

**Procedural justice in welfare complaints systems:
A comparative study of Norway and Germany**



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Master's thesis

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Spring 2013

Abstract

The thesis investigates to what extent Norwegian and German complaints systems secure procedural justice for welfare claimants. Complaints systems are important mechanisms for protection of citizen's welfare rights. The large number of welfare claimants affected by decisions made in the welfare administration and the significance of these decisions to the individual are important motivations for this thesis. Moreover, the presence of procedural justice, or lack thereof, may have broader consequences in terms of systemic legitimacy.

The theoretical framework is based on theories of procedural justice. Seven criteria are deduced from the literature which together constitute an ideal type of procedural justice. The criteria include consistency, independence, voice, quality, transparency, timeliness and financial risk. The thesis is a case study of Norway and Germany, including both within-case and between-case analysis. Data is drawn from public documents, existing research, as well as expert interviews of officials from complaints agencies in Norway and Germany. Three goals are addressed: (1) In terms of theory, the objective is to systematize existing research on procedural justice and present a coherent framework applicable to empirical evaluation of real-world institutions; (2) Empirically, the aim is to present the Norwegian and German complaints systems in a comprehensive manner; (3) By merging these contributions, the systemic characteristics are discussed in terms of criteria of procedural justice in order to illuminate strengths and weaknesses of the systems given the theoretical assumptions.

The discussion concludes that: (1) The Norwegian case secures procedural justice with regards to timeliness, and to a large degree on the criteria quality, transparency and financial risk. However, the criteria of geographical and systemic consistency, independence and voice are not fulfilled; (2) For the German case, the ideal of procedural justice is secured with regards to systemic consistency, independence, voice, quality and transparency. The answer to the criteria of geographical consistency and financial risk are more ambivalent, while the timeliness is far from attaining an ideal of procedural justice. The question remains whether there are inherent practical trade-offs in the fulfillment of some of the criteria. Prioritizations of some aspects of procedural justice on behalf of others might prove inevitable and perfect attainment of procedural justice thus infeasible. Further research can *broaden* knowledge through larger comparisons including more cases within the same universe. The empirical effects of the complaints systems should also be further investigated, implying the acquisition of more knowledge in *depth*.

Acknowledgements

Submitting this thesis marks the end of some great years in Bergen and at the Department of Comparative Politics. A number of persons have made important contributions in the process of writing the thesis. I would firstly like to thank my supervisor Stein Kuhnle for being accessible, positive and enthusiastic about my project. Thank you to Cornelius Cappelen for reading several drafts and for providing me with loads of ideas and theoretical clarifications. Anne Lise Fimreite contributed with the specific ideas which determined the topic of this thesis, as well as with access to respondents in NAV. Anneken Sperr has helped me with a thorough review of the German legal system and the German arrangement for legal aid. I would also like to thank all the respondents both in Norway and Germany for taking the time to talk to me.

I am grateful to the research groups *Challenges in Advanced Democracies* and *Citizens, Opinion, Representation* for giving me the opportunity to present chapter drafts. Thanks to Michael Alvarez, Eirik Laastad, Gunnar Grendstad and Jon Kåre Skiple for valuable comments on these drafts. I owe Lise, Stian and my Dad a great thank you for reading and commenting on the entire thesis.

My fellow students deserve thousands of thanks for making the years in Bergen into my best ones so far. Kristian, Øyvind and Lise – I already miss seeing your pretty faces every day. Thanks for good company! Thank you to Hanne for proofreading and for being a great friend. Finally, I owe a big thank you to Mum and Dad for your endless care, support and patience.

Berit Crosby

Oslo, May 2013

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List of abbreviations

CG	County Governor (Fylkesmannen)
FSC	Federal Social Court (Bundessozialgericht)
HSC	Higher Social Court (Landessozialgericht)
LSC	Local Social Court (Sozialgericht)
NAV AU	NAV Appeals Unit (NAV Klageinstans)
QoG	Quality of Government
SST	Social Security Tribunal (Trygderetten)

1. Introduction

1.1 Theme of the thesis

The fundamental idea of the modern welfare state¹ is the belief that it is the responsibility of the state to ensure all citizens a minimum economic standard. Laws on economic welfare started out as a form of gratuity furnished by the state, but the development has been towards legal rights to economic welfare. Implementation of these rights takes place through the welfare administration, and decisions made here often imply administrative discretion, with inherent danger of arbitrary treatment. Although the quality of decision-making in the first instance of the welfare administration is extremely important, the large amount of decisions made here implies that mistakes are inevitable (Calvert 1975: 193). Hence there is a need for complaints systems. Justice is central in this regard, as it is a fundamental value of modern democracies (Marshall 1950, Rawls 1999: 3, Scherer 1992: 2). While distributive justice addresses the substantive welfare schemes and the final distribution of resources, procedural justice is achieved through fair administration of these schemes. This is important because the framing of welfare benefits as legal rights imply the necessity of appropriate procedures for protecting these rights. Procedural justice requires that the procedures satisfy several aspects, which in this thesis are operationalized through the seven criteria consistency, independence, voice, quality, transparency, timeliness and financial risk.

The research question in this thesis is: *To what extent do Norwegian and German complaints systems secure procedural justice for welfare claimants?* The question is examined through a comparative analysis of the complaints systems in the welfare states of Norway and Germany. The complaints systems investigated are those of social assistance and disability benefits in the Norwegian welfare administration (NAV) and the fused benefit of social assistance and long-term unemployment payment in the German Hartz IV. The overarching research question raises several sub-questions: How are the complaints systems organized? Are different ideals and goals prioritized in Norway and Germany? What are the consequences of these eventual differences in terms of procedural justice?

¹In this thesis, the term *welfare state* refers to all welfare benefits related to citizens' economic security, excluding, however, the public responsibility for health and care services. The concepts of *social security* and *social insurance* are used interchangeably to refer to rule- and insurance-based benefits, corresponding to the German concept of *Sozialversicherungen* and the Norwegian concept *trygd*. Finally, *social assistance* refers to an economic safety net based on means-testing, accessible only when all other sources of income are exhausted. In Germany and Norway this refers to, respectively, *Sozialhilfe* and *sosialhjelp*.

1.2 Contributions to existing literature

The thesis has three main goals. Firstly, in terms of theory, the goal is to systematize existing research on procedural justice and present a coherent framework applicable to empirical evaluation of real-world institutions. Further, empirically, the aim is to present the Norwegian and German complaints systems in a comprehensive manner. Finally, by merging these contributions, the systemic characteristics will be discussed in terms of criteria of procedural justice in order to illuminate possible strengths and weaknesses of the systems given the theoretical assumptions. The latter constitutes a substantial contribution to the field of research. A further contribution to existing research is the use of the methodological procedure of applying normative theory on empirical cases. Normative and empirical research is often kept separate, but the combination has several advantages. While the normative theories can be developed and adjusted to what is practically feasible as suggested by empirical research, normative theory can give empirical research purpose and structure. These points make up the academic motivations behind the research question. There are, however, important real-world aspects which also justify the topic of this thesis. Firstly, the large number of welfare claimants affected by the decisions made in the welfare administration and the importance of these decisions to the individual, as welfare benefits often constitute the claimant's only source of income, points to an important motivation for this investigation. Secondly, the presence of procedural justice, or lack thereof, may have broader consequences in terms of systemic legitimacy.

1.3 Structure of the thesis

The thesis is organized in eight chapters. Chapter two presents the background of the research question and the reasoning behind the choice of theoretical framework, starting with a discussion of the welfare state. Esping-Andersen wrote in 1990 that: "The welfare state has been a favored topic of research for many years now" (Esping-Andersen 1990: 1). The interest in the welfare state, as well as the number of different approaches to the study of the welfare state, has only increased since. The more specific area of research in this thesis is welfare rights and their enforcement, namely the administration of welfare benefits. Administrative decisions are often characterized by discretion, implying a danger of arbitrariness. It is discussed how the importance of welfare decisions to the citizens, as well as the high degree of power held by welfare bureaucrats and the mentioned dangers of arbitrariness, make mechanisms for complaints handling necessary. Finally, the theme is

situated within existing research, and the choice of theoretical approach is discussed and justified. The third chapter presents the theoretical framework which forms the basis of the thesis. The chapter starts by discussing concepts of justice, making an initial distinction between distributive and procedural justice. Further, procedural justice is defined more carefully, including the discussion of neighboring and overlapping concepts. The chapter ends with the deduction of criteria of procedural justice. In the subsequent chapter, the methodological choices of the thesis are presented and discussed. This includes the choice of a comparative case study, methods of data collection and operationalization of procedural justice criteria. Chapter five contains data and discussion of relevant contextual factors of the cases studied. This is followed by a chapter presenting the complaints systems of the Norwegian and German cases. Within-case as well as between-case discussions of the complaints systems in terms of procedural justice criteria are provided in chapter seven. The eighth and final chapter contains a summary of the findings and contributions of the thesis, as well as suggestions for further research.

2. The study of welfare state complaints systems

The main motivation behind the research question is the importance of justice in the administration of welfare benefits. A short introduction to welfare state theory constitutes a necessary background. Theories of the welfare state have in various ways tried to describe and explain differences between welfare states, as well as suggesting what effects these differences might have for citizens. The classic contributions of Titmuss and Esping-Andersen are useful heuristics to categorize the Norwegian and German cases, as well as describing and explaining the welfare benefits discussed. Further, theory on welfare rights explain how the development of positive rights to welfare, in contrast to welfare as a privilege, also implies a duty for the state to provide and administrate these rights in a just manner.

Although it is very difficult to provide a neutral definition of the welfare state applicable across different contexts (Kuhnle 1983: 23), and many different definitions of the welfare state are used in existing literature, a central hallmark of the welfare state agreed upon by most scholars is that the state has undertaken significant responsibility for the economic welfare of its citizens (Ohnstad 2011: 18). Welfare includes the public responsibility for income security. The existence of national laws that guarantee a minimum income or minimum benefits for all citizens in the case of illness, disability, old age, unemployment and so on is fundamental to the idea of the welfare state (Kuhnle 1983: 29). The welfare state concept thus alludes to the fact that all citizens are ensured a minimum level of economic welfare by the state, although the exact level and form of these welfare benefits vary between countries and over time (Kuhnle 1983: 27). The variation in materializations of the welfare state is captured in the following quote by Briggs (1961: 231): “Welfare states can and do employ a remarkable variety of instruments, such as social insurance, direct provision in cash or in kind, subsidy, partnership with other agencies (including private business agencies) and action through local authorities.”

2.1 Welfare regimes

Esping-Andersen’s (1990) regime theory is a well-known theoretical framework for discussions of the welfare state.² The theory is based on the observation that there are qualitatively different institutional arrangements between the state, the market and the family

² See Kemeny (1995) and Arts and Gelissen (2002) for objections to and modifications of the regime theory.

in different countries, and that these differences are clustered in what Esping-Andersen terms *regimes*. The three overarching welfare regimes are the liberal regime, the conservative regime and the social democratic regime. *The liberal welfare state* is characterized by means-tested benefits, modest universal transfers, as well as a reliance on residual welfare and social assistance, thus implying a great importance of the market for people's welfare (Esping-Andersen 1990: 22, Titmuss 1974: 141). Benefits are low and often associated with stigma. The United States is considered to be the classic example of this regime (Esping-Andersen 1990: 76). *The conservative regime type*, associated with Germany, France and Austria, among others, is predominated by a focus on status preservation. This means that rights are attached to class and status (Esping-Andersen 1990: 27). The regime is typically formed by ideas emanating from the Catholic Church, and thus seeks to maintain traditional family values. Compulsory state social insurance is central (Esping-Andersen 1990: 22). Universalism is the hallmark of the *social-democratic welfare state*, associated with the Scandinavian countries (Esping-Andersen 1990: 27). According to Arts and Gelissen (2002: 142), social policy within this type of welfare state is "aimed at a maximization of capacities for individual independence."

Esping-Andersen's regime theory builds on the work of Richard Titmuss. Titmuss (1976: 130) suggested a framework for analysis of the welfare state. He states that regardless of the nature of welfare service one discuss, three issues are of central relevance: (1) the nature of the entitlement, that is, whether the entitlement is legally, contractually, financially, discretionary or professionally determined, (2) the rules of entitlement, i.e., who is entitled to the benefit and on what conditions, and (3) the methods employed in determination of access, utilization, allocation and payment.

A central distinction in the discussion of different principles of welfare is between universal and selective benefits. Universalism in welfare policy is a distributive principle associated with equity and redistribution (Kildal and Kuhnle 2005a: 13-14). The principle of universalism implies that the right to social security is guaranteed to all citizens (Andersson and Kangas 2005: 112, Esping-Andersen 1990: 25). This is contrasted with selective policies which are normally targeted at the poor (Kildal and Kuhnle 2005a: 13-14). The fact that selective benefits concentrate help on those whose needs are greatest implies the necessity of a test of need, a means-test, in order to prove eligibility (Titmuss 1976: 132). Selective policies also, however, include insurance-based, reciprocal welfare programs; they include

programs targeted at individuals who cannot provide for themselves, as well as programs restricted to the working population (Kildal and Kuhnle 2005a: 13-14).

2.2 Rights to welfare

Historically, laws on economic welfare grew out of a conception of welfare as a privilege or “gratuity” furnished by the state, and welfare claimants could thus be made subject to whatever conditions the state, in practice the local community, found fit (Reich 1965: 1245). However, the development has been towards clear conceptualizations of a *right* to public assistance (Reich 1965: 1246). There has, in other words, been a “legal reconceptualization of welfare recipients as rights-bearing citizens entitled to quasi-judicial processes for the protection of their rights” (Mashaw 1985: 34). Such rights are based upon the fundamental idea of the modern state that society should take responsibility for those citizens who are not able to take care of themselves (Ohnstad 2011: 17). When benefits are framed as a right rather than a privilege, mechanisms for protecting these rights become necessary (Lens 2007: 384). This implies that there must be a possibility to bring disputes about these rights before an external agency (Hatland 2011a: 154).

Traditionally, there is made a distinction between “negative rights” to be free from state interference and “positive rights” to state assistance (Noonan, Sabel and Simon 2009: 525). Arguments against positive rights to public assistance are that social rights are indeterminate (Noonan et al. 2009: 560), and that they cannot be enforced in a court “because their enforcement requires the courts to make decisions that have large-scale consequences for government budgets” (Tushnet 2003-2004: 1896). This refers to the view of determination of welfare benefits as resource allocation disputes. Such disputes are considered part of the jurisdiction of democratic politics, and hence should not be determined in the judicial sphere (Palmer 2000: 74). However, when a welfare benefit is framed as a positive, legal right, it is no longer a matter of competition for scarce resources; a legally based rights claim cannot be rejected because of budget concerns (Kjønstad and Syse 2008: 103). An important distinction can thus be made between welfare benefits that only provide the right to fight for scarce resources, on the one hand, and positive welfare rights where this competition is not relevant, on the other hand (Kjønstad and Syse 2008: 102-103). When positive welfare rights are established by law, a concomitant entitlement is “to have one’s interests in a public program considered in a process that is responsible and accountable” (Noonan et al. 2009: 561), and it is to this end this thesis is focused.

2.3 Administrative welfare decisions

Distribution of resources according to entitlement lies at the heart of administrative decision-making within the welfare state (Palmer 2000: 73). Decisions are made regarding eligibility and requirements of welfare claimants. Administrative discretion is an important component of these decisions. Discretion implies that the administrative decision-maker can select from more than one option (Handler 1986: 45). When more than one option is possible, the question is whether the correct criteria are used in making the decision or whether the decision is “arbitrary”. Discretion is apparent in somewhat distinct forms in the determination of different welfare benefits. A dichotomy between discretion and rules is often presented (Arts and Van der Veen 1992: 169-170), where rules are assumed to limit or exclude discretion. In the determination of social assistance benefits, decisions are often based on a means-test; services are “tailored to need” (Handler 1986: 51). With social security benefits, on the other hand, the eligibility criteria are rule-based. However, the dichotomy between discretion and rules might be overstated, as “elimination of all discretion by a rule is rare” (Arts and Van der Veen 1992: 169). Rules can leave room for discretion if they are vague or ambiguous. Also more rule-based social security benefits like disability benefits include room for discretion, as they are based on medical assessments. Calvert (1975: 185) stresses that the task of decision-making in both cases is “the same in kind, even if it differs markedly in degree.”

It is generally argued that discretion in the administration of welfare benefits must be accepted as a necessary evil, as it is unrealistic to believe that all aspects of public policy can be regulated through rules (Allan 2001: 15). Discretion in welfare delivery allows for decisions adjusted to individual circumstances (Brodkin 1997: 4, Terum 2008: 72). There are nevertheless inherent dangers of unfair and arbitrary treatment when discretionary decisions are made (Selznick 1980: 14). Adequate safeguards against the misuse of discretion are thus necessary, as “officials, like claimants, are people” (Titmuss 1971: 127) – they are prone to make mistakes. Leventhal (1980: 43) emphasizes the need for mechanisms to modify and reverse allocative decisions, as “even the most well-informed and competent decision-makers commit errors or oversights.” Complaints systems are meant to provide such safeguards through a second look at the decision. The dangers associated with discretion are also thought to be minimized by the stricter requirements to the procedures of the complaints organ than the initial decision-making agency.

2.3.1 The importance of welfare decisions

Mashaw (1985: 12) illustrates the importance of decisions made within the welfare administration to citizens by this quote: “Our basic support may depend on the favorable determination of administrators in a host of programs providing income maintenance and in-kind distribution of essential goods and services.” Reich (1965: 1253) also argues that decisions about eligibility for welfare benefits are among the most important a government can make, because such a large portion of the population is dependent on the welfare state. The numbers of recipients of the three benefits discussed in this thesis underline the significance of these decisions: In 2011, there were 118.000 recipients of social assistance in Norway throughout the year, which constitutes 3.6 per cent of the population. About one per cent of the population received social assistance at any given point (Kann and Naper 2012: 84). In December the same year, 306.700 people in Norway received disability benefits. This constitutes 9.5 per cent of the working age population³ (Bragstad, Ellingsen and Lindbøl 2012: 33). In February 2011, 4.700.000 German residents received Hartz IV benefits, which is 7.2 per cent of the working age population (The Local 2011). Decisions regarding eligibility for and the size of welfare benefits affect all aspects of the lives of welfare claimants as they determine their economic basis of existence (Redlich 1971-1972: 58-59). Welfare bureaucrats have a *de facto* monopoly on the administration of individual welfare rights (Hatland 2011a: 166). The professions of the welfare state thus have a large degree of power over citizens. They act as gatekeepers and decision-makers, and determine whether individuals are eligible for welfare benefits or not. Complaints procedures offer an important possibility to challenge this exercise of discretion (Handler 1986: 45).

