p. 397.

<sup>18</sup> Creutzfeldt, *op. cit.*, n. 4 ; C. Gill and N. Creutzfeldt, ‘The ‘Ombuds Watchers’: Collective Dissent and Legal Protest Among Users of Public Services Ombuds’ (2018) 27 *Social and Legal Studies*. 367 BEIS, 2018 *op. cit.*, n.3. There is currently limited research on consumer experiences of ADR, and this is reflected in the relatively limited number of works cited here and in the following two sections. There is therefore a significant gap in current knowledge which this article seeks to address.

<sup>19</sup> H. Eidenmueller and M. Engel. ‘Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe’. (2014) 29 *Ohio State J. of Dispute Resolution* 261; G. Wagner, ‘Private Law Enforcement Through ADR: Wonder Drug or Snake Oil’ (2014) 51 *Common Market Law Rev* 165.

<sup>20</sup> For example, R. Abel, ‘The Contradictions of Informal Justice.’ In *The Politics of Informal Justice: Vol 1 The American Experience*, ed. R. (1982); O. Fiss, ‘Against Settlement.’ (1984) 93 *Yale Law J.* 1073.

complainants”.<sup>21</sup> Gilad’s research on the UK’s Financial Ombudsman Service recognised its success in increasing access to justice, at the same time noting its potential as a form of “bureaucratic manipulation which undermines citizen-consumer voice”.<sup>22</sup> These concerns have been given renewed impetus by the growth of ADR<sup>23</sup> and a recent government report highlights the need to improve the quality of services offered by some consumer ADR providers.<sup>24</sup>

In summary, consumer ADR in the UK has been subject to a significant expansion and is now an important mechanism through which consumers can raise complaints. However, while there are a number of potential advantages to this development, there is also a need to know more about consumer experiences of ADR and to address some of the concerns and criticisms suggested in the scholarship.

## 2. *The limits of procedural justice theory*

Procedural justice theory is the dominant scholarly paradigm for assessing how users experience dispute processes. Based on work by Thibaut and Walker<sup>25</sup> and Lind and Tyler<sup>26</sup> the theory of procedural justice predicts that people are more likely to accept the outcome of a decision if they perceive the process as fair even if the outcome is not in their favour. There is an extensive literature to support this in a variety of contexts, including: courts,<sup>27</sup> the police,<sup>28</sup> arbitration,<sup>29</sup> mediation,<sup>30</sup> negotiation,<sup>31</sup> and local government decision making.<sup>32</sup> The

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<sup>21</sup> L. Nader, ‘Disputing Without the Force of Law.’ (1978-79) 88 *Yale L. J.* 998 at 1012.

<sup>22</sup> Gilad op. cit., n. 4, p. 246.

<sup>23</sup> For prominent critiques of the growth of mediation in the UK see H. Genn, *Judging Civil Justice* (2009) and L. Mulcahy, ‘The Collective Interest in Private Dispute Resolution.’ (2013) 33 *Oxford J. of Legal Studies.* 59.

<sup>24</sup> BEIS op. cit., n. 3 p. 50.

<sup>25</sup> J. Thibault and L. Walker, *Procedural Justice: A Psychological Analysis.* (1975).

<sup>26</sup> E. Lind, and, T. Tyler, *The Social Psychology Of Procedural Justice.* (1988).

<sup>27</sup> T. Tyler, ‘Procedural justice and the courts’ (2007) 44 *Court Rev* 26; H. Grootelaar and K. van den Bos, ‘How Litigants in Dutch Courtrooms Come to Trust Judges: The Role Of Perceived Procedural Justice, Outcome Favourability, and Other Socio-Legal Moderators’ (2018) 52 *Law and Society Rev* 234.

<sup>28</sup> T. Tyler and Y. Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts.* (2002); B. Bradford, ‘Policing and Social Identity: Procedural Justice, Inclusion and Cooperation Between Police and Public.’ (2014) 24 *Policing and Society* 22.

<sup>29</sup> E. Lind, A. Edgar, C. Kulik, M. Ambrose and M. de Vera Park, ‘Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic.’ (1993) 38 *Administrative Science Q.* 224.

<sup>30</sup> T. Tyler, ‘The Psychology of Dispute Concerns in Mediation.’ (1987) 3 *Negot J* 367. D. Pruitt, N. Peirce, N. Mcgillcuddy, G. Welton and L. Castrianno. ‘Long-Term Success in Mediation.’ (1993) 17 *Law & Hum. Behav.* 313.

<sup>31</sup> T. Tyler, ‘What is Procedural Justice? Criteria Used by Citizens to Assess the fairness of legal procedures’ (1988) 22 *Law and Society Rev.* 301; . R. Hollander-Blumoff and T. Tyler, ‘Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance and Integrative Potential.’ (2008) 33 *Law and Society Inquiry* 474.

<sup>32</sup> K. Van Den Bos, L. Van Der Velden and E Lind, ‘On the Role of Perceived Procedural Justice in Citizens’ Reaction to Government Decisions and the Handling of Conflict’ (2014) 10 *Utrecht Law Rev* 1.

importance of procedural fairness appears consistent across cultural backgrounds<sup>33</sup> and some studies have found that procedural justice is even more important when outcomes are not in the claimants' favour and when the objective value of claims is low.<sup>34</sup>

Despite the focus on procedural justice in the literature, there is relatively little empirical research using this framework to explore consumer ADR. An important exception is Creutzfeldt's work: her findings show that while procedural justice is important in explaining whether consumers are willing to accept the decisions of consumer ADR schemes as legitimate, substantive outcomes may be of much greater importance than has traditionally been found in other dispute contexts.<sup>35</sup> In this respect, it is important to note that procedural justice literature does not suggest that people do not care about outcome, just that they are more likely to be willing to accept a decision if they perceive the process used to reach the decision as fair.<sup>36</sup> Creutzfeldt's research suggests that this is less likely in the context of consumer ADR.

Questions over the applicability of procedural justice in the context of consumer disputes have also been identified in research commissioned by the UK government.<sup>37</sup> This research looked at consumers' and traders' experiences of courts and ADR schemes for consumer disputes. It found that the majority of consumers had a good experience: 76% of court users would use courts again and 69% of ADR users would use ADR again if they had a problem.<sup>38</sup> However, like Creutzfeldt's<sup>39</sup> research, they also found that users' perceptions of the fairness of ADR were highly correlated with outcome. For example 83% of ADR consumers perceived the process as fair if the outcome was in their favour but this plummeted to 17% if the outcome was in favour of the business. The equivalent figures for courts were 90% and 53%.<sup>40</sup>

There are telling suggestions, therefore, that in the context of consumer ADR, there may be benefits in looking at conceptual frameworks beyond procedural justice theory in order to help understand the consumer experience of ADR. One question to consider is why procedural justice theory may be of less application in this context. One suggestion is that

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<sup>33</sup> Law Commission of Canada. *Transforming Relationships Through Participatory Justice*. (2003); Hollander-Blumoff, Rebecca. and T. Tyler, Tom. (2011). 'Procedural Justice and the Rule of Law: Fostering legitimacy in Alternative Dispute Resolution.' (2011) *J. of disp. res.* 1.