2.4 Positioning the topic within existing research

This thesis builds upon former research in the endeavor to answer the research question. The following sections situate the thesis relative to former research in order to highlight the specific contribution of this thesis to the research field.

2.4.1 Complaints within administrative systems

The characteristics of administrative welfare decisions discussed thus far cover all stages of the decision-making process. In the literature, a distinction is drawn between decision-making

³ Working age is defined as age between 18 and 67 years in Norway and between 15 and 65 years in Germany.

process and application of rules and discretion, on the one hand, and processes of grievance-handling, appeal and review, on the other (Halliday and Scott 2010: 470-471). Although both are concerned with the exercise of administrative powers, the division can be useful in situating the thesis within the field of research. While Ison (1999) argues that the emphasis on mechanisms for complaints and redress is misplaced because the focus should be on the initial decision-making process, this thesis follows the argument made by Calvert (1975: 193) that the initial decision-making level is characterized by mass production to such a degree that we can only afford a fairly unsafe system of decision-making at the lowest level. An obvious argument against this is that the standards applying to the part of the decision-making system that most citizens encounter should be prioritized, but the fact remains that competing goals like efficiency and scarce resources nevertheless lead to a need for higher-standard systems to take a second look (Calvert 1975: 193). The “review- part” of the welfare system is thus the topic of this thesis.

Further divisions can be found in the literature on complaints systems. Felstiner, Abel and Sarat (1980-1981) made a seminal contribution to the research on complaints and disputes in their investigation of which conditions contribute to the emergence and transformation of disputes in society, namely that injustices must be perceived (*naming*), attributed to another individual or social entity (*blaming*), and voiced (*claiming*). Existing research on citizens’ decisions about whether to file a complaint or not can be further divided between studies addressing practical barriers such as cost, procedural complexity, ignorance and physical accessibility, on the one hand, and studies emphasizing attitudinal barriers such as fatigue and faith in the rectitude of rules and satisfaction, on the other hand (Halliday and Scott 2010: 477). This thesis follows Redlich (1971-1972: 60), however, and takes as point of departure that “a decision has been made to challenge the position of the welfare department.” Two strands of research have departed from this starting point. Firstly, some researchers have focused on users’ experiences with various complaints mechanisms (Halliday and Scott 2010: 477, e.g. Adler 2006, Lens 2007, Tyler 1988). Secondly, other researchers have investigated how different mechanisms of administrative justice operate (e.g. Partington, Kirton-Darling and McClenaghan 2007, Richardson and Genn 1994). While the focus of this thesis is more in line with the latter approach, it seems useful to draw on findings of studies of users’ experiences as well when establishing criteria for evaluation of the complaints systems.

2.4.2 What constitutes a complaint?

Several distinctions are made in the literature regarding what constitutes a complaint. Seneviratne and Cracknell (1988: 183) present a broad definition of complaints as including “allegations to injustice caused by maladministration”, as well as approaches to the authorities for “advice, information or to raise an issue which, if not handled properly could turn into complaints.” On the other hand, Dunleavy, Loughlin, Margetts, Bastow, Tinkler, Pearce and Bartholomeou (2005: 7) make a clear and narrow distinction between complaints and appeals. They conceive of complaints as concerning the personal treatment by officials, a field that has been considered a part of internal organizational arrangements, while appeals concern the actual decisions made and form part of the administrative justice sphere. Appeals are conceived of in terms of legal rights, natural justice and related quasi-judicial criteria (Dunleavy et al. 2005: 7). Following this understanding, appeals is clearly the topic of this thesis. However, these concepts are not used consistently in the literature. In this thesis the concepts *complaints* and *appeals* both refer to grievances related to substantive decisions, not including service complaints. Following the separation between service claims and rights claims made by Thompson (1999: 475), the thesis addresses rights claims and excludes service claims. The distinction between complaints and appeals in this conceptualization is between a complaint on an initial decision and an appeal on the subsequent review. The kind of complaints discussed is objections to decisions made within three different welfare benefits. The nature of such welfare complaints is overwhelmingly economic, which follows from the income-dispensing function of welfare benefits (Redlich 1971-1972: 60). Complaints may arise because claimants have been found ineligible for a benefit, the grant may be too small, or there has been a termination of or reduction in the size of the benefit.

2.5 About complaints systems

Complaints systems refer to mechanisms for “resolving disputes between citizens and the government that arise from decisions of officials and agencies” (Cane 2010: 426). The following sections present some dimensions of variation between different complaints systems.

2.5.1 Internal review

In most countries, the first step in a complaints process is an optional or required *internal review*. If this is required, it means that the agency responsible for the initial decision must

review the decision before an appeal to an external complaints organ can be filed. A review is “a re-appraisal of a primary decision within the administrative area responsible for making that decision” (Harris 1999: 43). In this sense it can be seen as a continuation of the primary decision-making process; it is a reconsideration of the decision. However, whether an internal review is required or not is an important aspect of the complaints system, as it has several consequences for the overall process.

2.5.2 Tribunals and courts

There are further two main modes of adjudication of administrative decisions, namely through tribunals or courts (Cane 2010: 426). These are arenas for external review. A *tribunal* is an adjudicatory body that is not a court (Cane 2010: 426). It can be defined as a “body set up by statute to adjudicate disputes arising under that statutory scheme” (Dunleavy et al. 2005: 20). Administrative decisions may alternatively be subject to *judicial review* in the courts. Palmer (2000: 70) asserts that the purpose of judicial review is “the control of discretion in accordance with the rule of law.” There is further a distinction between ordinary courts and specialized courts. In a majority of the continental European countries a system of specialized administrative courts is established (Ziller 2007: 172). These systems are more closely linked to the activities of the public administration, and the judges are specialized in administrative law.

2.5.3 Ombudsman

The Ombudsman in the Scandinavian conception is a parliamentary commissioner who will investigate complaints from citizens with any kinds of grievance against the state (Wade 1963: 95). The task of the Ombudsman is to determine if maladministration has caused injustice (Thompson 1999: 465). This institution is not part of the specialized complaints systems regarding welfare benefits, but is rather an institution meant to provide citizens an objective control instance against the administration more generally.

2.5.4 Other aspects of complaints systems

Several aspects that vary between complaints systems are not necessarily related to the tribunals-court distinction. These are whether the case is considered “de novo” or “on the record”, whether the adjudicative body has authority to make a new decision, that is, how much one can achieve with a complaint, and whether the style is adversarial or inquisitorial.

In a *de novo* consideration of a case, the appellate organ reexamines all the evidence and arguments that were advanced in the first decision (Shapiro 1980: 645). An *on the record* consideration, on the other hand, only includes a review of questions of law, leaving the facts out.

Regarding the *authority of the complaints agency*, a complete displacement by the tribunal or court may be seen as a remedy that immediately eliminates a violation of the citizen's right (Tushnet 2003-2004: 1909). A weak remedy, in contrast, can be a requirement that the government officials hold a promise and develop a plan of how to correct the violation of a welfare right within a "reasonably short, but unspecified time period" (Tushnet 2003-2004: 1910). Leventhal (1980: 43) argues that procedural justice will be reduced if the complaints agency does not have authority to render a final judgment and thus bypass the original decision-maker.

A broad dichotomy of adjudicatory systems is between those based on the *adversarial* principle and those following the *inquisitorial* principle. This dichotomy is often linked with the counterposition of formalism and informalism (Allars 1991: 381). The essence of adversarial systems is to allow the parties to challenge each other (Titmuss 1971: 123). This involves each party presenting his or her case orally, while the judge has a passive role (Bell 1992: 128). The inquisitorial model, in contrast, assigns the judge a greater role in bringing forth the facts, and the evidence are normally presented in writing (Bell 1992: 128). In a pure inquisitorial model both the decision itself and the process of investigation that precedes the decision is under control of a third party. In an adversary system, the decision is still in the hands of a third party, but the disputants and their representatives control the provision of information in the process preceding the decision (Lind and Tyler 1988: 17).

3. Theoretical framework: Procedural justice

3.1 The normative concept of justice

Theories of justice are normative. A normative statement expresses a judgment about what ought to be. Such statements are contrasted with positive statements, which are statements “about *what is* that may be right or wrong without any indication of approval or disapproval” (Kildal and Kuhnle 2005b: 3). Normative theory is concerned with the justification of principles for the design of basic institutions of society (Kildal and Kuhnle 2005b: 4). Normative approaches to the welfare state are important, as welfare systems are “expressions of norms, values and social goals, such as ideas of justice and freedom, and norms of solidarity and responsibility” (Kildal and Kuhnle 2005b: 2). According to Rothstein (1998: 1), no discussion of welfare policy can be complete unless normative questions of social justice are raised. Justice is a normative concept in that it can be regarded as “a measure of the acceptability of certain outcomes of human relationships or situations” (Bell and Schokkaert 1992: 237). Much has been said about the importance of justice in society. A famous quotation of Rawls (1999: 3) claims that justice is “the first virtue of social institutions.” Further, Marshall (1950) pointed to justice as one of the basic rights necessary to achieve individual liberty, which forms the foundation of the civil element of citizenship. He claims that justice is different from other rights because “it is the right to defend and assert one’s rights in terms of equality with other and by due process of the law” (Marshall 1950, cited in Sommerlad 2004: 346). The point is further underlined by Scherer (1992: 2), who claims that justice can be viewed as containing fundamental and indispensable principles for any kind of human organization. Related to the topic of this thesis – welfare state complaints systems – the accomplishment of justice is a central goal. Complaints systems are meant to secure justice in welfare bureaucracies by providing a mechanism for the users to challenge administrative decisions and to correct mistakes (Lens 2007: 383). Wade (1963: 2) points out that fair administration to a large degree depends on the procedures applied. Procedural justice addresses exactly the fairness of decisional processes.

This chapter deals with the theoretical framework and the deduction of criteria for empirical investigation. The concept of justice is addressed firstly. Secondly, the two overarching research traditions within justice, i.e., distributive and procedural justice, are presented briefly. Further, the focus is narrowed down to procedural justice, and an attempt is made to clarify this concept and its relation to the neighboring concepts of rule of law, administrative justice and natural justice. Next, criteria for procedural justice derived from the

literature are discussed, including the question of weighting of and inherent trade-offs between the criteria.

3.2 Theories of justice

There is a generally accepted divide within justice theory between distributive justice and procedural justice.⁴ The idea of justice is complex, and many definitions and conceptions have been promoted throughout history (Cohen 1986: 4). This is so partly because several academic disciplines have theorized on the subject of justice. Most prominent besides philosophy, which provides the foundation of all justice theory, are the traditions within law, economy, sociology, and social psychology. Lawyers have generally been more concerned with procedural justice, while economists have studied distributive justice in income and welfare considerations (Scherer 1992: 12-13). Sociological approaches to justice often emphasize the consequences of different justice principles on the social structure of the society concerned (Scherer 1992: 13). The social psychological approach to justice studies the perception of injustice by individuals and groups (Scherer 1992: 2-3).

There are different intakes to justice caused by theorizing from different disciplines, and an interdisciplinary approach to justice might be useful. Cohen (1986: 3) argues that an understanding of justice requires attention to concerns derived from different disciplines. An attempt is made in this thesis to follow this advice. The thesis draws, firstly, upon the tradition within legal writing, which provides analyses of the operation of existing institutions and the values they enforce (Bell 1992: 126). Within this field, the values of a fair procedure in the handling of claims and in the resolution of disputes, as well as equal access to legal institutions are seen as central concerns in the administration of justice (Bell 1992: 127). The approach adopted here is also, however, in line with what can be termed “sociology of law”, which maintains a similar focus but with a social science perspective, and includes the study

⁴ A third, less theorized perspective of justice is *interactional justice* (Blodgett, Hill and Tax 1997: 189, Nel, Athron, Pitt and Ewing 2000: 6). This perspective focuses on inter-personal treatment, which would in the context of this thesis refer to the inter-personal treatment of claimants by personnel in adjudicatory agencies. There has been disagreement, however, as to whether this can really be seen as a third form of justice distinct from distributive and procedural justice, or whether it is best viewed as a “social form of procedural justice” (Colquitt, Conlon, Wesson, Porter and Ng 2001: 427). It is nevertheless distinct from the kind of procedural justice addressed in this thesis, which emphasizes the formal procedural aspects of the complaints system.

of administrative agencies as key institutions in the administration of justice (Arts and Van der Veen 1992: 163-167).⁵

A further contribution utilized is a macro-theory of governance promoted by Bo Rothstein (2011) within the field of public administration. Rothstein argues that the goal should be high “Quality of Government” (QoG). The basis of QoG is impartiality, defined as: “When implementing laws and policies, government officials shall not take into consideration anything about the citizen/case that is not stipulated beforehand in the policy or the law” (Rothstein 2011: 13). While the aspect of impartiality is essential to the topic of this thesis, and will be discussed further as a criterion of procedural justice, the operationalization presented by Rothstein (2011: 30-31) is arguably underdeveloped for the purposes of this thesis. It is also infeasible to utilize with the methods applied here, as it is originally created to serve in expert surveys.

To sum up, the framework of this thesis accommodates an interdisciplinary approach as it is situated in the cross-section of several academic disciplines. In addition to theories of law, sociology and public administration, findings from studies of user experiences within social psychology are also included.

3.3 Traditions within distributive and procedural justice

The two main branches of justice theory, i.e., distributive and procedural justice, study different aspects of decision-making and adjudication. Distributive justice deals with the fairness of outcomes, while procedural justice emphasizes the fairness of the procedures used to arrive at a decision. The policies resulting from distributive justice considerations are important parts of the foundation of the welfare policies adopted in modern democracies. These policies require a just implementation, and hence a focus on procedural justice. The main contributions within distributive justice and procedural justice are presented in the following sections before a discussion of the relation between distributive and procedural justice.

3.3.1 Distributive justice

According to Blodgett et al. (1997: 188), distributive justice refers to “the perceived fairness of the tangible outcome of a dispute, negotiation, or decision involving two or more parties.”

⁵ Some of the sociological approaches are, however, more micro-focused, emphasizing the important role played by “street-level bureaucrats” in the administration of public policies (Arts and Van der Veen 1992; Lipsky 1980).

This theoretical approach has its origin in social exchange theory, which emphasizes *equity* in relations of exchange. According to Lind and Taylor (1988: 10), the most influential of these theories was promoted by Adams (1963). The theory assumes that an individual perceives the fairness of an award in terms of a contributions rule, which implies that justice exists when rewards are in proportion to contributions (Furby 1986: 155, Leventhal 1980: 28). A critique of this is that people often use other standards of justice than the contribution rule (Furby 1986: 155). Accordingly, other distributive rules have been suggested, namely *need* and *equality* (Blodgett et al. 1997: 188). The needs rule dictates that persons with greater needs should be prioritized, while the equality rule states that everyone should have similar outcomes regardless of needs and contributions (Leventhal 1980: 29).

Another prominent theoretical tradition within distributive justice is *utilitarianism*, associated with theorists such as John Stuart Mill, Henry Sidgwick and Jeremy Bentham. The basic premise of utilitarian theories is the proposition that the fundamental objective of morality and justice is that utility should be maximized (Wacks 2012: 213). In terms of practical policies, utilitarianism can be used both to justify sacrificing the weak minority for the benefit of the majority, but also to attack those who hold unjust privileges at the expense of the majority (Kymlicka 2002: 45). John Rawls' theory of "justice as fairness", a famous contribution rooted in the idea of a *social contract*, was developed in opposition to utilitarianism (Wacks 2012: 222).⁶ He claims the deficiency of utilitarian theories is that they would accept "the situation in which the benefit attained by some could compensate for the misery suffered by others" (Cullen 1992: 18). The basic conception of justice underlying Rawls' theory is that all primary social goods should be distributed equally unless an unequal distribution would favor the least advantaged members of society (Kymlicka 2002: 55). This egalitarian theory is often presented as a philosophical justification for the modern welfare state, as the welfare state can be seen as a compromise between the values of liberty, i.e., capitalist freedoms, and equality, i.e., egalitarian welfare policies (Kymlicka 2002: 88).

Libertarianism, a fourth approach within distributive justice theory, argues in favor of individualism and for "limiting the power of the state to protecting our security and administering justice through the courts" (Wacks 2012: 227-228). This implies that coercion may only be used to prevent or punish the infliction of physical harm or fraud, and to enforce contracts (Buchanan and Mathieu 1986: 34). Robert Nozick presented an "entitlement theory

⁶ Rawls' theoretical approach is also termed *liberal equality* (Kymlicka 2002: 53).

of justice”, which is a “hands-off” theory of individual possessions. He asserts a just distribution to be the result of people’s free exchanges (Kymlicka 2002: 103). The theory has conservative implications for social and fiscal policy, as libertarians argue that the state has no obligation to remedy unequal circumstances (Cullen 1992: 31, Kymlicka 2002: 159). Related are those theories which claim that justice is essentially a matter of respecting individual rights (Cullen 1992: 29), most famously developed by Ronald Dworkin (1981, 1985).

The theories of distributive justice have different political and practical implications. All, however, with the possible exception of the libertarian view, supports some kind of safety net for citizens through the existence of a welfare state. Theories of distributive justice present different principles for the distribution of public goods and these distributive principles constitute the substantive framework of the welfare state. These ideas have to be implemented in practice. This implementation, which is conducted by the administration of welfare benefits, relies on other principles of justice, that is, procedural justice.

3.3.2 Procedural justice

Procedural justice addresses the fact that every organization and society has procedures that regulate the distribution of rewards and resources (Leventhal 1980: 34). Walker, Lind and Thibaut (1979: 1402) define procedural justice in the context of trials as “the belief that the techniques used to resolve a dispute are fair and satisfying themselves”, in opposition to distributive justice which is “the belief that the ultimate resolution of the dispute is fair.” They define justice in terms of involved parties’ perceptions of fairness. Folger and Greenberg (1985), on the other hand, consider justice in the context of personnel and human resources research. In accordance with Thibaut and Walker (1975), Folger and Greenberg (1985: 143) define procedural justice as “the perceived fairness of the procedure used in making decisions.” In sum, the study of procedural justice addresses the means by which ends are attained.

Although questions and ideas about procedural justice are old (Solum 2004: 1), explicit theories of procedural justice were first formulated by social psychologists in the 1970s (Folger and Greenberg 1985: 143, Lind and Tyler 1988: 7). The two main perspectives on procedural justice developed in this era were advanced by Thibaut and Walker (1975, 1978) and Leventhal (1976, 1980). A convergence between these two conceptualizations of procedural justice is the argument that an important aspect of procedures is that they offer involved parties some control over the process affecting their outcomes (Folger and

Greenberg 1985: 148). Further, their approaches converge regarding the topic of this thesis; procedures for complaints handling in welfare cases. While Thibaut and Walker study dispute resolution, Leventhal emphasizes the relevance of procedural justice in allocative processes. Welfare complaints encompass both these dimensions, as they are disputes over resource allocations.