<sup>34</sup> Grootelaar and van den Bos op.cit., n.28.

<sup>35</sup> Creutzfeldt op cit., n. 3 and n. 4. See also N. Creutzfeldt, 'How Important is Procedural Justice for Consumer Dispute Resolution? A Case Study of an Ombudsman Model for European Consumers' (2014). 37 *J. Consumer Policy* 527.

<sup>36</sup> Hollander-Blumoff and Tyler 2011. op.cit., n. 37.

<sup>37</sup> BEIS op.cit., n. 3.

<sup>38</sup> Id., p. 2.

<sup>39</sup> Creutzfeldt op cit., n. 3, n. 4, and n. 36.

<sup>40</sup> BEIS op.cit., n. 3, p 3.

consumers have difficulty in distinguishing between outcome fairness and procedural fairness: unlike with courts or the police, consumers do not have a clear idea of what consumer ADR is and how it operates.<sup>41</sup> Consumers feel strongly enough about their complaint to find a scheme to complain to and often have firm expectations regarding the outcome, but they do not necessarily have a clear idea of what to expect in terms of process.<sup>42</sup> Research by Gilad<sup>43</sup> has emphasised the importance of managing consumer expectations in the context of the UK's Financial Ombudsman scheme and Creutzfeldt's research also highlights its importance.<sup>44</sup> A further suggestion has been that procedural justice theory is less applicable in situations where services are more transactional and the main loss is financial.<sup>45</sup>

Tentative suggestions in existing studies are, therefore, that although consumers do not know quite what to expect from consumer ADR, their implicit expectations are often not met, particularly if outcomes are not favourable. There is, as a result, a need to understand and analyse consumer experiences and expectations using a range of conceptual frameworks in order to develop fresh insights into how consumers experience ADR. Qualitative approaches are particularly important in this context, in order to build up deeper, more rounded, and bottom-up understandings.<sup>46</sup> McKeever<sup>47</sup> has recently demonstrated the value of participation as a framework in the context of tribunals, and this article seeks to explore whether this also has value in the context of consumer ADR. In the following sections, the article will examine the importance of participation in dispute resolution and make the case for deploying this framework in the context of consumer ADR.

### *3. Complementing procedural justice: the importance of participation*

Participation can be approached from several perspectives. In political science, participation is a form of democratic engagement where political power is redistributed to enable individuals to play a part in the decisions that affect them.<sup>48</sup> In the legal context, participation refers to the ability for individuals to take part in legal processes and is associated with access to justice.

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<sup>41</sup> Creutzfeldt, *op.cit.*, n. 4.

<sup>42</sup> Creutzfeldt and Bradford, *op.cit.*, n. 3.

<sup>43</sup> Gilad, *op.cit.*, n. 4.

<sup>44</sup> Creutzfeldt, *op.cit.*, n. 4.

<sup>45</sup> Creutzfeldt and Bradford, *op.cit.*, n. 3.

<sup>46</sup> M. Miles, M. Humberman and J. Saldana, J. *Qualitative Data Analysis Sourcebook* (2014, 3<sup>rd</sup> ed).

<sup>47</sup> McKeever, *op. cit.*, n. 1.

<sup>48</sup> S. Arnstein, 'A Ladder of Citizen Participation' (1969) 35 *J. of the Am. Planning Association*, 216.

This article argues that focusing on participation as a framework to supplement procedural justice theory is justified for two reasons.

First, participation has traditionally been seen as an important value in the formal and informal justice systems. In terms of the formal justice system, participation is central to common law adversarial traditions encompassing the idea of parties having their “day in court.” Fuller refers to an institutional guarantee of participation in adjudication which consists of the right to present proofs and arguments.<sup>49</sup> Minimum effective participation is seen as including the right to observe, the right to make arguments and present evidence, and the right to be informed of the reasons for a decision.<sup>50</sup> Participation is seen both as having an inherent value and an instrumental value, leading to better and more informed judicial decision making.

The concept of participation is also important in informal dispute settings, including ADR. Participation in this context means ensuring that individuals are able to play an active role not only in relation to the process of dispute resolution but also its substantive outcomes. Mediation has long recognized that effective participation is essential for the resolution of disputes, with its supporters arguing that it is able to facilitate participation better than third party adjudication due to its focus on consensus building, interest based justice, and party self-determination.<sup>51</sup> Mediators argue that its participatory processes produce outcomes qualitatively better than those imposed by third party decision-makers, because in mediation participation is not restricted to questions of process but also considers questions of substance.<sup>52</sup> Some also argue that in contexts such as community mediation, mediation facilitates more effective participation in wider democratic processes.<sup>53</sup> In Canada, mediation is strongly associated with the participatory justice movement.<sup>54</sup>

Second, a focus on participation is useful for addressing issues of access to justice in the context of consumer disputes. Participation in this context is essential for ensuring that individuals are able to access and participate in the decision making processes that affect them. Roberge identifies two complementary visions of access to justice, highlighting different

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<sup>49</sup> L. Fuller, 1978. ‘The Forms and Limits of Adjudication.’ (1978) 92 *Harvard Law Rev.* 353.

<sup>50</sup> L. Solum ‘Procedural Justice’ (2004) 78 *S. Cal. L. Rev.* 181.

<sup>51</sup> See for example C. Menkel-Meadow, ‘Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)’ (1995) 83 *Geo. L.J.* 2663; S. Subrin, ‘A Traditionalist Looks at Mediation: It’s Here to Stay and Much Better than I Thought’ (2003) 3 *Nevada Law Review* 196.

<sup>52</sup> L. Charkoudian, D. Eisenberg, and J. Walter, ‘What Difference Does ADR Make? Comparison of ADR and Trial Outcomes in Small Claims Court.’ (2017) 35 *Conflict Resolution Quarterly* 7.

<sup>53</sup> See Mulcahy L., ‘The Possibilities and Desirability of Mediator Neutrality - Towards an Ethic of Partiality?’ (2001) 10 *Social & Legal Studies* 505 for a discussion of whether such claims are justified in practice.

<sup>54</sup> Law Commission of Canada op.cit., n. 34; J. Roberge, ‘Emerging Trends in Access to Justice and Dispute Resolution in Canada’ (2014) 4 *J. of Arbitration and Mediation* 69.

approaches to participation.<sup>55</sup> This first of these is an “institutional approach” which emphasises taking a symbolic, normative, and economic approach to access. Here, access to justice is primarily viewed as “enforcement” seeking to ensure that people can enforce their legal rights by the facilitation of legal representation, public enforcement mechanisms, or the introduction of simplified court procedures.<sup>56</sup> The second approach is a “contextual perspective” to access to justice. This puts the litigant at the heart of the process and seeks to ensure that she is able to participate actively in the decision making process.<sup>57</sup> It calls for a broader notion of justice based on citizens’ perceptions of whether they feel a sense of fairness.<sup>58</sup> The growth of ADR can be seen as part of this contextual approach, as it reflects a reaction to traditional adjudicatory approach and seeks to support the parties’ right to self-determine and to negotiate solutions potentially outside of the narrow confines of the law and the court system.<sup>59</sup>

Thus, we have made two claims in the article so far: (1) procedural justice theory has limitations in the context of consumer ADR and (2) there are good *prima facie* reasons justifying the use of participation as a complementary analytical framework. The article now turns to discussing McKeever’s ladder of legal participation (LLP), which is the participatory framework used in this study.