Thibaut and Walker (1975, 1978) focus on the degree of control held by disputants in different dispute resolution procedures. Their emphasis is consequentialist, as it views procedural justice as a means of achieving a just outcome (Thibaut and Walker 1978: 542). Based on the contributions rule of distributive justice, procedural justice is seen to require a procedure that “facilitates the fullest possible report of inputs prior to determination of the distribution” (Thibaut and Walker 1978: 542). The necessary inputs to the transaction in question are achieved for the involved parties by process control and decision control. *Process control* is defined as “control over the development and selection of information that will constitute the basis for resolving the dispute” (Thibaut and Walker 1978: 546). *Decision control* is the disputants’ amount of control over determining the outcomes directly.

In contrast to Thibaut and Walker, who studied procedures of dispute resolution, Leventhal was the first to point out how procedural aspects could be applied to distributive decision-making situations (Folger and Greenberg 1985: 144). His definition of procedural justice as “an individual’s perception of the fairness of procedural components of the social system that regulate the allocative process” (Leventhal 1980: 35) reflects this focus. The fairness of procedures may be evaluated according to the following procedural rules: (1) consistency rule, (2) bias suppression rule, (3) accuracy rule, (4) correctability rule, (5) representativeness rule, and (6) ethicality rule (Leventhal 1980: 39-45).

3.3.3 The relation between distributive and procedural justice

Although addressing different aspects, distributive and procedural justice is closely connected. In the social psychology literature, where focus is on perceptions of justice, it is asked how the perception of a fair *process* affects the perception of a fair *outcome* (Walker et al. 1979: 1403), that is, to what extent a satisfying process contributes to the belief that the outcome is just. Walker et al. (1979: 1415) find that perceptions of procedural justice sometimes affect the perception of distributive justice, but not the other way around. Thibaut and Walker (1975: 3) argue that procedural justice and distributive justice can be independent, as “it is possible for distributive justice to be achieved without application of any special

procedure” (Folger and Greenberg 1985: 147). In opposition to this, Leventhal (1976: 230) asserts that procedural justice is a necessary requirement for distributive justice. According to Mashaw (1985: 5), the questions of substance and process are functionally inseparable. Procedural justice and distributive justice are in this view reliant upon each other. These positions are not necessarily incompatible, however. Just procedures are important to the fair implementation of distributive principles, but they also have *inherent value* in promoting fair treatment of citizens.

3.4 Does procedural justice matter?

3.4.1 Importance of procedural justice

Several scholars (e.g. Edelman 1967, Scheingold 2004, Tyler and Caine 1981, Tyler and Folger 1980) have found that the fairness of procedures contributes more to the perceptions of fairness than the outcomes of these procedures (Folger and Greenberg 1985: 149, Tyler 2007: 26). Tyler (1988: 104) argues that it is clear from existing research that procedures are in themselves important for perceived justice. Studies of legal settings suggest that the impact of procedural justice is twofold. Firstly, it has an impact on whether people accept decisions that are made, and secondly, it affects the way people evaluate the judge and court in point, as well as the overarching court system and the law (Tyler 2007: 26). Even though no one likes to lose, people recognize that they cannot always win. A loss will be accepted more easily if the process by which the outcome is produced is seen as fair (Tyler 2007: 26).

There are several possible reasons why procedures matter. Dolan, Edlin, Tsuchiya and Wailoo (2007: 159) suggest three such reasons. Firstly, a consequentialist or distributive position would be to argue that procedures matter because they promote the best outcomes. Secondly, a pure proceduralist view would argue that procedures have an inherent value in their own right, and that citizens should be able to enjoy procedural protections as a right (Mulcahy 1999: 76). Thirdly, following an instrumental view, procedures can be important because they promote some factors other than the outcome that individuals value. Dolan et al. (2007: 159) assert that: “any particular procedural characteristic may be justified using a combination of these three reasons.”

3.4.2 Broader implications of procedural justice

The extent to which complaints systems available to welfare claimants can be deemed just is expected to have important consequences at both individual and systemic level. The

importance of procedural justice in determination of welfare benefits and welfare adjudication on the individual level is discussed in section 2.3.1. While a detailed investigation of the broader implications on the macro level falls outside the scope of this thesis, they will be indicated as they serve to further underscore the importance of the research question.

General theories of procedural justice are often founded in social psychology, being defined through the perceptions of individuals. These theories imply a cognitive sequence in the minds of citizens (Grimes 2006: 286). On the macro level, the perceived procedural justice can be argued to affect the trust in and legitimacy of institutions (Grimes 2006, Lens 2007, Rothstein 1998), which further affect the individual's contestation or deference with the decision: "If citizens judge decision processes to be unfair and the decision institution to be less legitimate, they may see fit to contest, or simply attempt to circumvent or evade decisions" (Grimes 2006: 286).⁷ Whether complaints systems are seen as fair and deemed to satisfy due process requirements will arguably have consequences for the public system as a totality because of the state's need for legitimacy. Several studies have documented this correlation between perceived procedural fairness and institutional legitimacy (e.g. Hibbing and Theiss-Morse 2001, Tyler 2007). Eckhoff (1966: 196) addresses this interconnection by pointing out that while criticism against the legislature rarely affects the institution itself, this is different with the public bureaucracy. If a decision within the public bureaucracy is claimed to be incorrect, it is often presented as a sign that something is wrong with the *entire system*; with the organization and management, with case procedures, and even with public workers. This, in turn, can create a vicious circle, because, as Brewer (2007: 551) asserts: "The long-term viability of any public complaints handling system rests on confidence in its fair operation." Legitimacy is essential for public sector organizations, and for the welfare state in particular, to function the way they are intended (Rothstein 1998: 222).

The perspective focused on welfare claimants' legal protection adopted in this thesis can be criticized for ignoring competing concerns, such as the efficiency of public administration (Sainsbury 1999: 445).⁸ It can be claimed, however, that these concerns are not isolated from each other, exactly because of the welfare administration's need for legitimacy in order to function effectively. Wade (1963: 129) asserts that no one "stands to benefit more

⁷ These modeled sequences do, however, contain a host of under-explored empirical questions (Grimes 2006: 287), which it is beyond the scope of this thesis to test.

⁸ See section 3.8.2 for a discussion.

in the long run from just administration than the administrators themselves, because the state is permeated from top to bottom with the truth that government depends upon the approval of the governed.”

3.5 Concepts related to procedural justice

The concept of procedural justice is situated within a bewildering theoretical field where many concepts are left vague, overlap each other in subtle ways and are applied differently by different scholars. This calls for a conceptual overview and some clarifications. The rule of law can be seen as an overarching ideal behind the quest for procedural justice, while the concepts of administrative and natural justice, which are often used interchangeably with procedural justice in a confusing manner, are here seen as constituent parts of the concept of procedural justice.

3.5.1 Rule of law

The *rule of law* can be viewed as an overarching ideal to the conception of procedural justice in developed democracies. The concept is controversial and widely discussed. According to Eckhoff (1966: 200), the rule of law has a positive connotation in line with “democracy” and “freedom”. It is an ideal almost everyone supports, and yet precisely what it means is rarely made clear. Chesterman (2008: 332) argues that the degree of consensus surrounding the rule of law as an ideal stems exactly from the disagreement as to its meaning. According to Barendrecht (2011: 284), the rule of law is more like a field of inquiry than a coherent concept.

Most modern scholars build their conception of the rule of law on the core ideas articulated by A.C. Dicey (Rose 2004: 457-458). These ideas are (1) the absence of arbitrary or wide discretionary governmental power and the presence of regular law, (2) that no individual is above the law, and (3) that everyone is subject to the ordinary law and general constitutional principles including individual rights. The core of the concept of the rule of law is according to Tamanaha (2007: 3) the requirement that “government officials and citizens are bound by and act consistent with the law.” This conception is wide and ambiguous, and several attempts have been made to specify the concept. George Fletcher identified a “modest version” as well as a “more lofty ideal that incorporates criteria of justice” in the rule of law concept (Rose 2004: 258). This distinction has also been captured by other scholars in the separation of formal and substantial understandings of the rule of law (e.g. Ehm 2010: 3,

Tamanaha 2007: 3). The formal view, also termed the “thin” theory (Chesterman 2008: 340), is procedural and emphasizes the prevention of arbitrary state action and the protection of individual rights (Rose 2004: 459). “Thick” theories of the rule of law also incorporate substantive notions of justice (Chesterman 2008: 340-341). These theories are built on top of the formal conception of rule of law.

The content of the rule of law concept remains contested (Chesterman 2008: 340). While one could argue for the application of a substantive version of the rule of law including for instance rights to a minimum of welfare in developed democracies, procedural justice contained within the formal conception offers a more coherent and narrow focus for this investigation. Whether there are made guarantees for individual welfare is, however, a fundamental issue that will be raised.

3.5.2 Administrative justice and natural justice

A concept closely related to procedural justice, specifically addressing public administration, is *administrative justice* (Sainsbury 1999: 454). Adler (2003: 323-324) defines administrative justice as “the principles that can be used to evaluate the justice inherent in administrative decision-making.” Whether administrative justice is interpreted as including only procedures or also distributive justice varies in the literature, but the contributions of the administrative justice literature utilized in this thesis are exclusively the procedural aspects. Mashaw (1983: 24-25) defines administrative justice in the context of a statutory disability program as “those qualities of a decision process that provide arguments for the acceptability of its decisions.” According to Adler (2003: 325-332), Mashaw has an *internal approach* to administrative justice. This implies an emphasis on how administrative justice and adjudication can be solved within a public organization through internal administrative practice and routine activities (Mulcahy 1999: 79). This contrasts with the more common *external approach*, adhered to in this thesis, which highlights the need for courts, tribunals, and Ombudsmen external to the locus of administrative decision making in order to achieve administrative justice (Adler 2003: 328).

Another neighboring concept is *natural justice*. The principles of natural justice, which have their origin from English court procedures, are often viewed as fundamental to administrative and judicial procedures. The concept is sometimes used interchangeably with procedural justice. Christensen, Day and Worthington (1999: 201) apply the following definition of the principles of natural justice: “the rules and procedure to be followed by any

person or body charged with the duty of adjudicating upon disputes between, or the rights of others.” No person should be a judge in his or her own case because *neutrality* and *independence* is required. Another aspect of natural justice is the requirement of proper reasons for any decision (Harris 2007: 597).

The principles of administrative justice and natural justice are considered parts of procedural justice in this context of investigation, and consequently, these principles are brought further in the discussion of criteria for procedural justice. The rule of law, on the other hand, constitutes an overarching value, but is not operationalized or discussed directly in the analysis.

3.6 Criteria of procedural justice

It is well established that procedural justice matters, but it is contested *what* it is about procedures that lead to a perception of justice (Tyler 1988: 104). Theories of procedural justice offer several different criteria for the evaluation of concrete systems. Such criteria can never be conclusive. Sainsbury (1999: 453) points out that: “There is scope for differences which, ultimately, cannot be resolved by rational argument.” This thesis, however, follows Sainsbury (1999: 453) and Rothstein (1998: 4-5) in drawing on different perspectives and suggesting a “best fit”. The thesis adheres to Leventhal (1980: 39) as well, in that he defines a justice rule as “a belief that allocative procedures are fair when they satisfy certain criteria”, but also notices that the research field does not offer any conclusive criteria. It is better, however, to suggest and discuss such rules than to have none at all (Leventhal 1980: 39).

Leventhal (1980: 39) suggests the following six procedural criteria: consistency, bias-suppression, accuracy, correctability, representativeness and ethicality. The *consistency* rule refers to the requirement that allocative procedures should be consistent across persons and over time. The *bias-suppression* rule states that: “blind allegiance to narrow preconceptions should be prevented at all points of the allocative process.” The *accuracy* criterion asserts that decisions should be based on relevant and sufficient information. The *correctability* rule refers to the need for complaints mechanisms, while the *representation* rule dictates that all relevant subgroups, such as welfare claimants in a decision about an individual welfare benefit, should be involved in the decision process. The *ethicality* rule requires procedures compatible with fundamental moral values.

Based on a review of the theoretical literature on procedural justice within legal and organizational settings, Dolan et al. (2007: 160-161) present a list of what they claim are the

six most important procedural characteristics. These are voice, neutrality, consistency, accuracy, reversibility and transparency. *Voice* refers to the degree to which the affected parties are given an opportunity to contribute to the decision making process. This relates to Thibaut and Walker's emphasis on process control. The *neutrality* criterion requires that those making the decisions do not have any self-interest in the outcome. For *consistency* to be satisfied, the same criteria for decision-making must be applied both across time and across comparable contexts. The need for proper information to be retrieved and applied in the decision making process is captured within the *accuracy* criterion. The *reversibility* requirement demands that there must be a right to complain on a first-instance decision. Finally, the *transparency* criterion implies that involved parties must have access to relevant information. This is important as it gives the involved parties an opportunity to scrutinize the case information and judge how the information is applied in the decision-making process (Dolan et al. 2007: 162).

These criteria suggested by both Leventhal and Dolan et al. are formulated considering processes of decision-making in general. The focus of this thesis is more limited, and in their conceptions this aspect is only captured within the reversibility and correctability criteria. However, as pointed out by Leventhal himself, all the criteria are also important to the complaints procedure *per se*; "the appeals procedure must itself meet the standards set by the other rules" (Lind and Tyler 1988: 132).

Franks report (Franks Committee 1957) is considered a great contribution to the British literature on and practice of complaints handling and administrative justice. The mandate of the Franks Committee was to evaluate the functions of British tribunals and to provide suggestions for reform. They promoted three "watchwords" for complaints systems: openness, fairness and impartiality (Wade 1963: 70-71). *Openness* includes publicity of procedures and the reasoning behind the decision (Adler, Burns and Johnson 1975: 113). The *fairness* concept requires a clear procedure, that all parties have knowledge of their rights, and that they have an opportunity to present their case (Adler et al. 1975: 114). *Impartiality* requires the freedom of tribunals from the real or apparent influence of the administration (Lister 1975: 171).

According to Tyler (2007: 30-31), the most important aspects of procedural justice are voice, neutrality, respect, and trust. The *voice* aspect refers to the fact that people want to tell their side of the story before decisions are made. This criterion largely overlaps with the voice criteria suggested by Dolan et al. (2007) and the necessity of process involvement emphasized

by Thibaut and Walker (1978). The *neutrality* principle promoted by Tyler encompasses both the neutrality and consistency principles presented by Dolan et al., as well as a partial inclusion of their transparency principle. Tyler, however, emphasizes transparency of how rules are applied and decisions are made, as opposed to Dolan et al.'s focus on the disclosure of case documents. These are largely two sides of the same coin, however. The unifying idea is that the involved parties should have information about procedures and the facts of the case so that he or she is capable of making a judgment of the fairness in the decision-making process. The *respect* criterion suggested by Tyler points to the way decision-makers treat the involved parties. This is arguably more an interactional than pure procedural factor. Lastly, the *trust* principle refers to an assessment of the character of the decision-maker. This is not a pure procedural aspect either; although respect and trust are likely to affect judgments of procedural justice, these are not procedural elements in themselves. These criteria will thus not be discussed further in this thesis.

Nel et al. (2000: 15) find in a qualitative analysis that the most pervasive element of procedural justice is speed and timeliness. Sainsbury (1999: 455) also emphasizes speed of decision making. In addition, he points to the importance of the quality of decision-making, as well as independence, impartiality, participation and value for money.

A final contribution within the procedural justice literature is provided by Solum (2004: 111-113). He argues in favor of two clusters of criteria for procedural justice. These are the *participation principle* and *the accuracy principle*. The participation principle should extend to all persons who will be subject to the final decision (Solum 2004: 111). Participation ought to include, firstly, notice and information and, secondly, an opportunity to be heard. If necessary, the complainant should be provided with an adequate legal representative, including the "right to reasonable attorney's fees in suits for relief from violation of such liberties" (Solum 2004: 112). The accuracy principle implies that the procedural arrangements for adjudication should be structured in such a way that they maximize the likelihood of achieving the legally correct outcome in each proceeding (Solum 2004: 112).

3.7 Discussion of criteria

It is necessary to sum up from these contributions, and discuss which criteria capture similar factors, as well as which criteria actually fall within the scope of procedural justice and which criteria do not.

3.7.1 Consistency

The *consistency* criterion is mentioned by Leventhal (1980) and Dolan et al. (2007). This criterion points to the problematic aspects of welfare administration stressed by Reich (1965: 1252, italics added): “Absent challenge, welfare administrators are permitted broad areas of discretion in which they make the law by administrative interpretations under the pressures of public opinion – *interpretations that may be neither consistent from one jurisdiction to another nor in accord with the original purposes of the legislature.*” Consistency is an important aspect of justice, as like cases should be handled alike. This is valid both regarding time and geography. Consistency is based upon a comparison of the procedures utilized to other procedures used either at different times historically, or across space (Tyler 1988: 107). Practically, the consistency criterion is satisfied when “all parties believe they have the same rights under the procedure and are treated similarly” (Lind and Tyler 1988: 131). This criterion can be justified as having an inherent value, that is, the criterion has a pure *procedural* justification.

3.7.2 Bias-suppression, neutrality, impartiality and independence

Leventhal emphasizes *bias-suppression*. This criterion can be seen as part of a cluster, which also includes criteria for *neutrality*, *impartiality* and *independence*. Impartiality is discussed by Sainsbury and Franks Committee. Dolan et al. and Tyler emphasize neutrality, while Sainsbury also mentions independence.

The independence criterion is a matter of principle, derived from natural justice theory (Sainsbury 1999: 458), namely that “neither individuals nor authorities should be judge in their own cause” (Braye and Preston-Shoot 1999: 244). Independence can be understood as *distance* from the original decision-maker (Sainsbury 1999: 459). Several dimensions of distance can be identified: (1) accountability for decisions; (2) financial responsibilities; (3) responsibilities for appointments; and (4) managerial responsibility. Independence is important to avoid a situation where complaints procedures are local and informal, because this “may result in the complainant having to speak to staff who are either the subject of the complaint or are involved with those staff who are” (Braye and Preston-Shoot 1999: 242). If the complaints systems is organized such that the decision is reviewed by a more senior employee, higher in the hierarchy but within the same organization, the process may be hamstrung by the same organizational culture or loyalty to the other employees in the same

organization (Swain 2009: 89). In a study of the behavior of welfare complainants, Lens (2007: 401) found that those who chose not to appeal considered the hearing system as indistinguishable from the rest of the agency, “which they viewed as inflexible and intractable.”

Impartiality implies the absence of bias and prejudice in decision-making (Sainsbury 1999: 458). As such, it overlaps completely with the bias-suppression criterion of Leventhal. This is not an aspect that can be investigated merely by looking at procedures, as impartiality is a *functional* rather than *institutional* characteristic; it “refers to the adjudicator’s approach to his task” (Harlow and Rawlings 2009: 489, see also Sainsbury 1999: 458), and is therefore beyond the reach of this thesis to evaluate. The independence criterion is, however, an important premise for impartiality and absence of bias to be satisfied. The independence of the complaints organ will function as the concept for measurement of this cluster. This criterion can be justified *procedurally*, as this is a value derived from natural justice. It can also be justified in a *consequentialist* argument, because a lack of independence may lead to biased decisions.

3.7.3 Voice, representation and participation

Another cluster is constituted by the criteria *voice* mentioned by Tyler and Dolan et al., *representation*, emphasized by Leventhal, and, finally, *participation*, which is mentioned by Sainsbury and Solum. Thibaut and Walker’s process control, which brings focus to the complainant’s role in providing the information necessary to make a decision, also corresponds to these criteria. Bell (1992: 127) emphasizes the importance of participation as an aspect of procedural justice: “The right to participate in the process of decision about one’s entitlements under justice may be seen as a way of ensuring that all relevant considerations are brought into the conclusion.” In addition to increasing the accuracy of case information, participation in the complaints process may foster satisfied complainants, as they get the opportunity to tell their story in a meaningful way (Solum 2004: 83). Further, Solum (2004: 84-85) argues that participation in the adjudicatory process is fundamental for the normative legitimacy of this process and the decisions resulting from it, i.e., those who are bound by the final decision must be afforded a right of participation in the adjudicatory process. Legitimacy does not require actual participation, however, but rather the opportunity for participation. Participation can take several forms, most prominent (1) orally in person; (2) through a representative; or (3) in writing (Sainsbury 1999: 459). A common requirement within

theories of procedural and natural justice is for an oral hearing (e.g. Mashaw 1985: 52, Mulcahy 1999: 76, Solum 2004: 73).

There are several important aspects to the participation criterion. Firstly, there are symbolic aspects of respect and dignity, which provide a *proceduralist* justification. Secondly, there are *instrumental* advantages, as the appellant gets the opportunity to provide additional and clarifying information to the case (Sainsbury 1999: 459). As such, it is related to the criteria of quality and accuracy, as these require that sufficient and correct information is provided in the decision-making process; hence there is also a *consequentialist* justification for this criterion. This group of criteria will be referred to as voice in the further discussion.

3.7.4 Accuracy and quality

The two criteria *accuracy*, suggested by Leventhal, Solum and Dolan et al., and *quality*, mentioned by Sainsbury, also represent a common feature. The quality of decision-making is obviously important, but also almost impossible to measure without specification of the criteria that constitute high quality. Sainsbury (1999: 455-456) underlines this: “Assessing the quality of decision making at any level of adjudication is fraught with difficulties.” However, as a discussion of the decision process is meaningless if the quality of the decision is not taken into account, proxies for measuring this criterion are suggested. While the quality of the decision itself is a part of distributive justice, what is attempted measured here are aspects of procedures likely to lead to high-quality decisions. Leventhal (1980: 41) points to the need for good and sufficient information in order to attain accuracy and quality of decisions. This dimension is referred to as quality in the further discussion. The justification of this criterion is *consequentialist*, because certain aspects of procedures are expected to produce a high-quality outcome.

3.7.5 Openness and transparency

Openness, as conceived by the Franks Committee, and *transparency*, suggested by Dolan et al., both refer to the publicity of procedures, access to relevant information during the case processing, as well as the requirement for a statement of the reasoning behind the final decision. According to Swain (2009: 87), an important constituent of procedural justice is “the right to be provided with reasons for the decision by the decision-maker so that the reasoning involved is both ‘open and unashamed’.” Transparency is also indicated by Solum, in that he includes the right to notice and information as a part of the participation principle. Brewer

(2007: 551) argues that the skewed status between public bureaucrats and welfare claimants regarding the access to important information and understanding of policies and procedures implies that any positive discrimination of welfare claimants contribute to a higher degree of justice. Openness and transparency will be adjoined in the term transparency. The transparency criterion has a *proceduralist* justification as it contributes to the participation and equality of the citizens, as well as a *consequentialist* justification in that transparency increases the opportunities to monitor and check the process.

3.7.6 Timeliness

Regarding the speed or *timeliness* aspect suggested by both Nel et al. and Sainsbury, there is evident a possible trade-off between quick responses and the quality of the decision. It is hard to argue that a quick decision is of value if the decision-making process is of low quality. However, as Sainsbury (1999: 457) points out: “What is not in dispute is the widespread dissatisfaction in recent years with the length of time taken to clear social security appeals.” This criterion can be justified *instrumentally*, as the timeliness of procedures promotes some factors other than the outcome that citizens value.

3.7.7 Criteria left out from further discussion

From the discussion above, several criteria are arguably less systemic elements, but rather interactional or personal characteristics. These are *respect* and *trust*, as emphasized by Tyler. Although important factors in citizens’ overall justice assessments, they are not purely procedural criteria, and are thus beyond the scope of this thesis to evaluate.

Five mentioned criteria remain. Leventhal proposed *correctability*, corresponding to Dolan et al.’s *reversibility* criterion. These criteria point to the need for mechanisms for complaint and appeal. They constitute the basis for the entire discussion, and consequently will not be discussed as criteria for complaints procedures per se. The *fairness* criterion of the Franks Committee is wide in its coverage, and badly suited for empirical operationalization. The criterion contains such aspects as users’ knowledge of their own rights and their opportunity to present their case. These factors are already captured within the transparency and voice criteria. Much the same can be said of the *ethicality* criterion, suggested by Leventhal. This refers to general moral values, which ranges widely and needs operationalization through more specific concepts. Finally, Sainsbury mentions *value for money*. This refers to the requirement for efficiency, which is sometimes seen more as a trade-

off value for justice rather than a component of justice itself. This is discussed in section 3.8.2.

3.7.8 Adding another criterion: Financial risk

Another matter which needs to be raised is the financial risk of the complainant. This criterion is suggested by Solum as a part of the participation criterion, namely that the complainant ought to be provided with an adequate legal representative if necessary, and additionally that such fees should be bearable to the complainant. An important component of the financial question is thus whether free legal aid or other expert help is offered. In order to benefit from all the other procedural safeguards discussed, the access to external complaints organs must not be hindered by a claimant's lack of economic and other resources. From the perspective of welfare claimants, we have to consider that complaints procedures can only be seen as effective if they are also available to the "ill-educated, the inarticulate and the long-suffering who are normally afraid to complain or feel disempowered" (Seneviratne and Cracknell 1988: 191). This points to a classic problem stressed by Reich (1965: 1246), who claims that welfare clients are often ignorant of their rights, lack adequate representation and lack the resources to fight a large bureaucracy, and by Knut Dahl Jacobsen (1973: 179), who argues that welfare clients are left with the responsibility to check the decisions of public officials, even though these decisions are often very complicated. The result is that the well-informed and eloquent are rewarded, while the ignorant and quiet are punished. This implies that special consideration must be taken when discussing the legal protection of welfare claimants. The systems of complaint and redress must be available to everyone, and the ones who need it the most might be the ones least capable of utilizing them. Some kind of legal aid or expert help is often regarded as of key significance in achieving justice (Harlow and Rawlings 2009: 490, Young, Wikeley and Davis 1999: 293). What is needed is not only representation at actual hearings, but also assistance with drafting the complaint itself (Lister 1975: 179). The financial aspect is important as the lack of free legal aid and high financial risks may undermine all the other procedural safeguards.

3.8 How are the criteria related to each other?

The criteria are derived from normative arguments about what constitutes an ideal of procedural justice. Hence, there is necessarily room for disagreement. There is firstly a question of whether the criteria should be weighted in order to form an index of measurement

for procedural justice. This methodological question is raised in the following section. Next, there are competing values at stake between general values of justice and other values, but also trade-offs between the concrete criteria.

3.8.1 Weighting of the criteria

Because there are several criteria of procedural justice, it is important to consider whether the different principles should be weighted relative to each other (Tyler 1988: 105). Although Leventhal (1980: 46) assumed that principles of procedural justice were weighted differently, he did not offer specific predictions about the weighting of these procedural rules (Folger and Greenberg 1985: 147). He asserted that there is no research to substantiate the rule weight, and consequently “only the most general statements can be made about the relative importance of different rules in different situations” (Leventhal 1980: 46). Dolan et al. (2007: 161) suggest that the relative importance of different elements of procedural justice is likely to be highly context-specific. Hence it is difficult to weight the different criteria on a general basis. However, some new research on the topic has been produced since. The consistency criterion has proved especially important, and consistency across people is seen as more important than consistency across time (Tyler 1988: 105). Quality and voice are also seen as particularly important (Tyler 1988: 106). No attempt will be made in this thesis at specific weighting or aggregation of scores, in contrast to the approach adopted by Nel et al. (2000: 12). Rather, the criteria chosen are all regarded important and will be discussed on their own premises.

3.8.2 Trade-offs

In evaluating concrete systems in light of values drawn from justice theory, it is important to be aware of the inherent trade-offs between justice and other fundamental values. This thesis follows Sainsbury (1999) in that the evaluation of complaints systems is seen from a perspective that seeks to protect the interests of welfare claimants. According to Sainsbury (1999: 445), this “is an approach that can be contested since it essentially places a higher value on the individual rights of claimants than, for example, on the legitimate concerns of a public administrative organisation to operate at the lowest possible cost.” However, given the weak position of welfare claimants in society at large, a focus on protection of welfare claimants can be justified. Even so, what claimants want is only part of the question; the welfare state is not only consumer-based. The public services must also answer to a wider

public, such as voters and taxpayers (Sainsbury 1999: 455). As such, there are possible trade-offs between justice for the individual claimant and system efficiency.

Wade (1963: 64) states that: “There is always this profound and insoluble dilemma between judicial procedure and administrative efficiency.” This is so because an over-concern with justice may lead to a reduction in the efficient production of resources and welfare (Bell and Schokkaert 1992: 251). Lyster (1999: 391) argues that it must be remembered that efficiency tends to require “the speedy production of outcomes, rather than their correctness, with the consequent danger of elevation of the means (efficiency) over ends (legislative goals).” This implies that efficiency arguably can be considered less important than justice and high-quality decisions. Further, Rothstein (2011: 30) asserts that there is a case for arguing that impartial administration may enhance efficiency. The same is argued by Seneviratne and Cracknell (1988: 192), who claim that formal complaints procedures contribute to efficient administration because “it channels grievances, encourages openness and contributes to rational decision-making.” There are also several arguments in favor of prioritization of justice based on the connection between micro assessments of justice and macro effects on state legitimacy, as discussed in section 3.4.2.

Even with a main focus on the individual citizen, however, a possible trade-off exists between justice and freedom. As a theory of justice is meant to be a foundation for certain basic institutions which force individuals to behave in a certain way, it can be regarded as contrary to individual freedom (Bell and Schokkaert 1992: 251). Finally, there is in reality a trade-off between what welfare claimants may need, and what is practically attainable (Redlich 1971-1972: 94, Swain 2009: 86).

It is also important to consider more specifically how the different criteria are related, and whether there are inherent trade-offs between them and between any of the criteria and other important values (Tyler 1988: 106). The following sections present the most severe tensions between the procedural justice criteria.

Timeliness versus quality and voice

Timeliness may be in conflict with the quality of a decision, as a speedy consideration of a case necessarily reduces the achievable degree of accuracy and precision. Wade (1963: 88) argues that: “You cannot reduce the price of an article and speed up production without lowering the quality.” An example of a measure taken to reduce the time spent on a decision is to dispose of oral hearings and instead rely only on written information. This is likely to

have negative consequences for both the voice criterion and the quality criterion (Swain 2009: 86). Nevertheless, timeliness is a criterion of procedural justice that has to be taken into account, as there cannot be excessive periods of waiting for claimants in need.

Consistency versus quality

A trade-off between the criteria of consistency and quality can also appear, because the quality of a single decision may be higher if allowed judgment by individual criteria (Tyler 1988: 107). However, the consistency principle arguably has such importance for the administration of justice as a system in the long run that it has to take precedence over justice in an individual case (Scherer 1992: 13).

Independence versus values of local democracy

There is a trade-off between the independence criterion and the value of local democracy (Braye and Preston-Shoot 1999: 237) when a welfare benefit is administered at the local level, while independence requires a state-level or judicial complaints organ. The degree to which a complaints body has the opportunity to check the decision of the administrative body is an important criterion for complaints handling to have real consequences, but at the same time collides with the value of local democracy. While it can be argued that state-level complaints organs for municipally administered welfare benefits threaten the values of local democracy, an objection to this critique can be found in the consistency criterion. The municipalities are still a part of one nation-state with national welfare goals (Eskeland 1992: 79), and thus it is unfair if citizens of different municipalities are offered different assessments of their applications for welfare benefits.

Serious trade-offs are thus apparent between the criteria themselves and between the criteria and other values. Absolute justice is arguably unattainable, and there are necessarily tensions between different criteria when considering what procedures are closest to the ideal of procedural justice (Swain 2009: 86). Nevertheless, this is an inherent aspect of normative theories, and an attempt to overcome this barrier is made here by utilizing prior research in arguing for a set of criteria. According to Sen (2009: *preface*), “the necessity of reasoning and scrutiny is not compromised in any way by the possibility that some competing priorities may survive despite the confrontation of reason.”

4. Methods: In-depth study of Norway and Germany

4.1 Introduction

The aim of this chapter is to explain and discuss the research design. The choice of a qualitative case study is justified. Further, the selection of cases, namely complaints systems within the Norwegian and German welfare state, is explained. The research design implies empirical application of normative theory. This, as well as the comparative aspect of the research design, offer several advantages but also challenges. Next, the data applied in the thesis, which consists mainly of public documents, existing research, as well as expert interviews, is discussed. The chapter concludes with an assessment of the validity and reliability of the findings.

4.2 Qualitative case study

This thesis follows the assumption of King, Keohane and Verba (1994: 6) that “it is possible to have some knowledge about the external world but that such knowledge is always uncertain.” Hence, the thesis can be placed within the naturalist camp, as opposed to the constructivist camp.⁹

The research design is a qualitative case study. This implies that focus is on (1) analytical description rather than statistical generalization, (2) a flexible rather than structured approach, and (3) details and relevance rather than simplification and precision (Grønmo 2004: 129-132). There are several trade-offs in the choice between a qualitative and a quantitative approach (Gerring 2007: 37-63). In this thesis a qualitative approach is preferable because existing knowledge of the phenomenon under investigation, welfare complaints systems, is scarce. Qualitative studies enjoy a natural advantage in research of an exploratory nature where existing data is incomplete (Gerring 2007: 39, 57-58). Furthermore, qualitative research tends to offer opportunities for more intensive investigation (Gerring 2007: 48-49). In this context it seems more useful to investigate few cases in depth in order to acquire some detailed knowledge, rather than to compare many cases superficially. The comparison of welfare complaints systems in a procedural justice perspective also requires attention to context and equivalence, which is more difficult to achieve in quantitative approaches.

⁹ See Moses and Knutsen (2007: 2-10), Ryen (2002) and Silverman (2006: 57) for discussions of the major research paradigms and their implications. Ryen (2002: 96) also explains how qualitative approaches can follow the naturalist paradigm, in opposition to the traditional distinction between naturalism and constructivism as parallel to the distinction between quantitative and qualitative research.

A case study (see Yin 2009: 18 for a definition) is appropriate whenever “how” and “why” questions are posed, when there is little investigator control over events, thus excluding an experimental approach, and the focus is on a contemporary phenomenon within a real-life context (Yin 2009: 2). This thesis asks whether different complaints systems secure procedural justice for welfare claimants, and hence addresses present conditions within a real-life context that cannot be controlled by the researcher. Although there are different opinions as to what constitutes a case study regarding the number of cases, this thesis follows Yin (2009: 53) and George and Bennett (2005: 18) and considers the study of a few cases, in this context two cases, to fall within the methodological framework of a case study.

The analysis will consist of both within-case analysis of two single cases and comparison of the cases. George and Bennett (2005: 18) state that: “there is a growing consensus that the strongest means of drawing inferences from case studies is the use of a combination of within-case analysis and cross-case comparisons within a single study.” Yin (2009: 53) also recommends multiple-case studies over single-case studies, even when this only implies adding a second case to the original case. This is so because the evidence from multiple cases “is often considered more compelling, and the overall study is therefore regarded as being more robust” (Yin 2009: 53).

4.3 Case selection and external validity

The cases selected for study are complaints systems within the Norwegian and German welfare states. Within NAV, two units of analysis are chosen, namely the complaints systems of the two welfare benefits social assistance (administered at municipal level) and disability pension (administered at state level). This implies that there are two embedded units of analysis within the Norwegian case (Yin 2009: 59). In the German case, only the complaints systems of the Hartz IV benefit, i.e., the fusion of long-term unemployment benefit and social assistance, is studied. The different choice for the two countries is meant to cover the varieties within the Norwegian case, while such differences are not present in the German welfare administration; all social security and social assistance cases are subject to the same complaints system in Germany. The cases are situated in developed welfare states, representing two different welfare regimes (Esping-Andersen 1990). Both welfare states have recently implemented large reforms. Consequently, both countries have modernized their organization and systems of basic social security and social assistance. The complaints systems are very different in Norway and Germany, and the case selection thus follows the

strategy promoted by Creswell (2007: 75) to pick cases that display different perspectives of the problem under investigation, in other words, to maximize variation.

A central aim of this thesis is to illuminate the two cases in a theoretically led manner, rather than to identify a causal chain. The goal is thus descriptive inference, which is a premise for causal inferences. Description often comes before explanations as we must know something about the world and what needs to be explained before we can develop causal explanations (King et al. 1994: 34).

According to Gerring (2007: 85), every case study must state what constitutes the broader population of the cases studied. This concerns the *external validity* of the study, i.e., whether the findings of a study are generalizable beyond the cases studied (Yin 2009: 43). Generalization is a standard goal of quantitative research and is normally achieved by random sampling (Silverman 2006: 303). Random sampling procedures are, however, normally not appropriate within qualitative research. The cases selected here are instead based on purposive sampling, which means that the cases are not representative of a larger universe of cases. This implies that while quantitative studies rely on statistical generalization, the mode of generalization relevant to qualitative studies is analytic generalization (Yin 2009: 43). Analytical generalization entails that “the investigator is striving to generalize a particular set of results to some broader theory” (Yin 2009: 43). The potential for generalization is theoretical rather than statistical; the thesis will include a discussion of what is the “normatively” best system, and thus a framework for comparison and study of other cases as well as a foundation to consider reforms to strengthen the legal protection of welfare claimants.