#### 4. *The ladder of legal participation*

McKeever’s<sup>60</sup> model draws on Arnstein’s<sup>61</sup> ladder of citizen participation developed in relation to political participation. Arnstein’s framework conceptualises citizen participation as the devolution of democratic power to the individual. McKeever adapts this model for considering tribunal disputes, reframing it as the ladder of legal participation (LLP), shown in figure 1. This identifies three broad categories of participation – participation, tokenism and non-participation – and then seven more specific sub-categories.

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<sup>55</sup> Roberge, *id.*

<sup>56</sup> *id.* p. 72.

<sup>57</sup> *id.* p. 73.

<sup>58</sup> I. Barral-Vinals, ‘Consumer ‘Access to Justice’ in EU in Low-Value Cross-Border Disputes and the Role of Online Dispute Resolution.’ In *Achieving Open Justice through Citizen Participation and Transparency*, ed. Carlos Jemenez-Gomaz and Mila Gasco Hernandez. (2017) 191.

<sup>59</sup> Roberge, *op. cit.*, n. 55; Barral-Vinnals *id.*

<sup>60</sup> McKeever, *op. cit.*, n. 1.

<sup>61</sup> Arnstein, *op. cit.*, n. 49, p. 217. There is a substantial political science literature on the concept of participation; we focus here on McKeever’s adaptation of the concept. See McKeever, *op. cit.*, n.1 for further discussion of the political science literature.

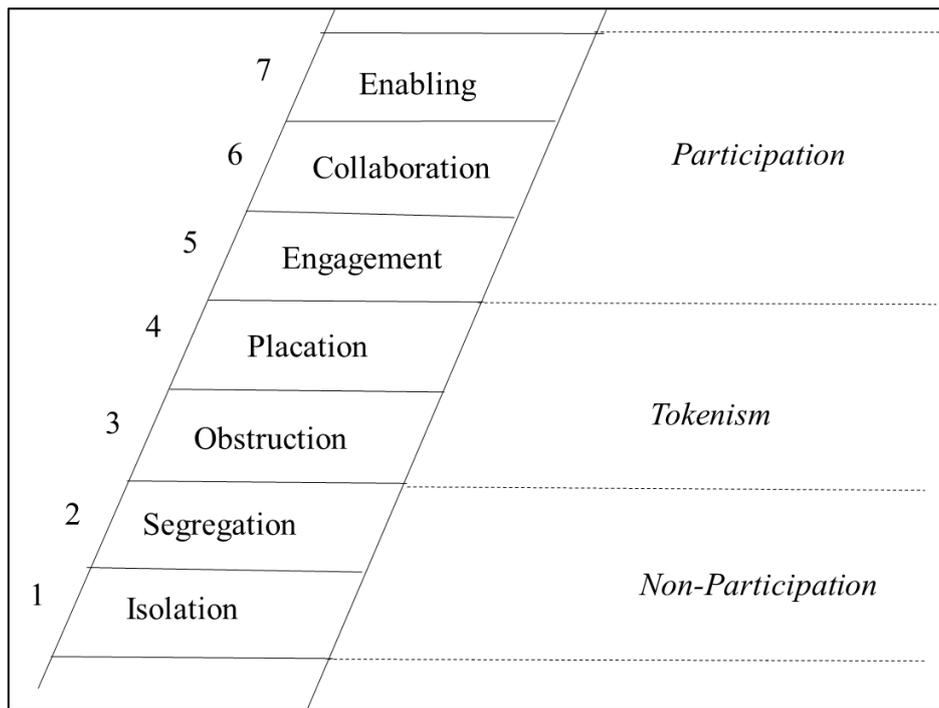


Figure 1: McKeever's (2013) ladder of legal participation<sup>62</sup>

Before describing the LLP in more detail, it is helpful to outline some of the similarities between the tribunal and consumer ADR settings, since these are important in justifying our decision to use the LLP. First, both tribunals and consumer ADR schemes are said to improve access to justice by offering a cheaper, quicker, and more accessible alternative to the courts. Second, they both tend to deal with disputes between individuals and large organisations that are likely to be repeat players and where there is inequality of power and resources. Third, they both offer (at least in theory) more inquisitorial and flexible forms of dispute resolution focused on user needs. Fourth, they have also both effectively replaced the courts as the primary mechanism by which consumer or administrative disputes are resolved in certain areas of large scale disputing. Finally, both forms of dispute resolution have attracted concerns, tribunals with regard to whether informal procedures mask injustice<sup>63</sup> and consumer ADR with regard to whether the privatisation of consumer disputes results in consumers receiving second class justice.<sup>64</sup>

Turning now to a more detailed description of the LLP, non-participation is represented by the bottom two rungs of the ladder. Isolation is the lowest rung, where users are isolated

<sup>62</sup> McKeever, op. cit., n. 1.

<sup>63</sup> McKeever, op. cit., n. 1.

<sup>64</sup> Eidenmueller and Engel, op. cit., n. 20; Wagner, op. cit., n. 20.

from decision making in an intellectual, practical and emotional sense. In this situation, users may be unaware of the option of taking part or view participation as futile due to a perception that a process is biased against them (isolation) or that their role is secondary (segregation). It includes users who have unsuccessfully attempted to engage and for who a sense of futility has developed.

The next two rungs relate to tokenism and include obstruction and placation. At the obstruction stage, the user may be able to take part, but meaningful participation is obstructed in various ways. A classic example of this is referral fatigue where the user is passed from one person to another.<sup>65</sup> It also includes being delayed and being misinformed. These are all examples of practical barriers to engagement.

Finally, participation is reflected in the top three rungs of the ladder which include engagement, collaboration, and enabling. A collaborative and enabling approach ensures that participation moves beyond simple engagement to embrace a more cooperative approach putting the user at the heart of the decision making. McKeever notes that it is debatable whether a model designed for the political arena is appropriate in a public law context since participation in a legal context does not usually mean sharing decision making power. In contrast, for some forms of ADR such as mediation where parties have a high level of control over process and outcome, it should be relatively easy to satisfy the higher levels of participation envisaged by the ladder. However, McKeever also shows that participation is possible even in more adjudicative settings such as tribunals by, for example, tribunal members and tribunal staff putting users at their ease and adopting a more inquisitorial approach to the provision of evidence.

Overall, McKeever argues that the LLP allows for the identification of intellectual, practical, and emotional barriers to effective participation in tribunal hearings and is an effective tool to support individuals to participate genuinely rather than simply being an object of the tribunal process. The next part of the article moves on to test whether the LLP can usefully be applied in the context of consumer ADR, by using it as a framework for analysing qualitative interviews with consumers who have used ADR.

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<sup>65</sup> For example see P. Pleasance and N. Balmer 'The Audacity of Justice : Recession , Redundancy Rights and Legal Aid.' (2010) 9 *Social Policy and Society*. 475; G. McKeever *Supporting Tribunal Users Access to pre-hearing information, advice and support in Northern Ireland* (2011).