Theoretically, the framework and discussions of this thesis address a population that includes all modern welfare states. Empirically, however, no generalization beyond the Norwegian and German cases can be made from this thesis. Nevertheless, an overview of comparable cases contributes to situate the cases under investigation in relation to a larger population. Table 1 includes data on the complaints systems of nine other Western democracies¹⁰ – Sweden, Finland, Denmark, the United States, the United Kingdom, Ireland, Australia, France and Austria.

¹⁰ These serve as examples, but do not exhaust the population. Cases from Esping-Andersen’s three different welfare regimes are represented, and there are also countries from both common law and civil law traditions.

Country	Structure of social security and social assistance complaints system		Oral hearings or written procedure	Sources
<i>Sweden</i>	<ol style="list-style-type: none"> 1. Optional internal review 2. The Administrative Court 3. The Administrative Court of Appeal 4. The Supreme Administrative Court 		Mainly documentary treatment, but hearings are held upon request by the claimant or the court.	Försäkringskassan 2013, Socialstyrelsen 2013, Sveriges Domstolar 2013
<i>Finland</i>	<ol style="list-style-type: none"> 1. Obligatory internal review 2. The Social Security Appeal Board or the Unemployment Appeal Board 3. The Insurance Court (social security matters only) 4. The Supreme Administrative Court 		The procedures are mainly written, but oral hearings must be held whenever necessary or any part to the case request a hearing.	Kela 2013, Ministry of Justice, Finland 2013, Ministry of Social Affairs and Health, Finland 2013
<i>Denmark</i>	<ol style="list-style-type: none"> 1. Obligatory internal review 2. The Social Complaints Board or the Employment Complaints Board 3. The National Social Appeals Board 		Case proceedings are written in their entirety.	Ankestyrelsen 2013, Statsforvaltningerne 2013
<i>United States</i>	<u>Social security</u> <ol style="list-style-type: none"> 1. Obligatory internal review 2. Administrative law judge hearing 3. Appeals Council Review 4. The Federal Court 	<u>Social assistance</u> <ol style="list-style-type: none"> 1. Local Boards 2. The State District Court 	Oral hearings are a substantial part of both complaints systems.	Minnesota Department of Human Resources 2013, Social Security – The Official Website of the U.S. Social Security Administration 2013
<i>United Kingdom¹¹</i>	<ol style="list-style-type: none"> 1. Obligatory internal review 2. The Social Security and Child Support Tribunal 3. The Upper Administrative Appeals Chambers 		Oral hearings are obligatory with few exceptions, and are always held when requested by claimant.	Justice UK 2013, The Official Home of UK Legislation 2013
<i>Ireland</i>	<ol style="list-style-type: none"> 1. Optional internal review 2. The Social Security Appeals Office 3. The High Court 		Oral hearings are not obligatory, but can be requested (and most likely granted) already in the first stage.	Flac 2012
<i>Australia</i>	<ol style="list-style-type: none"> 1. Two-tiered obligatory internal review: original decision-maker and authorized review officer 2. The Social Security Appeals Tribunal 3. The Administrative Appeals Tribunal 4. The Federal Court 		Oral hearings are held from stage two.	Administrative Appeals Tribunal 2013, Social Security Appeals Tribunal 2013
<i>France</i>	<ol style="list-style-type: none"> 1. The Appeals Board of the Courts 2. The Social Security Court 3. The Social Chamber of the Court of Appeal 4. The Council of State 		Oral hearings in the courts.	Le Nouvel Observateur 2013, Service-Public.fr 2013
<i>Austria</i>	<u>Social security</u> <ol style="list-style-type: none"> 1. Provincial Court for Labour and Social Affairs 2. Higher Regional Court 4. The Supreme Court 	<u>Social assistance</u> <ol style="list-style-type: none"> 1. Local District Administrative Authority 2. Independent Administrative Panel 	Oral hearings in the courts.	Austrian Social Security 2013, Federal Ministry of Labour, Social Affairs and Consumer Protection 2013, Unidroit – International Institute for the Unification of Private Law 2013

Table 1: Complaints systems in nine Western democracies

¹¹ There will be made changes to the system of United Kingdom during 2013.

With this background, Norway and Germany stand out as “extreme cases” (Gerring 2007: 89) in some aspects. Firstly, the Norwegian and German cases capture the tribunal-court distinction. While the Norwegian system is based on administrative tribunals, the German system consists of specialized courts. Of the nine other countries, two systems consist of courts, two have pure tribunal systems, while five systems combine tribunals and courts.¹² Secondly, only Denmark is similar to Norway with a complete absence of oral hearings. Five countries have obligatory oral hearings and the remaining three cases have mainly written procedures with oral hearings held only upon request. In this sense, the Norwegian case can be placed on the one extreme together with Denmark, and Germany can be found on the other end of the scale with obligatory oral hearings in all court instances. Thirdly, Norway is an outlier with regards to different complaints systems for social assistance and social security. Only the United States and Austria display a similar division. The Norwegian and German cases hence exhaust much of the variation present in other cases and serve to illuminate important analytical dimensions.

4.4 Empirical application of normative theory

Empirical and normative research is often presented as difficult to reconcile. This thesis, however, follows the advice of Rothstein (1998), as well as Kildal and Kuhnle (2005b: 3), and suggests that a combination of normative and empirical analysis may be an especially useful research strategy. Empirical research can say something relevant that have real-world implications and illuminate practical limits of normative arguments. Normative research, on the other hand, implies acknowledgement of inherent values, and give structure and purpose to the empirical investigation. Rothstein (1998: 2) justifies his combined approach through Ricci’s (1984) criticism of contemporary political science, namely that while classical political science was dominated by normative concepts like justice and rights, contemporary political science, termed “descriptive empiricism”, has “sacrificed its political relevance and urgency on the altar of empirical precision and statistical generalization” (Rothstein 1998: 2). A frequent critique of a normative approach, on the other hand, is that “it cannot be scientifically demonstrated that certain normative standpoints are more correct (in the sense closer to the truth) than others” (Rothstein 1998: 4). The goal, however, is to find solid argument that “certain conclusions follow logically from certain basic principles - principles

¹² Tribunals can, however, be more or less court-like and more or less independent of the administration. Such differences are not apparent in this superficial overview of the complaints systems.

over which, we can reasonably hope, far-reaching agreement can be reached” (Rothstein 1998: 4). This relates to the operationalization of normative criteria for empirical evaluation. According to Westerståhl (1993: 281-282), operationalization is about trying to bridge the gap between “should be” and “is”. He states that the building material of this bridge must be found in an authoritative debate, and that most people must accept the operationalization. Without this acceptance, the operationalization is useless as a measure of a certain value.

4.5 Comparison across countries

The comparative aspect of this thesis has several advantages. The least cross-national comparison can do is to reveal and point to “possible exaggerations within the parochial scientific discourse”, which implies putting national results into perspective (Brans 2007: 296). Certain practical recommendations and new ideas about what constitute good structure and best practices can also be achieved through cross-country investigation. King et al. (1994: 5) argue that comparison, which entails judgments of which phenomena are more or less alike in degree or in kind, is a fundamental part of all social science. The empirical discussion in this thesis is based upon the derived criteria of procedural justice. As these criteria are not measured in absolute terms, a comparative discussion will be even more meaningful than merely within-case analysis, as this provides an opportunity to discuss what is more or less just between the systems with regards to the criteria.

A problem in comparative research is the question of issue or process equivalence. The question is whether “matched comparisons” that track the same phenomenon or process in different contexts are in fact “comparing apples with apples” (Locke and Thelen 1998: 9). Thus, in the empirical investigation one must be aware of the possibility that differences in the Norwegian and German welfare states might create different kinds of problems when it comes to the conceptions of procedural justice. Taking context into consideration can be critical to establish analytically equivalent phenomenon making comparison possible (Locke and Thelen 1998).

A fundamental question in this discussion is whether justice principles are universal. Rothstein (2011: 19), in his analysis of QoG, argues that we need universal conceptualizations in order to avoid relativism that renders comparative approaches and common theories futile. According to a natural law approach, it is possible to establish and justify principles of justice that are independent of particular societies (Bell 1992: 118). Such an ideal could then form the basis for evaluation of the achievements of particular communities, “whose achievements

will never be more than approximations of the ideal” (Bell 1992: 118). While Greenberg (2001: 370) suggests that concerns about distributive justice may be universal, but that its operationalization is particularistic, he also asserts that beliefs about procedural justice are more universal in nature. In a comparison of administrative law within the United Kingdom and the United States, Wade (1963: 4) argues that the ideal of administrative justice is a connecting thread that holds the comparison together. The goal in this thesis is that the criteria for procedural justice applied can also be seen as such connecting threads.

4.6 Data

Data is drawn from different sources, most importantly from public documents, academic texts and expert interviews. Public documents include public information about the complaints systems, legal propositions, laws and reports. Data is also obtained from academic sources with information about the German and Norwegian welfare states and complaints procedures (e.g. Foster and Sule 2010, Kjørstad and Syse 2008, Refsdal 2009, Øie 2010). In addition, interviews with employees in the complaints systems in Norway and Germany provide primary data. Such interviews give opportunities for gaining further knowledge about facts of the complaint systems, and also to ask people with extensive knowledge on the topic about their opinion on the matter in question (Yin 2009: 107). Although interview accounts, like all other data sources, must be interpreted with caution, it can constitute an important part of *data triangulation*. Data triangulation implies that several different data sources are applied to shed light on the same facts or phenomena (Yin 2009: 115-116). The use of several sources of information will contribute to a more complete and accurate analysis.

4.6.1 Public documents and existing research

According to Yin (2009: 101), “documentary information is likely to be relevant to every case study topic.” This includes administrative documents and prior studies of the same cases and/or phenomena in question. Advantages with documents as sources of data are that they are stable, unaffected by the study, and have a broad coverage of topics (Yin 2009: 102). Ethical considerations are less important in work with existing documents than for many other data sources exactly because the sources are not affected by the research (Silverman 2006: 306). Possible problems are bias in the documents because they are written for a certain purpose, as well as bias in the selection of documents (Yin 2009: 102). Regarding selection bias, broad coverage of existing research as well as relevant public documents from both

countries has been attempted obtained. There may, however, still be voids in the background material due to problems of irretrievability. A weakness of this thesis is a lack of complete overview of relevant documents written in German. Even though some documents in the German language have been included by the assistance of translation tools, a lack of proficiency in the German language has made the search for relevant sources a difficult task.

4.6.2 Expert interviews

There are several justifications for conducting interviews with employees in the relevant institutions. Firstly, there is a lack of available data regarding details of the complaints systems in both countries. Secondly, the interviews can provide a better basis for contextual understanding, and in the German case interviews with English-speaking officials contribute to overcoming the language barrier present regarding written documents. Further, by triangulating the interview data with other data sources, facts can be confirmed and clarified (Wroblewski and Leitner 2009: 240, Yin 2009: 102). The interviews are targeted at data covering all the criteria for procedural justice as well as detailed descriptive accounts of the complaints systems in both Norway and Germany.

An interview can be considered an expert interview when the respondent is regarded expertise, i.e., in possession of interpretative and procedural knowledge of a particular field central to the area of research (Littig 2009: 107). In an expert interview, the expert will serve as an informant and possess knowledge which might otherwise not be accessible (Littig 2009: 100). The interviews are conducted in accordance with Yin's (2009: 107) "focused interview". Although a variant of semi-structured interview, it follows a pre-specified set of questions. This implies a rather high degree of structure, while there is still room for follow-up questions and alteration of the interview questions during the interview. This relatively high degree of structure is due to the aim of evaluation of specific criteria, and hence the need for information that cover these aspects. Moreover, the need for comparability between countries also requires stringency (Ryen 2002: 97).

There are several challenges in the conduct of expert interviews. All kinds of interviews are prone to problems of bias, poor recall and inaccurate articulation (Yin 2009: 108-109). Wroblewski and Leitner (2009: 241) assert that such problems are even more pronounced in expert interviews than in other kinds of interviews. The so-called "stakeholder problem" is a special problem for expert interviews (Wroblewski and Leitner 2009: 236). This problem occurs because the respondents are usually also participants in the organization or

institution being evaluated, that is, they are *stakeholders*. This means that they have a special interest in the results of the investigation. Hence the stakeholder might try to control and even withhold certain information. There are also methodological problems related to the fact that the expert is representing an institution because the information shared with the researcher could reflect the private opinion of the respondent rather than objective information about the institution (Abels and Behrens 2009: 140). This must be taken into consideration in the analysis and utilization of the interview accounts.

*Selection of respondents*¹³

The selection of respondents for qualitative interviews does not follow procedures for random selection common in quantitative studies, but rather relies on a *strategic selection* of respondents (Grønmo 2004: 98-99). When respondents are selected strategically, the important criteria to follow are that respondents are chosen according to what is advantageous to the research question and according to theoretical considerations (Grønmo 2004: 99). In this thesis, the respondents are chosen with the aim of gaining information and insights from experts in the relevant institutions in the German and Norwegian systems. The scope of a master's thesis including available time limits the number of respondents. The choice is therefore to recruit one respondent from each of the institutional bodies deemed relevant to the research question. This can be termed as a type of quota selection, as a certain number of respondents are selected within predetermined categories (Grønmo 2004: 99). Although Ryen (2002: 85) argues that it is less important how many people you interview than the information they provide, the limitations of a master's thesis may still imply that a point of saturation, i.e., the point where another interview would not contribute with new information (Ryen 2002: 94), may not be reached, as the limits are set before the interviews are conducted.

Ethical considerations

There is a specific need to consider human subjects protection in case studies, as they address contemporary human affairs (Yin 2009: 73). An application to The Norwegian Social Science Data Services (NSD) for permission to collect personal information was necessary because personal data like names and positions of the Norwegian respondents are saved

¹³ See appendix A for the list of respondents.

electronically.¹⁴ Further, informed consent from all respondents is required, as well as making sure they are protected from possible harm caused by the research project (Yin 2009: 73). Another question is that of confidentiality and anonymity. In this thesis, the respondents are not asked personal or sensitive questions. It would be preferable to publish the position and workplace of the interviewees because the source is relevant for the quality of the data obtained. There must, however, be given a consent for this (Silverman 2006: 320). According to Silverman (2006: 320), this is required even when “we are not dealing with matters that seem, on the face of it, to be particularly delicate or intimate.” With expert interviews anonymization can prove problematic because the experts are implicated into social hierarchies and associations. There are often few experts, and they take part in unique events (Obelené 2009: 197). In this thesis, the respondents are partially anonymized as their names are not provided. None of the respondents objected to this solution.

*Conducting the interviews*¹⁵

Whether or not to use a tape recorder was a practical matter to be considered prior to conducting the interviews. An advantage of using a tape recorder is that it yields a complete and accurate transcript of what is said (Peabody, Hammond, Torcom, Brown, Thompson and Kolodny 1990: 454). Woliver (2002: 678) argues, however, that tape recorders can be intrusive both for the interviewer and the interviewee. It could also cause the respondent to be more reserved in his or her answers (Peabody et al. 1990: 454). On the other hand, this should be less of a problem because the topics to be discussed are not sensitive or personal. The choice was made to ask the respondent whether he or she was comfortable with the interview being recorded. When this was accepted without hesitation, which was the case with all the interviewees, a tape recorder was utilized. Tape-recording and subsequent transcription can increase the reliability of the data (Silverman 2006: 287).

Three of the interviews were conducted through e-mail and one by phone. These interview procedures have the advantages of being cost and time effective, as well as the lack of necessity to coordinate a common meeting point (Ryen 2002: 253). Challenges are mainly concentrated on how to ensure that the respondents actually answer, and that there is a lack of contextual understanding that comes as a bonus when interviews are conducted in the natural

¹⁴ The project was approved by NSD and given the project number 31363.

¹⁵ See appendix B for the interview guides.

context (Ryen 2002: 255). The remaining six interviews were all conducted at the location of the institution in point. In the Norwegian cases this implied offices, and since the cases are mainly handled in writing, these are the places where assessments and judgments are made. In Germany, however, hearings take place in court rooms. When conducting the interview with a judge in Berlin Social Court, six hearings were also attended at this court. The fact that all interviews have taken place in the natural context has improved the contextual understanding and provided considerable additional knowledge about the different processes.

The experience was that despite a fairly small number of interviews, the point of saturation was in fact reached both in the Norwegian and the German context. This can be explained by the rather limited aim of the interviews, namely to provide concrete information rather than opinions and different perspectives. A limitation of the data material is, however, that interviews were only conducted in some localities in Germany and Norway. In order to cover all possible local variations, interviews would have to be conducted within every Norwegian county and every German state. This is an insurmountable task for a master's thesis, and the limitation is less severe because the questions asked and the information obtained addressed formal procedural aspects which can be assumed to be similar within the two countries. The problem would have been much more pronounced in a study of the actual effects of the system.

The stakeholder problem was clearly apparent in one interview. In this case, the respondent seemed uncomfortable with the interview setting and spoke from a position of defense of the institution in point. This may have resulted in an overly positive presentation of that institution, but as the questions were focused on facts and procedures, the consequences should not be too large. There is also a possibility that this problem was present in other interviews, although in a less obvious manner. This implies that the data obtained in the interviews must be handled with caution, and as far as possible these data are therefore triangulated with other sources of data.

Transcription and coding was conducted according to thematic categories, including the criteria of procedural justice, but also more descriptive categories such as "about the Hartz IV benefit".

4.6.3 Alternative approach: User survey

The focus of many approaches to justice, especially by social psychologists, is of the *perceived* justice, which implies investigating empirically how citizens feel. Following this

line, a survey of welfare complainants would have been a more viable approach. According to Sainsbury (1999: 454) and Harris (2007: 573), the user perspective is clearly important. The users' evaluation of the system is relevant to the effectiveness of the complaints systems, and also for the broader system implications of legitimacy. However, there are important reasons to disregard this approach. Such surveys are not always very instructive because it may be difficult to attain knowledge of procedural elements through surveys. Nel et al. (2000: 27) suggest that although procedures are an important aspect of complaints handling, "it would seem that they are commented upon only when they break down." Several studies show that the views of the complainants are affected by the outcome of their complaint, and that "their assessments of their experiences are made difficult by an incomplete knowledge of social security adjudication and alternative decision-making structures, and that their assessments are often based on low expectations of public bodies" (Sainsbury 1999: 454).

4.7 Credibility

A critical discussion of the credibility and quality of a study is important in order to illuminate possible strengths and weaknesses of the study and its conclusions. Such a discussion should be guided by the concepts of reliability and validity (Silverman 2006: 281). In the following sections the credibility of the results is discussed through these concepts.