## EMPIRICAL CASE STUDY

### 1. Methodology

The data presented below was gathered as part of a research project commissioned by Citizens Advice.<sup>66</sup> Thirty three semi-structured telephone interviews were conducted between January 2017 and March 2017 with consumers who between them had used eight different consumer ADR schemes.<sup>67</sup> Interviews lasted on average 33 minutes. The aim of the interviews was to understand how consumers perceived and understood the end-to-end journey of their dispute: how they found out about ADR schemes, what they expected, what happened during the process, and how they evaluated their experiences at the end. While statistical generalisation was not the aim, the research sought to achieve a balanced sample by including interviewees who had received both favourable and unfavourable outcomes in relation to their complaint. This involved working with five ADR schemes to help create a database of potential interviewees. The sampling frame was consumers whose complaints had been closed within the previous six months and included a range of outcomes. Due to some difficulties in securing consent to participate from consumers, the interview sample was boosted using a database of consumers who had approached Citizens Advice and been referred to ADR.<sup>68</sup>

The final sample consisted of 58% males and 66% was over fifty five. Nobody interviewed was under the age of twenty five. While this inevitably meant that some groups were overrepresented, the sample was reflective of the type of user ADR schemes usually attract, namely: male, retired, and with a higher than average income.<sup>69</sup> The value of claims ranged from £10 to the cost of a new car. In terms of perceived outcome, 50% of the sample perceived the outcome to be favourable, 34.4% mixed, and 16.6% unfavourable. Uphold rates vary across schemes and from year to year. In 2016/17 the Financial Ombudsman Scheme reported an uphold rate of 34% (compared to 43% the year before).<sup>70</sup> Ombudsman Services

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<sup>66</sup> [Citation removed to anonymise paper]

<sup>67</sup> In total 37 interviews were conducted of which 33 had used an ADR scheme in the previous six months. ADR schemes that had been used by participating consumers included: Ombudsman Services: Energy, Ombudsman Services: Communications, the Motor Ombudsman, the Dispute Resolution Ombudsman, the Retail Ombudsman, the Financial Ombudsman Service, and the Communication and Internet Services Adjudication Scheme, and the Glass and Glaziers Federation.

<sup>68</sup> As a result, this meant that some of the consumers we spoke to had also used the Financial Ombudsman Service, the Communications and Internet Services Adjudication Service, and the Glass and Glaziers Federation and some had also used more than one scheme.

<sup>69</sup> Creutzfeldt, *op. cit.*, n. 4; BEIS, 2018, n. 3, p. 4 and Hubeau, *op. cit.*, n. 9.

<sup>70</sup> <<https://www.financial-ombudsman.org.uk/publications/annual-review-2018/PDF/data-in-more-depth.pdf>> p. 61.

reported in 2017 uphold rates of 58% for communication complaints<sup>71</sup> and 63% for energy complaints.<sup>72</sup> Generally, therefore, the mix of favourable and unfavourable outcomes in our sample was broadly in line with that reported by some of the major UK consumer ADR schemes.

Data was uploaded to Nvivo, coded and analysed. The initial analysis was focused on identifying naturally occurring themes and categorised using Miles, Huberman and Saldana's 'thematic analysis'.<sup>73</sup> The commissioners of the research were interested in gaining a qualitative sense of the consumer journey through ADR and, therefore, the initial data analysis grouped consumers' experiences into those that fell before, during, and after the use of ADR. This provided a helpful framework for describing consumer experiences to a policy audience interested in how consumers viewed their end-to-end journeys. As noted in the introduction, participation emerged as a dominant theme when looking at our data again following completion of the commissioned research project. This led us to search for and identify relevant theoretical frameworks, with McKeever's framework selected for the reasons outlined in the introduction (its adaptation to legal disputes and the sufficient similarities between the disputing contexts). Having identified the LLP, we returned to our data, seeking to identify how it co-related to the LLP and looking particularly for negative cases and evidence that suggested that participation was not important or that the way the LLP conceptualised participation was not borne out by our data. Our initial codes were systematically compared to McKeever's framework and the data subjected to secondary coding. The aim of this analysis was to test the relevance of McKeever's model and to gauge whether it provided a helpful and illuminating means of analysing and understanding consumer experiences of ADR. In particular, McKeever's framework was drawn on and used in order to provide a language and analytical context in which our data could be meaningfully discussed.

There are a number of limitations. First, the data are exploratory and were not gathered for the purpose of exploring how a participatory justice model could be applied in the context of consumer ADR. That said, this presents an advantage in terms of testing the LLP, since the data provide a test case for exploring the utility of the framework in future research and in the consumer ADR context. Second, due to the tight timescales required by the research

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[https://assets.ctfassets.net/46t2drav2f3e/5CzzPpbboWwO2o8yOO2KIc/bee982863d249a3b2b5e3303576b4530/1118-comms-report-2017\\_\\_1\\_.pdf](https://assets.ctfassets.net/46t2drav2f3e/5CzzPpbboWwO2o8yOO2KIc/bee982863d249a3b2b5e3303576b4530/1118-comms-report-2017__1_.pdf) p. 4.

<sup>72</sup>[https://assets.ctfassets.net/46t2drav2f3e/2fTLGLYqHamM8iI2uQQ4cM/76c5f88c00f529e02b12f6351c81bd e4/1118-energy-report-2017\\_\\_1\\_.pdf](https://assets.ctfassets.net/46t2drav2f3e/2fTLGLYqHamM8iI2uQQ4cM/76c5f88c00f529e02b12f6351c81bd e4/1118-energy-report-2017__1_.pdf) p. 4.

<sup>73</sup> Miles, Huberman and Saldana, *op.cit.*, n. 47.

commissioner, the interview schedule was fairly directive in order to speed up analysis. There are likely to be additional questions or probes that we may have used had participation been an explicit construct in the initial data collection and had more time been available. Longer interviews may have allowed for greater data saturation, albeit the analysis confirmed that few new themes emerged towards the end of the data collection. An example of where greater saturation may have been achieved is in relation to data indicating non-participation; as noted below, the amount of data we collected made it difficult to distinguish entirely between the LLP's sub-categories of segregation and isolation. Third, although, as noted above, the sample did not aim to be representative, the consumers interviewed had used only a small number of ADR schemes most of which were consumer ombudsman schemes. As a result, there may be important insights missing from the sample, particularly considering the broad range of ADR types and settings that exist in the UK.<sup>74</sup> Finally, asking consumers to reflect back on their complaint was inevitably influenced by a variety of factors including whether their complaint was upheld, memory loss, and retrospective bias. While such concerns are common to research in this area, it is a limiting factor when considering the data presented below.

## 2. Findings

In this section we use the LLP as a framework for analysing consumer experiences of ADR and structure our discussion of the data accordingly.

### *(a) Participation: engagement, collaboration, and enabling*

The LLP recognises three levels of participation – engagement, collaboration, and enabling. 16 (48%) interviewees' experiences were categorised as being within the 'participation' rung of the ladder. The LLP proposes that engagement involves active participation by users but recognises that it can also encompass more passive forms of participation, such as having access to information that is clear, concise and understandable. In terms of engagement, a number of interviewees referred to the efficiency of the process and that they found the complaints process "*straightforward*" and "*easy to do*", and the paperwork "*perfectly clear*".

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<sup>74</sup> OFT, op.cit., n. 12; Gill et al, op.cit., n. 4.

*“They haven’t put any obstacles in the way of the complaint at all, they’ve dealt with my complaint with ease, they’ve you know, kept us informed all times.” (Teresa)<sup>75</sup>*

Some interviewees thought the ADR scheme could perhaps do more. For example, it could have been quicker or more proactive, especially in terms of whether the businesses had given the remedy they had agreed too. But, overall, people interviewed and who had received a favourable outcome were happy with the experience and felt that complaining to the ADR body had been worthwhile despite some niggles. As long as the consumer’s complaint was upheld, they were willing to overlook any minor issues along the way.

*“I found it quite straightforward and quite easy and very well regulated. I have no complaints about them at all. It could have been a bit more pushy. They could have chased it up... It was always left to me to contact them.” (Isa)*

While the degree of participation was perceived by interviewees as acceptable because their complaint was upheld, it is less clear that this level of participation would be enough if the outcome was not in their favour. Some recognised that they may not have been so happy with the experience if their complaint had not been upheld. The procedural justice literature discussed earlier suggests that decision acceptance is more likely if the process used is perceived as fair, but the evidence for this was limited in our study. Here, in only one case did someone who perceived a decision to be unfavourable, explicitly state that the quality of the process helped him to perceive the outcome as more legitimate.

*“I think it's the beauty of the service that despite the ruling against me I have absolutely no complaint. I guess the person who handled it because he was .... was exceptional. He would talk, discuss, make things clear and ... he was able to show me a perspective which I'd missed.” (Dev)*

The LLP refers to the next level of participation as collaboration and defines it as a cooperative venture between the parties, where users are supported in their efforts to work together. In tribunals, this means informal and accessible hearings which do not rely on judicial trappings and where users’ expectations and understandings of the process are captured at the start and

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<sup>75</sup> Interviewees are referred to by pseudonyms to protect their identity.

used as a starting point to help them through the process. It also includes working with users to identify the type of support that would be useful. In our data, there was a strong sense that consumers thought it was important that consumer ADR schemes had listened and understood the situation, that clear explanations were given of what had happened, and that, overall, they were left with the feeling that it was worth complaining.

Use of the telephone and ease of contact were important here, facilitating participation by giving consumers the opportunity to explain what mattered to them and provide clarification. It was effective in ensuring a shared understanding of the complaint and in overcoming concerns that the ADR scheme did not understand what the problem was. The quotation below highlights the importance not only of voice, but of a two way facilitation enabling both parties to hear and understand each other. Interestingly, those interviewees who fell at the opposite end of the ladder commented on the absence of these elements (see below).

*“For me going to the Ombudsman was kind of the last resort ... I’d struggled so far with the businesses that I’d spoken to beforehand. And I think to a certain extent they achieved that, you know, being able to just pick up a phone and talk to someone and just understand where your complaint is and to be able to supply evidence easily and to just be able to get the message across quite easily and talk to someone personable, you know, and that’s a huge benefit.”*  
(Conal)

*“There was a problem with an email [from the ADR body], it was very clinical, .... I felt that they didn’t capture what I said ... I was just a little bit concerned when I received that, but when he [the ADR staff member] explained everything that was fine.”* (Farzana)

Many interviewees were confident that their complaints would be upheld. They often had long journeys before they got to the stage of complaining to the ADR body. External vindication by an independent scheme was seen as particularly important.

*“I didn’t know what the result was going to be, but, you know, when I had this telephone conversation with the lady at the service, she understood what I was saying and realised that there was something going on that wasn’t right. And that gave me confidence that she was going to deal with it properly. Now that didn’t give me confidence that she was going to come down on my side, because you’re never confident until you get there are you. But at the same time, I felt as though, right, that’s off my chest now, which is one thing, and I felt that it was*

*going to be dealt with by people that understood the situation really and had the wherewithal to come up with an answer.” (Harry)*

Enabling, the top rung of the ladder, involves empowering users to participate as equals, including a degree of self-determination. In terms of enabling, ADR schemes might question the extent to which an enabling role is either desirable or achievable, as they are not consumer champions and emphasise their impartiality. Impartiality is also an essential criterion for approval in terms of the Directive on Consumer Alternative Dispute Resolution 2013/11/EU. There was evidence that some schemes supported consumers while being impartial, although there was also evidence that some consumers believed that the organisation had taken up the complaint on their behalf.

*“You know, you just feel that it is impartial in one way but you feel helped in the other.” (Vanessa)*

*“I think to be honest, if anything, it felt like they were complaining on behalf of myself so they were representing... my point of view.” (Andrew)*

#### *(b) Tokenism: obstruction and placation*

The middle two rungs of the LLP relate to tokenism and include obstruction and placation. At the obstruction stage, the user may be able to take part but meaningful participation is obstructed. As noted above, examples of this are referral fatigue where the user is passed from one person to another, being given misinformation, and delays. 11 (33%) interviewees had experiences that were categorised as falling within the tokenism rung of the ladder.

A common theme from our data was that there is often a delay between lodging a complaint and the complaint being investigated. Many commented on this aspect of the process negatively, including those whose complaint was upheld. Research has also found that even though ADR processes are shorter (and cheaper) than the courts, 31% of consumers indicated that it took longer than expected compared to just 13% of consumers who used the court.<sup>76</sup> Our interviewees thought that the process took longer than it should have and they had to chase too often to find out what was happening.

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<sup>76</sup> BEIS, *op.cit.*, n.3 p. 21.

*“Because really I had to press, press, press all the time.” (Neil)*

Referral fatigue was also evident particularly when it came to appealing decisions.

*“So I thought speaking to the Ombudsman would wrap it up, when in fact, all it was doing was starting a whole new chain of events and putting me back to the beginning again, essentially.” (David)*

The LLP describes placcation as occurring when the person is given assistance which does not really help them. Examples include being given complex and voluminous information and the use of jargon, which create intellectual barriers to participation and some interviewees commented on this too as a barrier to participation.

*“But, it was all jargon and legal stuff, so you give up in the end, don’t you?” (Carol)*

Barriers to participation also included the absence of an opportunity to speak to someone at the ADR scheme and reliance on paper records. In those schemes which did not use telephone communication regularly, it was clear that interviewees wanted to speak to someone about their complaint and worried that the ADR scheme would not otherwise understand their complaint. Relying on written communication was described as *“clinical”* and, even if they were able to complete them satisfactorily, some commented that they did not think it was an easy process and that others may struggle.

Another issue relating to placcation was the fact that, even if the complaint was upheld, some felt the remedy did not suit their circumstances particularly if the remedy included credit against an account or a credit note. Deciding on a remedy appeared to be an opportunity lost in terms of the active participation of the consumers. On the face of it, these complaints had been upheld, but many consumers were dissatisfied with the proposed resolution. Some consumers perceived this as demonstrating a lack of interest in the final outcome of the complaint by the ADR scheme, but rather than challenging this, they gave up. Some consumers also experienced difficulties in the business doing what was agreed and again this appeared to contribute to the perception that there was a lack of interest in the remedy.