4.7.1 Reliability

Reliability refers to the degree to which the findings of a study are independent of chance or errors in the data collection (Silverman 2006: 282), and implies the goal of minimizing errors and bias in the thesis (Yin 2009: 45). A common criterion for reliability is replicability. Replicability addresses the question of whether the study could have been repeated by another researcher with the same results (Silverman 2006: 282). The requirement for replicability applies not only to the data, but also to the reasoning process behind the conclusions (King et al. 1994: 26). Two ways to increase the reliability in qualitative research is through *process transparency* and *theoretical transparency* (Silverman 2006: 282). Process transparency can be achieved through describing the research strategy and methods in a sufficiently detailed manner, which is the overall purpose of this chapter. Theoretical transparency implies making the theoretical standpoint which guides the collection and interpretation of data explicit. The latter is attempted in the theory and operationalization sections.

Regarding the different data sources utilized in this thesis, documents are often considered a reliable source, because they exist prior to, and are thus unaffected by, the data collection. However, issues of reliability may arise in the categorization and interpretation of the data (Silverman 2006: 286). The reliability of the interviews, also discussed in section 4.6.2, can be increased through the tape-recording of interviews, careful transcription of the interviews, as well as providing long extracts of data in the research report (Silverman 2006: 287). Although there is no room for the latter in a master's thesis, transcriptions and tapes of the interviews are stored and available upon request.

4.7.2 Validity

Validity refers to measuring what we claim to measure (King et al. 1994: 25). According to Yin (2009: 40), there are three types of validity, that is, construct validity, internal validity and external validity. Internal validity in Yin's conception is not relevant here, as it refers to the truth of causal relationships investigated in the study. This type of validity is more relevant in experimental and quantitative studies (Grønmo 2004: 234). The external validity is discussed in section 4.3.

Construct validity

Construct validity implies identifying correct operational measures for the phenomena studied (Yin 2009: 40). Useful tactics to improve the construct validity are to use multiple sources of data seeking converging lines of evidence, and to establish a chain of evidence (Yin 2009: 42). The advice to use multiple sources is followed by utilizing both primary and secondary sources of data. Yin (2009: 116) distinguishes between true data triangulation and the use of multiple sources of data that address different facts. Both approaches are followed in this thesis, as the interviews are meant both to validate existing information *and* as a supplement where information is lacking. Maintaining a chain of evidence implies keeping an explicit analytical line all the way from the research questions, through data and to the final conclusions (Yin 2009: 123). This latter tactic is also important to secure reliability, as it increases the transparency of the study, and thus possibilities for replication. The operationalization of procedural justice criteria is discussed in the following sections.

4.8 Operationalization of procedural justice criteria

In order to apply the theoretical framework to real-world institutions, the criteria deduced must be operationalized, i.e., they must be made concrete and practically observable. While the approach to procedural justice adopted by most social psychologists is to study subjective justice, this thesis seeks more objective criteria of procedural justice. Objectivity is, however, nearly impossible to attain in discussion of normative issues. The term intersubjectivity, on the other hand, can refer to “agreement in the sense of having a shared definition of an object” (Gillespie and Cornish 2010: 19). In this context intersubjectivity points to the desire to arrive at criteria which can be agreed upon by most people and that are applicable across time and space. According to Lind and Tyler (1988: 19), there are two main problems with this approach: (1) one must find a way to establish a standard for measuring the extent to which a procedure meets a given objective criterion, and (2) one must decide which criteria are important, and also consider possible trade-offs between different criteria. These tasks are attempted achieved through the thorough assessment of existing literature and previous studies, such as user surveys. The following sections contain the operationalization of the procedural justice criteria.

Consistency

The literature suggests that the most important aspect of consistency is across space rather than across time. Consequently geographical consistency within the nation-state will serve as a point of departure in the measurement of the consistency criterion. A reason not to consider consistency over time as a criterion for procedural justice is the fact that circumstances are changing over time, and procedural aspects may be reformed for the better; hence, inconsistency over time may not necessarily be negative for procedural justice. The questions to investigate empirically are how the complaints system is designed to mitigate any possible inconsistency in first-instance decisions, *and* whether the complaints treatment itself can be expected to be consistent considering systemic aspects. The question is what is done to secure uniformity in decision-making across geographical space and across different claimants in the same geographical areas.

Independence

Independence can be operationalized through the organizational distance from the former decision-maker (Sainsbury 1999: 459). Some relevant distinctions are: (1) whether the initial

decision-maker belongs to the same governmental level of the executive branch as the complaints organ, i.e. they are both municipal or both state-level, (2) whether the initial decision-maker belongs to a lower level of the executive branch than the complaints organ, that is they are from municipal and state level, or (3) whether the two instances belong to different branches of government, e.g. the executive and the judicial branch. These three possibilities imply increasing degrees of independence.

Voice

The voice criterion can be measured by the degree to which the complainant is allowed a part in the complaints process. Important questions are whether the complainant is invited to an oral hearing, and whether such a hearing is an obligatory part of the case procedure. If not, is there any other kind of contact between the decision-making agency and the complainant?

Quality

Procedures to increase the quality of decisions is a difficult component to measure. However, an inevitable requirement of the complaints procedure for a high-quality decision to be produced is the acquirement of relevant and sufficient case information. Accordingly, one question is how information is obtained. Given the procedures of the complaints agency, what are the chances of obtaining sufficient, high-quality and unbiased documentation? Further, the level of competence of adjudicators is highly likely to be related to the quality of the decision. Whether all adjudicators are trained within law and whether they are specialized within a specific area of welfare law can be expected to increase the procedural justice by raising the chances for high-quality decisions. This is so because important requirements of the decision-makers are to grasp complicated facts, understand the rules, give fitting judgments and to have the competence to “declare the law” (Morton 1998: 173, Sainsbury 1999: 456). These are important aspects of an education within law. In addition to the competence of the individual decision-maker, a relevant aspect is how many adjudicators are involved in each case. A larger number of adjudicators will reduce the chances of wrong, biased or hasty decisions (Sainsbury 1999: 456).

Transparency

The indicators for the transparency criterion are how much information is provided to the complainant by the complaints agency, whether complainants are given updates on case

progress, and whether there are always given written reasons for decisions. A requirement is that persons affected by a decision are given “proper, adequate, intelligible reasons which deal with the substantive issues raised” (Swain 2009: 90).

Timeliness

The operationalization of the timeliness criterion is quite straightforward; how much time does the complaints agency spend on deciding a complaints case? A related question, which, depending on the answer, can mitigate or exacerbate the consequences of this criterion, is what happens to the complainant while he or she awaits a decision; what kind of financial support is the complainant given, keeping in mind that the benefit applied for is meant to provide basic subsistence? This overlaps with the financial aspects discussed separately. Although the indicators of measurement are straightforward, the judgments as to what is reasonable timeliness are not set. However, according to Flac (2012: 49-50), the assessment must be done keeping in mind that the “matter at stake” is access to economic means which constitutes the main or only source of income for the claimant.

Financial risk

The first operational indicator for this criterion is whether the complainant risks being charged with legal costs, and, secondly, what kind of economic support the complainant is provided with while the case is being considered. Next, is expert help, or legal aid, provided for free when this kind of assistance is regarded important?

5. The cases: Context and welfare benefits

5.1 Introduction

This chapter lays out contextual characteristics about the cases that can be of importance to the discussion of procedural justice. The motivation behind this is to deal with the challenge of establishing equivalence in the comparison across countries, a problem discussed in section 4.5. This chapter thus presents and discusses the history of the Norwegian and German welfare state, the two countries' placement within Esping-Andersen's regime theory, the conceptions of welfare rights, as well as the constitutional backgrounds and the welfare benefits in focus.

5.2 Historical account of the welfare state

The right to social security for people unable to provide their own income was introduced in Norway in the 20th century (Hatland 2011b: 107). Social security deviated both from the former Poor Law of 1845 (Fattigloven), in that it gave much stronger rights, and from private insurance, because it was compulsory by law and administered by public agencies (Hatland 2011b: 109). A statutory disability benefit was adopted in 1960, and in 1966 all existing social security benefits were gathered within the National Insurance Scheme (Folketrygden) (Hatland 2011b: 110-111). Since the establishment of the National Insurance Scheme, the basic characteristics of the Norwegian welfare state have remained stable. There is wide coverage of insurance against risks, and the complementary social assistance system is thus smaller than in most other welfare states (Hatland 2011b: 112, Lødemel 1989: 76, 147). The NAV reform, adopted in 2005 and carried out between 2007 and 2011, implied the decision to merge the administrations of social assistance, social security and the labor market agency. This has been characterized as the most comprehensive administrative reform in the modern history of the Norwegian welfare state (Hatland 2011b: 144).

The basic characteristics of the German welfare state were established with Bismarck, who is generally viewed as the founder of the German welfare state, and still remain today. These are organizational fragmentation and social differentiation, as well as a heavy reliance on social insurance (Kuhnle and Kildal 2011: 16). Prominent characteristics of the German social insurance established in the 1880s are corporatism and selectivism. Although many of the original characteristics of the German welfare are intact, the Hartz reforms, which addressed the inefficient labor market organization, have contributed to important changes (Kemmerling and Bruttel 2005: 1). The reform package, which has been implemented since

2002, has been characterized as the most ambitious German reform project within social policy since World War II.

Both countries have a long welfare state history, and they both possess encompassing schemes of social security. The basic structure of the welfare state has remained stable in both countries, despite comprehensive reforms during the past ten years. Hence the welfare state history and development should not cause problems of equivalence in the comparison between Norway and Germany; they both exemplify modern and developed welfare states.

5.3 Welfare regime and welfare rights

In Esping-Andersen's terminology, the Norwegian welfare state belongs to the social democratic regime type¹⁶, with universalism as an important characteristic (Esping-Andersen 1990: 27). This implies that people are entitled to welfare benefits due to residence, citizenship or participation in a work sector (Kuhnle and Kildal 2011: 18). The core of the welfare state is the public responsibility for income securitization, health and care. Positive welfare rights can be traced back to the introduction of social security laws in the 20th century, and especially with the establishment of the National Insurance Scheme (NOU 2005: 164). The Norwegian social security legislation today is characterized by a comprehensive, formalized and standardized statutory system of rights. However, rights to social assistance are of more recent date and are still disputed (NOU 2005: 164). Although the law states the right to economic support at a reasonable minimum level through social assistance, the discretion of the municipal administration and individual professionals is wide, and the rights formulations require individual interpretations in welfare delivery (NOU 2005: 165).

In Germany, the principle of the Sozialstaat, i.e., the requirement that the Federal Republic is a social state, "underpins the provision of social laws and the extensive involvement of the state generally in social welfare to provide the social element and balance or correct the unfortunate effects of a market economy" (Foster and Sule 2010: 187). This implies a legally binding obligation for the state to provide social welfare to its citizens. There is an overwhelming academic consensus that the German welfare state is empirically very close to what Esping-Andersen termed the conservative regime type (Schiller and Kuhnle 2007: 75). This regime type, also called the Continental model, is considered a product of Catholic and corporatist ancestry. Five distinguishing characteristics of the German welfare

¹⁶ This regime type is sometimes referred to as the Scandinavian welfare regime (e.g. Kuhnle 2000).

state are: (1) high importance of social insurance, (2) few services in kind, and more money transfers, (3) social insurance contributions shared equally between employee and employer, (4) the aim of the welfare state is to maintain the former standard of living, and (5) a strong orientation towards the male breadwinner model (Schiller and Kuhnle 2007: 75).

Norway and Germany are classified as different welfare regimes. In contrast to the equalizing aim of the Scandinavian welfare regime, the German corporatist consensus hold that social protection should be aimed at sustaining people's economic status as set by the labor market. This implies that earnings should be maintained at previous levels (Goodin, Headey, Muffels and Dirven 1999: 74). However, these differences are less important to the comparison in this thesis than the fact that both the Norwegian and the German state have taken on considerable public responsibility for the welfare of its citizens. Both welfare states provide strong rights to economic welfare. Because this thesis addresses procedures of the administration of welfare benefits, rather than the distributive welfare schemes themselves, this latter aspect is important as it expresses equivalence regarding the need for mechanisms for enforcement of these rights.

5.4 Constitutional background

Norway has a unitary legislative system with one national law applying throughout the country. Although administrative decisions are made by public agencies on three administrative levels, namely the state, 19 counties and 429 municipalities, the counties and municipalities do not have legislative competence (Frihagen, Rasmussen and Bernt 2010: 37, Hagelien, Vonen and Advokatfirmaet Schjødt 1994: 11). The principal source of law, the Norwegian Constitution of 1814 (Grunnloven), states the separation of powers between the executive, legislative and judicial branch (Frihagen et al. 2010: 20, Hagelien et al. 1994: 11). The general court system is divided into three levels of jurisdiction (Stern 2008: 331). There are no specialized administrative or constitutional courts, and the ordinary courts have jurisdiction over administrative disputes. Administrative law in Norway implies the judicial control of administrative decisions (Frihagen et al. 2010: 42). Welfare legislation falls within the administrative law and is governed by the same general regulations. The highest administrative organ within this jurisdiction is the Social Security Tribunal (Frihagen et al. 2010: 20). Few administrative cases, including welfare cases, are appealed to the ordinary courts (Bragdø 2005: 69). Consequently the courts play a minor role in the Norwegian

complaints system for welfare benefits (Kjønstad and Syse 2008: 193), and will not be discussed further in this thesis with regards to the criteria for procedural justice.

Germany is a federally structured democratic state built upon the *Rechtsstaat* and social justice (Birkinshaw 2003: 136). The term *Rechtsstaat* indicates the supremacy of law (*Recht*) within the state (*Staat*); all power is bound by the law (Foster and Sule 2010: 178). The *Rechtsstaatsprinzip* further demands “a fixed and certain hierarchy of laws binding on all, the separation of powers, and the provision of accessible independent courts offering protection to the citizen, namely his basic rights” (Foster and Sule 2010: 187). The federal state is composed of 16 states, which have certain competences in legislation, administration and the judiciary (Kofler 2008: 203). Judicial power in Germany is divided into five areas: (1) ordinary jurisdiction, including civil and criminal courts, (2) jurisdiction in labor affairs, (3) administrative jurisdiction, (4) financial jurisdiction, and (5) social jurisdiction (Bundessozialgericht 2012). Social law is a part of public law, in contrast to civil law, because it deals with the relations between citizens and the state (Foster and Sule 2010: 310). This field is considered a special area within administrative law. The social law has its own hierarchy of courts regulated by the Social Courts Act (*Sozialgerichtsgesetz*) (Foster and Sule 2010: 310). Courts play an important role in the German society, and there is a constitutional guarantee to have any administrative decision tried by an independent court (Respondent 9 2012).

The constitutional background is an important contextual factor because a significant dimension of the complaints systems regarding procedural justice effects is the difference between administrative and judicial adjudication. It is clear that the differences in constitutional background concur with the differences in degree of judicialization of these complaints systems. Courts play a larger role in the German society than the Norwegian, and there are stronger individual rights to judicial review of administrative decisions in Germany. This is likely to have caused different expectations in Norway and Germany regarding degree of formality and judicialization of complaints systems. There is also a difference between the courts systems in Norway and Germany, in that the German system is divided into five specialized jurisdictions while the Norwegian system contains only one common jurisdiction. These differences in tradition, and consequently citizens’ expectations, must serve as a note of precaution to the interpretation of the findings of this thesis, but the main goal of the thesis is to illuminate and discuss the differences in the complaints systems according to criteria of procedural justice rather than to explain their origin or to measure their empirical effects.

5.5 Benefits in question

Social assistance constitutes the lowest safety net in the Norwegian welfare state, and aims to capture problematic economic conditions not solved through other social institutions (Hatland 2011b: 143). The benefit is financed and administered at the municipal level. It is to a certain degree a continuation of the poor law (Helsetilsynet 2007: 10). In contrast to the poor law, however, formulations of social assistance as a *right* have become more apparent since the establishment of a new law on social assistance in 1964 (Kjønstad, Bernt, Kjellevoid and Hove 2000: 46).

Following the framework of Titmuss (1976: 130, see section 2.1), the nature of the benefit is discretionary. The rules of entitlement are based on economic need, and the main criterion for eligibility is that a person is not able to ensure his own subsistence through work or other economic rights (Hatland 2011b: 143). The determination of eligibility as well as the size of the benefit is based on extensive economic means-tests and the discretion of the local social worker based on guidelines from the local government (OECD 2010a: 6). The law does not state precisely who are eligible for social assistance and what level the benefits should have (Helsetilsynet 2007: 10). Although the government provides guidelines for the level of benefits, these are only advisory (Hatland 2011b: 143). This implies a heavy presence of discretion. Each administrative decision-maker has to make a judgment regarding what expenses are seen as necessary to secure a decent level of subsistence and to what degree the claimant is capable of reaching this level of income without social assistance (Helsetilsynet 2007: 10). There is a legal claim for a welfare benefit when the law provides criteria for bestowal and measuring of a benefit (Helsetilsynet 2007: 13). For social assistance, a legal claim is present when criteria for the right to financial assistance are fulfilled. This implies that social assistance, when certain criteria are met, can be considered a positive right not dependent on the competition about scarce resources (Helsetilsynet 2007: 13). However, the right can be regarded as weak, because the ambiguity of the rights formulation makes it difficult to enforce (Kjønstad et al. 2000: 333). A special feature of the conceptualization of a right to social assistance is the tension between the right given by the state and the principle of local democracy (Kjønstad et al. 2000: 47). The principle of local democracy implies that the municipalities make decisions without interference in areas where they are granted administrative responsibility (Eskeland 1992: 69).

The Norwegian *disability benefit* provides economic security for persons who are not able to enter the labor market, or who have to step out of the labor market before they are

eligible for retirement pension, due to disability or illness (Hatland 2011b: 125). The benefit is administered on state-level. The nature of the entitlement is an insurance principle, but all Norwegian citizens in employable age (18-67 years) are entitled to disability pension regardless of former participation in the labor market because Norwegian citizenship implies obligatory membership of the National Insurance Scheme (Kjønstad and Syse 2008: 295). The rules of entitlement are based on at least 50 per cent reduction in a person's capacity for work due to some form of sickness or disability (Hatland 2011b: 126). Appropriate treatment must have been tried and work assessment must have been conducted before disability pension can be granted. The determination of eligibility for disability benefits is based on statements from medical experts, rehabilitation experts, information about former income, as well as administrative judgments (Kjønstad and Syse 2008: 304). Exactly what constitutes "appropriate treatment", how lengthy this treatment must be, as well as how much resources should be devoted to rehabilitation before disability benefits can be approved are questions that offer much room for discretion in administrative decisions, as there are no clear-cut answers to these questions (Hatland 2011b: 126, Respondent 2 2012).