*“I felt at that point, I don’t know whether the Ombudsman has a standard procedure or a standard compensation package where they tick all the boxes and go, right, recommendation*

*is a £100 credit because that's the standard compensation number and a letter. You know, they've ticked the boxes and then everyone's happy but they don't actually think, oh, hold on, that's not going to work." (Grant)*

The traditional approach to this in the literature is to suggest a conversation in the early stages of the complaint in terms of identifying what the consumer hoped to get out of the complaint and managing expectations in terms of whether that remedy was likely to be achievable.<sup>77</sup> In some cases, the interviewees did not have a good understanding of the relevant law and / or were looking for a remedy that may not be possible. This lack of understanding of how dispute resolution works and what consumer ADR schemes can deal with echoes the intellectual barriers McKeever highlights as impediments to resolving disputes. It also relates to research which suggests that consumers do not know their rights and may overestimate them.<sup>78</sup> Imposing a legal solution was seen by some consumers as very unsatisfactory. Consumers were very frustrated to find out, at the end of the complaints process, that certain remedies were not possible and thought more could be done to make them aware of this at the start of their complaint.

*"I think clarity right up front saying, this is the only aspect we can be looking at ... rather than wasting their time as well as mine." (Ellie)*

In addition to signposting earlier to other more appropriate organisations, a more participative approach could include collaboration in the early stages to identify different possibilities rather than simply "managing expectations".

### *(c) Non-participation: isolation and segregation*

Non-participation is represented by the bottom two rungs of the LLP. Segregation occurs where users feel that they are part of the dispute resolution process but their role is inferior or secondary and not central to the decisions being made. Users are attempting to engage with the process and feel that they are participating up to a point, but are unable to progress beyond this

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<sup>77</sup> Gilad, *op.cit.*, n. 4; M. Bismark, M. Spittal, A. Gogos, R. Gruen and D. Studdert, 'Remedies Sought and Obtained in Healthcare Complaints'. (2011). 20 *BMJ Quality & Safety* 806; Creutzfeldt, *op.cit.*, n. 4.

<sup>78</sup> C. Denvir, N. Balmer, P. Pleasance, 'When legal rights are not a reality: do individuals know their rights and how can we tell?' (2013) 35 *J. of Social Welfare and Family Law*, 139.

point. Arnstein referred to this stage as therapy where the organisation supposedly seeks to involve citizens but the true aim is to “cure” them of their views.<sup>79</sup> As with other rungs, there is inevitable overlap between segregation and isolation. In terms of our interview data, it was particularly difficult to distinguish isolation and segregation due to the small sample size within this category and therefore we have dealt with them together. 6 (19%) interviewees’ experiences were categorised as falling within the non-participation rung of the ladder.

In terms of segregation, a number of issues emerge in our data. In the tribunal context, McKeever points out that segregation includes the economic difficulties of accessing tribunals due to lack of funds or representation. The majority of Consumer ADR schemes are free in the UK and legal representation is unusual. What did emerge was a perception among those who did not receive a favourable outcome that the ADR scheme “*lacked interest*” in their complaint, that they didn’t investigate anything, and that their complaint was a burden. This reflected the perceived power imbalance between the consumer and the ADR provider, who prioritised their own interests over those of the consumer leaving the consumer feeling segregated.

*“Really the perception that I got was that we’ve too much work on, we haven’t got enough caseworkers, we’ll get to it when we can and then when they get to it, its here’s the decision. If you don’t like it you can do this, but just to let you know, it’s not likely to make a great deal of difference.” (Rosa)*

*“They don’t want to spend time investigating things, they just gloss over it.” (Jenna)*

In terms of participation being illusory, this was suggested by the fact that despite the majority of those interviewed having a mixed or negative experiences in terms of outcome, few consumers challenged these outcomes by seeking to have the decision reviewed. They also did not revert to the court, despite being aware this was an option. Overwhelmingly, the reason they did not pursue their complaint was that they did not think there was any point. Where the only remedy was to submit a claim in court, this seemed to cause frustration since at least some consumers were looking for a different type of solution when using consumer ADR.

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<sup>79</sup> Arnstein, op. cit., n. 49, p. 218.

*“The Ombudsman believes that they’ve helped me as much as they can, in getting my contract cancelled. And no matter how much I explained to the Ombudsman that that means you haven’t done anything, they weren’t having it ... They just made [company name] exercise my legal rights.” (David)*

Communication between consumers and the ADR schemes influenced perception of fairness. Users were very frustrated if they felt that they were not being listened to and understood. Using terminology that was similar to the organisations been complained about – and the perception that there was no compromise – were mentioned by interviewees as leading to a perception of “*them and us*”. The lack of compromise also suggested that consumers rate the opportunity to influence substantive outcomes as a means of participation, but this was not often reflected in practice.

*“The Ombudsman sounded like a [company name] call handler, if I’m honest, when he was talking.” (David)*

*“I was so dissatisfied because ... I do have the ability, I would think, to remain objective ... But the whole thing, there was never any compromise in it. There was never any leeway. The whole thing just appeared to me to be one-sided, hence I’ll never go through ADR again.” (Rosa)*

Isolation is the lowest rung of the LLP, where users are isolated from decision making in an intellectual, practical, and emotional sense.<sup>80</sup> In some situations, isolation takes place because users are unaware of the option of taking part. However, it also includes users who try unsuccessfully to engage and subsequently feel a sense of futility. Isolation also includes those whose experience of using ADR has lead them to believe that the scheme is biased or against them.

In terms of our interview data, isolation was more closely associated with those interviewees whose complaints had either not been upheld at all or who had a mixed outcome. They expressed shock, surprise, and a sense of futility when the outcome was not in their favour. There was a strong sense from some consumers that they would not engage with consumer ADR again in the future.

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<sup>80</sup> McKeever, op.cit., n. 1.

*“I was flabbergasted. I know it's probably not a word in the Oxford English but, you know, just absolutely shocked at what they came up with at the end.” (Michael)*

The perceived lack of independence of the scheme featured heavily in the reasons why consumers were disengaging. They did not believe the scheme was impartial and this impacted on individual perceptions of the fairness of the proceedings. For some consumers, the process was seen as favouring business. There was, in their view, an absence of equality of arms. Again, the perception that schemes were biased was sometimes linked to a misunderstanding of the role of ADR (for example they expected the ADR body to act as an advocate). There was a strong sense that effective participation was not possible.

*“Again I just felt really strung along, and I think, now it's coming back to me, I just felt they weren't on my side at all, they were on [company name] side and they were just supporting [company name] and not me.” (Eva)*

*“But the way I see it now is that they are actually working on behalf of the ... companies .... From my own personal experience they are definitely biased, they're trying to get the best arrangement that causes the least amount of damage to the company and to move things on quickly and shut up the complainant as quickly as they can.” (Jenna)*

Generally, intellectual, practical, and emotional barriers to participation were in evidence among those interviewees who experienced non-participation. Intellectual barriers included misunderstandings about the role of ADR bodies or how the law applied to their particular complaint, which meant that they could not meaningfully participate. Practically, consumers expected something else from ADR, such as an advocate or someone that would go beyond the law to help resolve their grievance. A perceived absence of communication by the ADR body was a clear practical barrier to participation and was the exact opposite for those interviewees who had felt high levels of participation. Emotionally, consumers who experienced non-participation felt that their high levels of emotional engagement were met with passivity and disinterest. This included a perception that the ADR body aped the bureaucratic and legalistic approach which they had experienced from the company they were complaining about, leading ultimately to apathy and disengagement about pursuing issues further.

## **DISCUSSION: THE VALUE OF PARTICIPATION AS A FRAMEWORK FOR CONSUMER EXPERIENCES OF ADR**

The purpose of this article has been to consider whether a participatory model of justice, specifically the LLP, provides a helpful framework for analysing how consumers experience ADR. McKeever questions whether a model designed for the political arena can be applied to the public law context; in turn, we have asked whether it could be further extended to a private law context and to alternative systems of dispute resolution. Having identified limitations with procedural justice theory in the consumer ADR context and some *prima facie* theoretical indications that participation may provide a helpful supplementary framework, the article has then tested the utility of the LLP as a means of analysing and understanding consumer experiences through secondary analysis of a qualitative data set. In this part of the article, we discuss the findings of the empirical case study presented above and draw a number of conclusions about the value of using participation as an analytic framework for understanding consumer ADR.

First, overall, the data confirm that participation is important for consumers. Given the low value and transactional nature of many consumer disputes, and the fact that current consumer ADR systems conform to a low-participation approach, this finding is perhaps surprising. However, consumers who received a favourable outcome emphasised the importance of participation in explaining their positive experiences and, similarly, consumers who had received mixed or unfavourable outcomes emphasised a lack of participation when describing their more negative experiences. The data show that consumers experienced low levels of participation in situations where they: did not feel listened to; did not feel the ADR body had understood their problem; were not able to speak to someone; and where they did not receive clear explanations. Conversely, consumers who experienced high levels of participation were more likely to comment positively on exactly the same features. An initial conclusion, therefore, is that consumers appear to expect high levels of good quality participation in their interactions with consumer ADR bodies and that the relatively low value of their claims does not appear to lower those expectations.

Second, the data show a strong relationship between outcome and perceptions of the quality of participation experienced. Our data, therefore, echo Creutzfeldt's<sup>81</sup> findings: outcome effects appear to be significant in the context of consumer ADR, and perceptions of

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<sup>81</sup> Creutzfeldt, *op. cit.*, n. 4.

process and outcome are closely intertwined. In our view, using participation as a framework for analysis is helpful here, because it is not limited to procedural justice theory's attempts to explain decision acceptance and legitimacy by separating out process and outcome. Since participatory models emphasise that participation is important in both procedural and substantive terms, the focus shifts from considering the relationships between process and outcome to considering the underlying and unifying concept of participation as a lens to understand consumer experiences. This lens appears particularly fruitful in qualitative work, where the aim is not statistical prediction, but the development of rich descriptions of people's everyday experiences of justice. While participatory models do not help to explain why outcome effects are stronger in the consumer ADR field, they provide a rich and analytically fruitful means of discussing consumers' experiences and understandings of ADR. This is helpful because it takes us beyond the apparent dead end which procedural justice leads to in the context of consumer ADR: if it is right that procedural justice theory loses some of its predictive power in the context of consumer ADR, we need other analytic tools to explore consumer experiences here. The paragraphs below further discuss the utility of participation as one such tool.

Third, and connected to the discussion of process and outcome directly above, since participatory models of justice are not limited to considering participation as a process value, they can also shed light on the extent to which systems of dispute resolution provide for participation in shaping outcomes. Proponents of forms of ADR such as mediation often argue that its value lies in the fact that parties control both the process and outcome of dispute resolution: they participate not only in the course of resolving the dispute but they participate in the outcome itself.<sup>82</sup> In developing the LLP, McKeever notes that this aspect of participation creates some problems when applied to tribunals, since that form of third party adjudication does not provide for participation by the parties outwith of procedural participation. The question here is whether consumers feel any sense that – in the consumer ADR context – they are given opportunities to participate in shaping outcomes. Our data suggests that the answer to this question is negative: even where consumers received favourable outcomes, there was no suggestion in the interviews that consumers had been involved in shaping outcomes and remedies. In some cases, our data explicitly showed that – even where a remedy was provided – consumers often felt it was inadequate to their personal situation, suggesting that participation in shaping outcomes had not occurred.

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<sup>82</sup> Menkel-Meadow *op.cit.*, n. 52; Charkoudian, Eisenberg, and Walter, *op.cit.*, n. 53.

One insight that arises from applying a participative model of justice in this context, therefore, is that there may be potential to move consumer ADR towards an approach that allows the parties to participate more actively in shaping the outcome of the dispute. This would require a shift away from the largely adjudicative paradigm that dominates consumer ADR towards one that is closer to mediation. Providing the parties with greater agency in relation to shaping outcomes might help to overcome the problem discussed above in relation to the close intertwining of process and outcome in terms of how consumers experience ADR. On the other hand, the large power differentials in consumer ADR settings and the fact that outcomes often need to reflect the legal rights and obligations of parties, presents some limits in moving towards active participation in determining outcomes. There may, however, be ways of involving consumers more closely, for example, by asking them at key stages how they would like the dispute resolved or by consulting them on potential outcomes and seeking to draw on consumers' suggestions to the extent that this is possible within legal constraints. Since one of the rationales for ADR is to provide solutions that are more flexible and that go beyond the law in terms of recognising why consumers might feel aggrieved, our data suggest that there is potential for ADR schemes not only to enhance their attempts to deliver genuine participation in procedural terms, but to find ways to enhance participation in substantive outcomes.

Fourth, by helping us understand what consumers expect from ADR, participatory models provide a useful means of addressing the gap that has been identified in several studies between what consumers expect and what they get from ADR.<sup>83</sup> Clearly, not all consumer expectations can be met, particularly with regard to outcome, however, the long term legitimacy of ADR as a form of dispute resolution requires that the gap between consumers' expectations and the reality of their experiences be addressed. Currently, those consumers who do not get a favourable outcome are left feeling bruised and dissatisfied by their experiences, with ADR contributing to their negative experiences.<sup>84</sup> One of the challenges here is that consumers do not necessarily share the same expectations and not all want the same things. Dispute resolution systems need to be sensitive to those differences.<sup>85</sup> However, it is significant that our data show broadly similar expectations regarding participation in ADR and a recognition across our sample of the value of participation. Indeed, genuine participation and

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<sup>83</sup> Gilad, *op.cit.*, n. 4; Creutzfeldt, *op. cit.*, n. 4; BEIS *op.cit.*, n. 3; Gill and Creutzfeldt, *op.cit.*, n. 19.

<sup>84</sup> Barral-Vinnals *op.cit.*, n. 59; M. Hagan, 'A Human-Centered Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Intervention to Make Courts User-Friendly,' (2018) 6 *Indiana J. of Law and Social Equality* 199.

<sup>85</sup> Hagan, *id.*

feeling that a complaint has been taken seriously seemed to be at the heart of consumers' expectations.