According to Titmuss' framework, then, the nature of the determination of entitlement is arguably legal as well as professional, while the rules of entitlement concern the loss of work capacity and completion of treatment and work ability assessment. Finally, the methods of determination are administrative judgment of different expert assessments, the reduced working capacity as well as former work experience in order to determine the eligibility for and the size of the benefit. Determination of the size of a disability benefit is quite clear-cut, and follows the same principle as retirement pension (Kjønstad and Syse 2008: 302), which is mainly based on former income. There is a relatively strong legal right to disability pension in the Norwegian context. There are certain clear conditions, like age and membership of the National Insurance Scheme, and the rules for measurement of the benefit size are clear and predictable (Kjønstad and Syse 2008: 106). However, there are judgments that have to be made by the decision-maker regarding the conditions necessary in order to be eligible for disability benefit (Kjønstad and Syse 2008: 106). Rights enforcement requires detailed information, often from several specialists, in order to determine whether the necessary criteria are fulfilled (Kjønstad and Syse 2008: 107). In sum, the right to disability benefits, given that certain criteria are fulfilled, is legally determined, but some of the criteria are vague and require professional insight within medicine and rehabilitation (Refsdal 2009: 42-43).

The German *Hartz IV benefit*¹⁷ was established as one of four acts in the Hartz reform (Kemmerling and Bruttel 2005: 3). The Hartz IV act was specifically aimed at reform of the unemployment benefit system (Kemmerling and Bruttel 2005: 5). The unemployment system is divided into two benefits, Unemployment Benefit I and Unemployment Benefit II. Unemployment Benefit I is contributions-based and limited to 12 months, with a six months extension for people over 55 years. After this period, jobseekers move to Unemployment Benefit II, which is the Hartz IV benefit. The benefit level of Hartz IV is fixed at the level of the former social assistance and is independent of previous income (Kemmerling and Bruttel 2005: 6).

The conditions for receiving the Hartz IV benefit are: (1) age between 15 and 65 years, (2) working capacity of minimum three hours per day, (3) residence in Germany, (4) foreign nationals must have permission to work, and (5) need (OECD 2010b: 3). There are no requirements of former contributions. A goal with the Hartz IV benefit was to construct an easily administered benefit, through flat-rate payments and hence no need for income assessments (Respondent 8 2012). However, the administration of the benefit has proved extremely difficult (Respondent 5 2012). The main complexities lie in the needs criterion and assessments of special cases, such as children being involved, illness, as well as the contribution for house rent, which is not flat-rate. The needs criterion requires a means-test which asks: (1) how much money the claimant has to live for, and (2) how much he or she needs. Claimants with children will generally receive more than claimants without children, and if there is illness involved, the claimant may have the right to extra money to cover medicines or a special diet (Respondent 5 2012). Finally, the rent depends on where the claimant lives and what kind of residence he or she possesses (Respondent 5 2012). As such, there are several discretionary judgments that have to be made both in the determination of eligibility and benefit level.

Following the framework of Titmuss, the nature of the entitlement is contractual, discretionary, as well as legal. The aim of the benefit is to provide a minimum subsistence level for job-seekers (Respondent 4 2012). The contractual element relates to the fact that every employable needy have to sign an integration agreement binding himself to certain obligations such as active search for jobs and participation in labor market activities in order to achieve eligibility (Federal Ministry of Labour and Social Affairs 2013: 10), while the

¹⁷ This benefit is also termed “the basic income support for job-seekers”.

discretionary element regards the needs criteria, and the legal nature points to the legal rights of a benefit when criteria for eligibility are fulfilled (Respondent 4 2012). The rules of entitlement are based on age, country residence, working capacity and need. Finally, the methods employed in determination of access are working ability assessments as well as a means-test regarding need.

Although the benefits chosen for study in the Norwegian and German cases are not similar, there are several reasons why a comparison of the benefits is feasible. Firstly, they are all benefits aimed at securing a basic level of income for people with insufficient income from employment, and they are in most cases directed towards people who have been unemployed for a while. Secondly, the administration of all three benefits includes elements of administrative discretion. Thirdly, the benefits have a substantial amount of recipients relative to the population. This would for instance not be the case for social assistance in Germany, which in 2010 was received by approximately 250.000 citizens, i.e., 0.3 per cent of the population, to give an example.¹⁸ This is so because most former recipients of social assistance are now absorbed by the Hartz IV benefit. For comparison, at the time of introduction of the Hartz IV benefit in 2006, 2.750.000 people received social assistance. Fourth, these three benefits together exhaust the different welfare complaints systems of the two countries. Finally, positive rights are present for all these benefits, and the requirements of a complaints systems regarding procedural justice is thus equivalent.

¹⁸ Data in print-out from respondent 8, obtained from Statistisches Bundesamt, Wiesbaden (2012).

6. The complaints systems

6.1 Introduction

This chapter provides detailed presentations of the Norwegian and German complaints systems. Such empirical accounts are scarce in existing literature, and provide a necessary foundation for the further discussion. The information cover all the criteria of procedural justice, but systematic discussion regarding the criteria is provided in chapter 7. Figure 1 displays the basic structures of the complaints processes. The Norwegian institutions in grey are *formally* part of the complaints system, but nevertheless not frequently utilized.

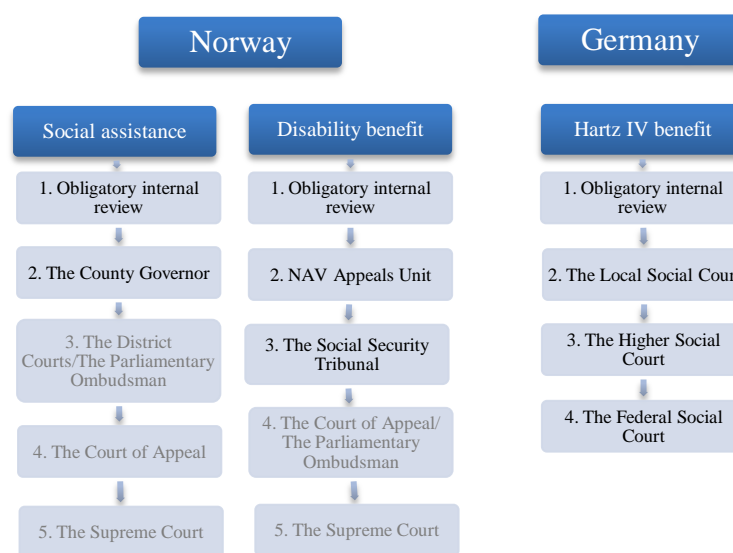


Figure 1: The complaints processes in Norway and Germany

6.2 Norway

In the Norwegian case, both the complaints systems of social assistance and disability benefits are chosen for study in order to illuminate the internal disparities within the Norwegian welfare system. NAV contains municipal and state-level benefits. This has led to a two-tracked complaints system (Refsdal 2009: 35). Complaints on the municipal benefit social assistance are handled by the County Governors (CG), with the further possibility to appeal to the ordinary courts. Complaints on the state-level social insurance benefits, including disability benefits, are handled by NAV Appeals Unit (NAV AU), with the option of further appeal to the Social Security Tribunal (SST) and lastly to the ordinary courts.

Common for the CG, NAV AU and the SST is that the law of 1980 about free legal aid (Rettshjelpsloven) applies. The arrangement implies that anyone living alone with an income below 246.000 NOK or living with a partner with a total income of less than 369.000 NOK, and holds wealth below 100.000 NOK, has the right to free legal aid. When free legal aid is granted, the appellant must pay a fee of 25 per cent of the costs if he or she has an income above 100.000 NOK per year (Øie 2010: 40).

Table 2 shows the organizational affiliation of the Norwegian complaints institutions as well as the administration of disability benefits and social assistance.

Level of Government	Branch of Government		
	<i>Executive</i>	<i>Legislative</i>	<i>Judicial</i>
<i>State</i>	<ul style="list-style-type: none"> - Disability benefits: first decision and internal review - The County Governors - NAV Appeals Unit - The Social Security Tribunal 	<ul style="list-style-type: none"> - The Parliamentary Ombudsman 	<ul style="list-style-type: none"> - District Courts - Courts of Appeal - The Supreme Court
<i>Municipal</i>	<ul style="list-style-type: none"> - Social assistance: first decision and internal review 		

Table 2: The organizational affiliation of the Norwegian institutions

6.2.1 Social assistance: The CG

An application for social assistance can for instance concern support for food, rent, electricity or clothing. It is the rejection or limitation of the economic contribution for these purposes which are the objects of a complaint (Helsetilsynet 2007: 3-4). A complaint on a decision regarding the eligibility for, as well as size and form of, social assistance must be directed towards NAV Local Services, which will then review the case (NOU 2004: 62). The first-instance is obliged to consider the complaint, but a completely new assessment of the case is not required (Kjønstad et al. 2000: 214). If NAV Local Services rejects the complaint, the case is sent to the CG. NAV Local Services prepares a case file for the CG. This file must contain the application, the decision, the complaint, a case recital and other necessary documentation, such as a medical statement (Respondent 3 2012). These documents are normally sent to the complainant for information (Helsetilsynet 2007: 16).

The CG is the representative of the government in each county, and is thus part of the executive branch. Organizationally and financially, the CG is subordinate to the Ministry of Government Administration, Reform and Church Affairs (Fornyings-, administrasjons- og kirke departementet). The CG has authority to review all aspects of a decision except for the

purposive discretion of the municipal agency (NOU 2004: 62). The exercise of discretion can only be overruled if it is deemed “obviously unreasonable”. However, the judicial discretion can be reviewed, and this is often the basis for reversal or abolishment (Respondent 3 2012). There are three possible outcomes of a complaint to the CG: (1) the case can be abolished and sent back to NAV Local Services because there is not enough information to make a final decision, (2) the decision can be changed, or (3) the decision can be affirmed (Helsetilsynet 2007: 11). The reason for abolishment or reversal can be procedural errors, misapplication of the law or clearly unreasonable discretionary considerations (Helsetilsynet 2007: 12).

There are 19 counties in Norway holding 18 CG agencies (Oslo and Akershus have a joint CG). Empirical investigations have shown clear differences between the agencies of the CG both regarding the outcomes of complaints and the reasons given for decisions in complaints cases (Helsetilsynet 2007: 4). This indicates different interpretation of the law, administrative practices or exercise of discretion. The border between legal and administrative discretion, the latter not subject to review by the CG unless obviously unreasonable, may not be sufficiently clear (Helsetilsynet 2007: 11). This can in itself contribute to inconsistent treatment of complaints by the CGs. The argument is that the complaints cases to a large degree are determined by the competence and conscientiousness of each CG, and that this can lead to considerable disparity between different CGs (Helsetilsynet 2007: 16-17). Although there is generally a high level of legal competence within the CG agencies, a problem regarding consistency is the lack of a nation-wide complaints agency (Kjønstad and Syse 2008: 97). There is, however, an overarching agency with professional responsibility for all of the CGs, namely the Norwegian Board of Health Supervision (Helsetilsynet) (Respondent 3 2012). This agency provides supervisors for the CGs and works to maintain high quality and consistency between the different CGs. The Norwegian Board of Health Supervision also arranges seminars in order to exchange experiences and contribute to development of skills among the workers of the CGs (Respondent 3 2012).

The profession and competence of the CGs comprise jurists, social workers, social scientists, child welfare officers and social educators (Respondent 3 2012). This varies between the different agencies. A minimum of two decision-makers are involved in each case (Respondent 3 2012).

There are different considerations regarding the time aspect in each case. This is due to the urgency of some cases, namely the emergency aid (“nødhjelp”). These cases, which imply that the claimant is supposedly lacking money for food or other necessities, are handled when

they arrive, independent of regular cases (Respondent 3 2012). The timeliness is, however, considered a general problem. The requirement for treatment of regular cases, set by the Government and the Norwegian Board of Health Supervision, is that a case should be handled in three months (Respondent 3 2012). For the ten agencies with available data for 2011, this limit was generally kept and used as a guiding standard.

As a main rule, there is little or no contact between the complainant and the CG. The complainant can contact the agency in order to get an update on the case, and also has the opportunity to make comments to the case recital that is sent to the CG from the local agency. Such comments are normally made in writing, and must be sent within two weeks. Other material from the complainant can also be sent to the CG during the case proceedings, but normally only in documentary form (Respondent 3 2012). The complainant is informed when the complaint is received by the CG, and is also provided with the estimated time of the case proceedings. When a decision is made, the complainant receives a written document with reasons for the decision (Respondent 3 2012). A difference between the CGs is whether they address the letter to the local NAV agency or to the complainant. The letter is always sent to both parties, but the formulations differ. The document contains the facts on which the decision is based, the relevant legal rules, the assessment of the local NAV agency, as well as the assessment made by the CG (Respondent 3 2012).

Some complainants use legal help during the complaints process. This is in principle not necessary (Respondent 3 2012). The main reason to use legal help is for the formulation of the complaint. There are several voluntary providers that offer some free legal aid, and this is often sufficient to write down the complaint. If the complainant has expenses on legal help during the process, these are covered in cases where the decision is reversed or abolished by the CG. There are no other expenses of the process for the complainant (Respondent 3 2012). Although it is claimed unnecessary to have help from a lawyer, the respondent from the CG of Oslo and Akershus states that they only look at the aspects of the case that the complainant points to. This implies that the complainant must himself have knowledge about the legality or treatment of his case, something that might be difficult without the involvement of a jurist. A complaint to the CG does not have a postponing effect, i.e., the decision already made will still be in force following a complaint (Kjønstad et al. 2000: 216). This means that if a claimant has lost his welfare benefit, this decision will be valid while a complaint is processed.

Decisions made by the CG cannot be appealed further through the administrative channel (Kjønstad et al. 2000: 210), but it is possible to bring the case before the District Court (Tingretten). This is, however, very unusual (Respondent 3 2012). A more frequently used organ for further appeal is the Parliamentary Ombudsman (Sivilombudsmannen). Although the Parliamentary Ombudsman does not have authority to change a decision, his recommendations are followed by the CG as a custom.

6.2.2 Disability benefits: NAV AU and the SST

Determination of disability benefits are prepared by NAV Local Services and decided by regional NAV Agencies (NAV Forvaltning) (Kjønstad and Syse 2008: 304). The decision can be complained to NAV AU and appealed to the SST, after a reassessment by the original decision-making instance. If the complaint is rejected in the internal review, the case is forwarded to NAV AU. NAV Local Services has an obligation to assist the complainant in the formulation of a complaint (Refsdal 2009: 51).

NAV AU

NAV AU was established after the NAV reform in 2005 (Refsdal 2009: 1). Previously cases were decided by the Local Social Security Office (Trygdekontoret). The case could be complained to the County Social Security Office (Fylkestrygdekontoret) and further appealed to the SST (Refsdal 2009: 36). NAV AU comprises six regional agencies. Some welfare benefits are gathered within one regional unit in order to increase competence and equality of treatment (Refsdal 2009: 36). This is not the case for the disability benefit, which is handled in all six offices. However, there has been a continuous movement towards centralization in order to achieve a higher degree of geographical consistency as well as satisfactory levels of competence. The number of offices within NAV AU dealing with disability complaints cases is planned to be reduced to three during 2013 (Respondent 2 2012).

NAV AU is subject to NAV Central Agency, which has budgetary and instructional authority. The complaints unit is at the same time organized lateral to the NAV Agencies, and cannot instruct these offices. NAV AU does, however, have full authority in the complaints cases it deals with. The unit has authority to fully review a case, including the review of discretionary assessments (Refsdal 2009: 12). A decision can be affirmed, abolished and sent back to the initial decision-maker, or changed fully or partially. The case is prepared by the NAV Agency making the initial decision, which is also obligated to forward all documents to

NAV AU (Respondent 2 2012). If the case is not sufficiently informed, the decision is abolished and the case is sent back to the NAV Agency for a new treatment. The average time of case processing in 2011 was ten weeks, but there is variation over time depending on the amount on cases. The case file sent to NAV AU is also sent to the complainant, who has an opportunity to add remarks. Except for this, the main rule is that there is no direct contact with the complainant, unless documentation is missing or the complainants contact the complaints agency themselves (Respondent 2 2012). The case proceedings are written. Written reasons are given for all decisions.

Although the complaints agencies can function to reduce disparities between different NAV Agencies across the country (Refsdal 2009: 12), a problem of geographical inconsistency exists today (Respondent 2 2012). The Office of the Auditor General of Norway states in a report that there is great variation in the reversal rate between the six NAV AU agencies (Riksrevisjonen 2011-2012). This indicates differences in regular case practices between the counties *or* different practice in the complaints handling between the regional complaints offices. The cooperation across municipalities and regions is claimed to be low, contributing to diversity (Riksrevisjonen 2011-2012: 12). A different account is given, however, by the respondent from NAV AU. The claim is that there is a relatively high degree of cooperation between the regional offices, and a national network is established for each benefit (Respondent 2 2012). From 1.1.2013 these networks were replaced by monthly video conferences between the different agencies (Respondent 2 2012).

Help from a legal expert is not considered necessary in principle because NAV Local Services is obliged to help the complainant in the formulation of the written complaint. However, it could make a difference to the outcome of the complaint (Respondent 2 2012). Although the complaints agency reviews the entire case regardless of the complaints formulation, legal experts might add relevant arguments to the case (Respondent 2 2012).

There are no arrangements for temporary disability benefits, an option which existed prior to the NAV reform (Respondent 2 2012). It is, however, possible to extend the maximum time of the complainants' former benefit, which is usually Work Assessment Allowance (Arbeidsavklaringspenger), with a total of eight months. If the complainant does not have any other rights to welfare benefits after this period, the only remaining option is social assistance. This requires possession of little or no economic assets, and hence implies the draining of accumulated economic resources before such eligibility occurs.

Most people working in the complaints agencies are trained lawyers, with a minimum requirement of 70 per cent lawyers in each office. Other groups are also represented, however, such as sociologists and political scientists, and this vary between the six offices. The development is towards higher proportions of jurists (Respondent 2 2012). In addition, at least one advisory medical expert is affiliated with each agency. In each case, a minimum of two decision-makers are involved in the decision, and when it is regarded necessary, medical experts and professional leaders can be involved additionally (Respondent 2 2012).

The SST

A complaints case about disability benefits rejected by NAV AU can be appealed to the SST within six weeks. The establishment of the SST in 1967 implied the unification of several appeal systems for benefits within the National Insurance Scheme (Kjønstad 2002: 10), and as such contributed to systemic integration. The SST is an independent administrative body which cannot be instructed (NOU 2004: 83). The tribunal is a court-like institution, but is not part of the regular court system. The agency has authority to review all aspects of a case, including the administrative discretion, judgment of evidence, application of law and case procedures, and as a main rule makes a final decision (NOU 2004: 44, Trygderetten 2007). The SST cannot, however, change the initial decision in disfavor of the appellant. There are three possible outcomes of a decision: (1) the decision is affirmed, (2) the initial decision is changed, fully or partially, or (3) the decision is abolished and the case referred to the responsible agency for a new treatment (Trygderetten 2011: 11). The latter happens when the SST finds that the case has not been sufficiently informed (Respondent 1 2012).