Fifth, while the means of closing the expectations gap has been described in previous literature as a bureaucratic process of “expectations management”,<sup>86</sup> participatory models provide a fresh lens through which to view such approaches. Bismark *et al* argue managing expectations involves a two tiered approach: (1) understanding consumer wants and delivering them; and (2) if consumer expectations are unrealistic, reducing them. In practice, managing expectations can be dominated by the second aspect, ignoring what is important to consumers.<sup>87</sup> Arnstein's original model referred to the “segregation” stage as “therapy” where, on the face of it, the organisation seeks to involve the citizen but their true aim is to “cure” them of their views. There appears to be a risk that “managing expectations” could have the same effect and the LLP provides a helpful framework to guard against this by keeping the focus on participative elements. By emphasising distinctions between genuinely participative and tokenistic approaches, the LLP provides a means of avoiding the risk identified by Nader<sup>88</sup> that complaint mechanisms such as ADR provide a means of diverting and pacifying consumers. Indeed, there were strong suggestions in our data that consumers could experience ADR as “placatory”, “disinterested”, and “box ticking”. This issue is at the heart of the dilemma faced by consumer ADR bodies. As mechanisms for dealing with high volumes of low value disputes, they clearly require standardised approach and there are limits to the amount of personal attention that can be given to each individual case. The ADR model, in the UK at least, has also involved shifting the costs of dispute resolution onto industries, rather than publicly funded courts. While there may be advantages in that shift, it undoubtedly creates pressures on ADR bodies to present themselves as cost effective. The reality is that participation costs money and that current approaches perceived as non-participative or tokenistic by consumers are a feature of a model that – at least in part – seeks to provide a cheap alternative to courts.

Sixth, our data show that the form of participation that consumers are looking for from ADR bodies is not necessarily the same as from court proceedings, for example, in terms of being able to speak to someone to tell their story, receive an explanation, and in receiving an appropriate (not necessarily legal) remedy. Our data also show that – rather than expecting

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<sup>86</sup> Gilad, *op.cit.*, n. 4; Creutzfeldt, *op. cit.*, n. 4.

<sup>87</sup> C. Gill ‘Reimagining public sector complaint systems’ (2018) *UKAJI*, <<https://ukaji.org/2018/10/03/re-imagining-public-sector-complaint-systems/>>.

<sup>88</sup> Nader *op.cit.*, n. 22.

limited participation in consequence of the relatively low value of their claims – consumers who had made it all the way to an ADR body tended to be highly motivated and to expect to be closely involved in the resolution of their disputes. Indeed, consumers who complain to ADR bodies are not typical consumers and tend to be older, richer, educated and male<sup>89</sup> and this was also true of our sample. More generally, research suggests that consumers are more likely to complain if they have a favourable attitude to complaining<sup>90</sup>; and that emotions are also a driver for complaint behaviour.<sup>91</sup> This suggests that consumers who do complain are strongly emotionally invested in their complaints and do not see them as transactional matters even if the original issue that led to a complaint could be described in that way. The strong emotions reflected in our interviews – both the delight of those whose complaints had been upheld and the shock of those whose complaint had not been – demonstrates this quite clearly. This indicates that consumers have expectations in terms of a participatory process which current approaches to consumer ADR may not always be able to satisfy.

## CONCLUSION

In conclusion, the LLP provides a helpful framework for analysing consumer experiences of ADR and for providing a more theoretically informed analysis of the way in which consumer ADR processes are experienced by those using them. In our case study, the LLP allowed for the identification of processes and practices which led participants to believe that their views were being taken into account, allowing for clear distinctions to be made across the three main areas of the model: participation, non-participation, and tokenism. The LLP provided for fresh insights, by allowing for discussion of consumer experiences in a way that dealt with both procedural and substantive concerns and by highlighting limitations in the current ADR paradigm. In particular, the LLP provided the basis for clearly identifying the lack of focus on participation in shaping outcomes and the dominance of the problematic concept of “expectations management” in the practice of ADR bodies. Perhaps most importantly, applying the LLP to our data showed that participation was important to consumers across our sample. The importance of participation in this context presents a challenge to the current approach, whose working assumption is that consumers will be happy to offload their disputes onto a third party. All of this suggests that the LLP can be fruitfully

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<sup>89</sup> Creutzfeldt, *op. cit.*, n. 4; BEIS, 2018, n. 3, p. 4 and Hubeau, *op. cit.*, n. 9.

<sup>90</sup> Richin, *op. cit.*, n. 9; Singh, *op. cit.*, n. 9.

<sup>91</sup> Chebat and Slusarzyk *op. cit.*, n. 10; Tronvoll 2011 *op. cit.*, n. 10.

applied to research into consumer ADR and can also provide a helpful starting point for ADR bodies seeking to enhance their services.

One important issue in assessing the usefulness of participation as an analytic framework relates to what it adds to procedural justice theory. As noted above, we have not sought to argue that participation provides a superior framework for studying user experiences of dispute processes, but instead that it offers a complementary and supplementary approach. One advantage of the LLP is that it provides an analytic framework that is well suited to qualitative work. Unlike procedural justice theory, the LLP is a descriptive framework which provides a tool for classifying and understanding experiences by reference to a series of interconnected concepts. While the LLP is underpinned by a general normative presupposition that participation is a desired outcome in dispute resolution, it makes no predictions in relation to effects of participation and is therefore more suitable for use in exploratory and theory building work. Another advantage of using the LLP in this study relates to the fact that it is concerned with participation both in terms of process and outcome, rather than considering these as distinct elements. Given what appears to be a much closer relationship between process and outcome in the context of consumer ADR, this feature of the LLP is helpful, and also points to what is perhaps a limitation in current approaches, which do not appear to be making full use of the potential for ADR to produce more flexible, personalised, and participative outcomes for consumers. The focus on procedural participation in procedural justice theory is therefore usefully complemented in participatory justice models by an additional emphasis on substantive participation.

Our conclusion is, therefore, that future research on consumer experiences of ADR could usefully draw on the LLP as a framework for research and analysis. Such research could build on the initial insights we have presented here in various ways. It would be interesting, for example, to examine in greater depth the potential for consumers to participate in shaping outcomes through ADR and to develop this aspect of the LLP in more detail. There would also be benefit in analyses seeking to understand and map out more clearly how participation relates to other values that are important in disputing contexts. Another approach might be to consider participation in particular consumer sectors, rather than surveying experiences across consumer sectors as we have done here. Do levels of participation need to vary to recognise different consumer settings and demographics? There is also potential to use the LLP as a frame for comparative work, perhaps comparing how consumers experience court and ADR processes in terms of participation. It appears that court processes are perceived as more legitimate by

consumers for determining consumer disputes<sup>92</sup> and the ladder may provide a useful lens through which to investigate this further. Given the evidence that national disputing cultures are significant in shaping consumer experiences of ADR,<sup>93</sup> there is also significant potential to apply the ladder in different jurisdictions or in cross-jurisdictional studies. Our study was limited to considering consumer ADR in the UK and there are therefore questions about how the ladder might be applied in other contexts. Overall, we conclude that participation provides an important analytic framework for researchers working on consumer ADR, which can provide insights into consumer experiences and develop more granular and sophisticated understandings of consumer expectations.

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<sup>92</sup> BEIS, *op.cit.*, n.3.

<sup>93</sup> Creutzfeldt, *op.cit.*, n.2.