NAV AU prepares the case through a letter presenting the case and all relevant documents, which is also sent to the appellant for information (Respondent 1 2012). The case procedure is documentary, and there is normally little contact between the appellant and the SST (Respondent 1 2012). The appellants can, however, contact the tribunal at their own initiative in order to get information about the case proceedings or provide the tribunal with additional case information. The SST has an independent responsibility for making the necessary inquiries and securing sufficient information (Øie 2010: 82). Oral hearings may exceptionally be conducted. This is, however, considered too demanding on the institution's resources to be general practice (Respondent 1 2012). The arguments against more oral hearings are lack of resources and the time aspect (Øie 2010: 90). Arguments in favor of more oral hearings are the need to secure legal protection, to the obtainment of proper information

of the case and to increase transparency of the SST's proceedings (Øie 2010: 90). Oral proceedings are used more in terms of training of personnel aiming at a carrier within the regular court system than as a legal guarantee for the appellant (Respondent 1 2012). Consequently, cases for oral proceedings are picked according to their suitability for these purposes, not upon request from the appellant.

Although there is asserted to be no need for legal representation in order to appeal to the SST (NOU 2004: 88), there are certain indications that legal representation increase the chances of successful appeals because trained lawyers may be able to see what kind of additional information is required and provide statements that can promote the case of the appellant (Respondent 1 2012). Fees are not charged for the proceedings in the SST, but the appellant must bear the costs of legal representation himself unless he is eligible for free legal aid. All expenses are transferred to the opponent if the appellant's case succeeds.

The case processing time is shorter than in the regular courts. The requirement from the responsible ministry is that 75 per cent of all cases should be closed within six months, that the average time spent on a case should be less than four months, and that no cases should be at the SST for more than nine months (Trygderetten 2011: 7). The average time spent on a case in 2010 and 2011 was four months, and 90 per cent of the cases in 2011 were closed within six months (Trygderetten 2011: 9). The timeliness has been a problem for the SST in the past. This led to suggestions about simplification of procedures, which would have the potential of weakening the legal protection of appellants (Kjønstad 2002: 12). As an example, an important means to increase efficiency has been to open up for simplified reasons for decisions in some cases. However, the establishment of NAV AU in 2005 contributed to a reduction in the number of cases reaching the SST, and has consequently reduced problems of capacity and decreased arrears (Respondent 1 2012).

How the SST is composed in each case depends on the nature of the case (Respondent 1 2012). The employees of the SST include legal, medical and rehabilitation experts (Trygderetten 2011: 6). Each tribunal consists of two or more persons, depending on the complexity of the case. When a tribunal is appointed, their decisions cannot be instructed neither by the ministry nor by internal leaders.

Until 2004, there was not a clear requirement of the SST to give reasons for every decision. The main rule is now that reasons must be given for all decisions (Trygderetten 2011: 11). There is, however, an opportunity to give simplified reasons in some cases. Decisions with simplified reasons are made in cases where it is clear that the appeal will not

be sustained, and the case is considered not to have any wider interest beyond this specific case (Respondent 1 2012, Øie 2010: 109). Fully reasoned cases are publicly available through the internet source Lovdata. It is a stated goal of the SST to provide high-quality and sufficient information to appellants and the public in general (Trygderetten 2011: 15). The electronic journal “Innblikk” is published four times a year, containing cases considered of general interest.

The decisions made by the SST generally set precedence and guidelines for further administration in NAV (Respondent 1 2012). Given that the SST covers the entire country, the potential for contributions to increased geographical unity in handling of disability cases is large, but of course limited to the cases that actually reach the institution. Although decisions made within the SST are generally regarded as guiding for NAV, the welfare administration can disagree with these decisions. In these instances, the question is sent to the responsible ministry, which consequently must specify the legislation (Respondent 1 2012). Clarification and improvement of geographical unity is nevertheless the result in these cases too.

The SST is administratively and financially subject to the Ministry of Labor (Øie 2010: 25). The SST is not, however, part of the regular administrative hierarchy, as it cannot be instructed by the ministry. The organization of the SST, as an administrative tribunal which functions much like a regular court in practice, was disputed prior to its establishment, and has also been brought up at regular intervals since (e.g. Kjønstad 2002). The committee preparing the establishment of an appellant body suggested it was given a court status. Due to a general reluctance within the law profession against specialized courts, the SST was nevertheless organized as an administrative body. Another argument not to give the tribunal court status was that court proceedings would be too complex and intricate for the claimants (Øie 2010: 19). Kjønstad (2002: 13), on the other hand, argues that a social court should be established in Norway. According to him, this would imply several improvements to welfare claimants, including more oral proceedings and better legal assistance.

In reality, the SST is the last instance of appeal. Although cases can be brought before the Appeals Court, which is part of the regular court system, this is rare (Respondent 1 2012). In 2011, 57 decisions were made by the Appeals Court in cases appealed from the SST, out of a total of 2561 cases, including all social security matters, handled by the SST.

6.2.3 The Parliamentary Ombudsman

Since 1962, the Parliamentary Ombudsman has been Norway's administrative ombudsman institution with a general mandate (Stern 2008: 332). The Ombudsman's responsibility covers all public administration, including the welfare administration (Respondent 6 2012). Anyone who believes that they have been subjected to injustice by the public administration may bring a complaint to the Ombudsman (Stern 2008: 334). Although not part of the specialized welfare complaints systems, such cases can be treated at the Ombudsman after other institutions for complaint have been exhausted. Complaints cases from NAV constitute the largest number of complaints dealt with by the Ombudsman (Respondent 6 2012). The Ombudsman, in contrast to the other complaints systems considered in this thesis, also deals with complaints regarding service treatment. Because the Ombudsman is the representative of the Parliament, the institution is independent of the executive (Stern 2008: 333).

The only formal requirements of a complaint to the Ombudsman are that the grounds for the complaint and the decision in point are stated (Respondent 6 2012). The Ombudsman can obtain the necessary documents from the relevant public agency, and also offers assistance in formulating the complaint (Sivilombudsmannen 2012a). Making a complaint is free of charge and there is no need for a lawyer. An appeal to the Ombudsman must be promoted within one year from the final decision was made. Information about the Parliamentary Ombudsman and the procedures for complaint is published on their websites. The normal processing time of a complaint is four to ten weeks (Sivilombudsmannen 2012b).

The Ombudsman can make recommendations to the public administration agency in question, but does not have authority to change or abolish a decision. However: "If the opinion finds in favour of the complainant and the case results in censure of the administration, the administration will normally comply with the findings of the Ombudsman" (Sivilombudsmannen 2012b). The Ombudsman has only limited powers to criticize discretionary decisions. A characteristic that differentiates the Ombudsman from the other complaints organs is that the Ombudsman is not obliged by law to treat all complaints received. However, all cases are assessed and all complainants are given a written answer (Respondent 6 2012). The complainant always receives a confirmation of a received complaint as well as a written decision with reasons. The level of competence of the employees is very high. All employees are trained within law, but for most employees the experience and knowledge is general to public administration rather than specialized on welfare administration (Respondent 6 2012).

6.3 Germany

Table 3 displays the organization of the German Social Courts and the Hartz IV benefit in terms of level and branch of government.

Level of Government	Branch of Government	
	<i>Executive</i>	<i>Judicial</i>
<i>Federal</i>		The Federal Social Court
<i>State</i>	- Hartz IV : First decision and internal review	The Higher Social Courts
<i>Local</i>		The Local Social Courts

Table 3: The organizational affiliation of the German institutions

6.3.1 Internal review

Before challenging an administrative act in the Social Courts, welfare complainants must file an administrative appeal (*Widerspruch*) against the decision within the initial decision-making body, which is the local Jobcenter, within one month (Federal Ministry of Labour and Social Affairs 2012: 127). The initial complaint must be written down or recorded at the competent body, but there are no standardized forms for complaints (Respondent 4 2012). This first complaints handling is administrative, and includes a review of the lawfulness and expediency of the decision (Federal Ministry of Labour and Social Affairs 2012: 127). If the initial decision is fully or partly maintained by the Jobcenter, the welfare claimant can file a complaint at the Social Court within one month.

6.3.2 About the Social Court system

The Social Courts Code of 3 November 1953 established the social jurisdiction (Bundessozialgericht 2012). The implementation of the Social Courts Code implied that judicial power was entrusted to an independent judiciary. The court structure consists of three levels: (1) the Local Social Courts (LSC), (2) the Higher Social Courts (HSC) and (3) the Federal Social Court (FSC) (Federal Ministry of Labour and Social Affairs 2012: 127). The Social Courts are responsible for disputes involving social insurance matters, i.e., health, disability, occupational accident and pension insurance. Since January 2005, the Social Courts are also the courts of responsible jurisdiction for disputes about Hartz IV benefits and social assistance (Federal Ministry of Labour and Social Affairs 2012: 127).

The judges of the Social Courts can only decide within the claim. This implies that they cannot make decisions for the worse of the claimant, making the risk of complaining small, because there is nothing to lose by complaining. The judges at the Social Courts are

trained in law and in addition to this specialized within one area of welfare law. Because the court procedures are led by the *inquisitorial principle*, the court is not restricted to evidence submitted by the parties of a case (Federal Ministry of Labour and Social Affairs 2012: 128, Respondent 5 2012). There is no compulsion of legal protection before any of the Social Courts (Foster and Sule 2010: 126). However, even if self-representation is possible in principle, Foster and Sule (2010: 128) argue that: “the complexity of both the material and procedural law makes representation virtually a necessity.”

The courts are formally independent from the administration through the separation of powers declared in the German constitution (Respondent 4 2012, Respondent 5 2012). Reasoned decisions in writing are obliged by law in every case in all three court instances (Respondent 5 2012). In the LSCs and HSCs interim orders are made when necessary to secure the claimant financially during the case proceedings. Temporary Hartz IV benefits are provided in cases where there is a likelihood that the claim will succeed and there is an urgent need for money (Respondent 8 2012).

6.3.3 The Local Social Courts

There are 75 LSCs in Germany (Respondent 8 2012). Each first-instance court is divided into a number of chambers, based on specific areas of social law. This implies that some judges are experts on the Hartz IV benefit and only deal with such cases (Respondent 5 2012). A chamber comprises a professional presiding judge and two lay assistant judges (Federal Ministry of Labour and Social Affairs 2012: 127). Complaints to the LSC must state the remedy sought, and provide fact and evidence supporting the complaint (Federal Ministry of Labour and Social Affairs 2012: 127). The LSC can help the claimant file a complaint (Respondent 5 2012).

Every complainant has the right to an oral hearing in the LSC. In Berlin Social Court, 30 minutes is scheduled for each hearing, but the hearing may take more or less than this time. The judge can decide to have a documentary treatment of the case, but only if the complainant agrees. If the complainant requests an oral hearing, such a hearing must be held (Respondent 5 2012). The Federal Ministry of Labour and Social Affairs (2012: 128) presents the proceedings of the LSC in this way:

“Social court proceedings generally include one oral hearing. In advance of the oral hearing, the presiding judge can request papers, electronic documents and health

records. The presiding judge can also request information, hear witnesses, including expert witnesses, commission written opinions from expert witnesses, summon others to appear at the hearing, and discuss the matter in person at a meeting with the parties so that the dispute can be dealt with if possible in a single hearing. The oral hearing is public and chaired by the presiding judge. (...) The presiding judge next presents the facts and the dispute as they stand. Any evidence is then taken and heard as necessary, and the complainant and respondent state their case. Once the dispute has been heard, the presiding judge declares the oral hearing closed.”

Reasons for holding oral hearings are at least twofold: (1) the hearing is meant to clear up matters in an efficient way, and it is assumed easier to agree on facts and ensure that all parties understand the facts of the case when the parties and the judge are present in the same room, and (2) the fact that all parties have to prepare for the hearing means that everyone must read the case documents at a certain time leaving out the option of postponing these tasks (Respondent 5 2012). The oral hearings of the LSC in Berlin are informal, and the session has more a character of discussion or arbitration between the representative of the Jobcenter and the complainant, as well as the judge explaining the legal aspects to the complainant, rather than a formal hearing. This is in opposition to the general claim that court proceedings make it very difficult for the claimants to present and defend their case, and that court proceedings are complicated and esoteric. The court proceedings normally end with a decision, announced at the end of the oral hearing. A written document stating the reasons for the decision is always given. The facts and the case are also explained to the complainant in the hearing. This gives the complainant the opportunity to ask questions and get answers if he does not understand the decision, increasing the chances of the complainant leaving the court with “peace at heart” (Respondent 5 2012). Respondent 5 (2012) argued that a lawyer is not necessary but that the written complaints are “obviously much more professional-looking when such assistance is utilized.” Furthermore, the lawyers may be able to see legal aspects of the case not perceptible to the welfare claimant (Respondent 5 2012).

The LSCs handle cases by degree of urgency. Urgent cases are scheduled for hearings after approximately a week (Respondent 5 2012). These are cases where the claimant would not have any money to live for if he is right in his claim. In order to have a case treated as urgent, two conditions must be satisfied: (1) there must be a good possibility that the complainant is right in his claim, and (2) there must be a true urgent need (Respondent 5

2012). Regular cases can take up to two years. The time aspect is generally considered a problem within the German Social Court system (Herbert 2003: 10). This is connected to the large number of cases the LSCs have to deal with. According to respondent 5, some of the cases reaching the court should have been filtered out at a lower level as they do not concern aspects of law but rather straightforward misunderstandings of factual matters. This would have improved the capacity and timeliness problem. The administration of the Hartz IV benefits as well as the internal review would thus have to be improved (Respondent 5 2012, Respondent 8 2012). There are some different models to the internal review in the German states. In Saarland, they have an oral hearing or discussion already at the level of the internal review (Bundesagentur für Arbeit 2012, Respondent 8 2012). Another model, applied in some Jobcenters in Schleswig-Holstein, is to provide the claimant with a thorough written explanation of their first decision when an internal complaint is filed. This can contribute to solve complaints cases at an early stage because the initial letter with the decision is very brief, and the claimant may not understand the reasons from the decision (Bundesagentur für Arbeit 2012, Respondent 8 2012).

At the lower court levels there are not necessarily unifying effects of complaints unless the law is strict and easy to apply, and this is not the case with the Hartz IV benefit (Respondent 5 2012). The LSC can advise the Jobcenters, but the Jobcenters are not obliged to follow this guidance (Respondent 5 2012). In areas of the law with particular lack of clarity, there may even be different rulings within the same LSC. This implies that even if the courts follow the same guidelines and their common goal is the correct application of law, the degree to which consistency is reached depends much upon the law (Respondent 5 2012).

6.3.4 The Higher Social Courts

There are 14 HSCs. The HSCs take on appeals against the decisions of the LSCs. Their senates correspond to the chambers of the LSCs, and comprise a presiding judge, two additional professional judges and two lay judges (Federal Ministry of Labour and Social Affairs 2012: 127). Two types of appeal to the HSC are possible: (1) an appeal on the merits of the case and (2) an appeal on a point of law (Federal Ministry of Labour and Social Affairs 2012: 128). The former can be claimed against any decision of the first-instance court, but the amount at dispute must exceed 750 Euro. In such appeals, the HSC can review all factual and legal aspects of the case. The fact that the second-tier court can provide a *de novo* review is

different from many other comparable courts (Skoler and Weixel 1981: 277). The court can obtain further information, send the case back to the lower court, or make its own decision.

The case proceedings differ from the LSC's by the fact that there is already a court decision that has to be taken into account. This implies that if the decision of the LSC seems correct at first sight, the judge must ask the complainant why he or she brings the case further (Respondent 9 2012). The starting point of the court assessment is thereby different. The HSC has the option to gather more facts from all relevant parties. There is also held a hearing in each case, similar to the hearings in the LSCs. The hearings are kept in an informal manner so that complainants attending without a lawyer also have a chance to present their case and express what they wish to say (Respondent 9 2012). A quote from respondent 9 can illustrate the degree of formality of the hearings: "So we try to create an atmosphere that makes it easy for people to talk and tell us what they want, and in the end we have to deal with it anyhow, so...No use to make people feel bad when they come here." Although a lawyer is not required in the HSCs, they appear more often higher in the court system. Because the procedure in court is based on an inquisitorial principle, the judge has the responsibility of informing the case sufficiently also in cases where the complainant is not represented by a lawyer (Respondent 9 2012).

The average case takes between one and three years in the HSC (Respondent 9 2012). The timeliness depends on the amount of work at the court and the case itself. If medical or other expert statements must be obtained, it can delay the case severely. Large amounts of "emergency cases" also delay the regular cases (Respondent 9 2012).

The respondent from the Berlin-Brandenburg HSC posited that different treatment of similar cases is apparent across judges rather than across LSCs (Respondent 9 2012). The role of the HSCs is thus to correct and guide the judges at the lower level. There is contact between the HSCs to discuss cases and legal questions, but not on a regular basis (Respondent 9 2012).

6.3.5 The Federal Social Court

The FSC in Kassel acts as a court of appeal on points of law (Bundessozialgericht 2012). The duty of this court is first and foremost to secure legal uniformity and development of the law. In each case, the FSC consists of a presiding judge, two additional professional judges and two lay judges. The lay judges are selected for their particular experience as practitioners in the relevant areas of law (Federal Ministry of Labour and Social Affairs 2012: 127). The

Federal Court is divided according to benefits, which means that the judges are specialized in one or a few benefits (Respondent 8 2012).

A decision made in a HSC can be appealed to the FSC on a point of law (Federal Ministry of Labour and Social Affairs 2012: 128). An appeal can only be made if the HSC expressly gives leave to appeal. The basis for the decisions of whether to give leave for further complaint is determined within the law (Respondent 9 2012). However, if the HSC does not give leave to appeal, this decision can also be complained to the FSC (Respondent 5 2012). The FSC deals with cases where there is a legal problem of general importance or that concern a large amount of cases which has not yet been solved. Complaints can also be made to the FSC when a claimant regards his procedural rights to have been disrespected, i.e., that the lower Social Courts have made procedural errors (Respondent 8 2012). In an appeal on a point of law, the court does not review the facts of the case, but only address the legal point at stake. The court is solely to look at the verdict of the HSC. If the facts are unclear, the case is sent back to the HSC (Respondent 8 2012). The rulings of the FSC are only binding for the lower courts in individual cases, but the rulings of the FSC generally form a guideline for future implementation of social law (Bundessozialgericht 2012). This implies that the decisions made here are of considerable significance. Each federal state (Land) is represented with a judge in the FSC, and the judges are expected to travel to their Land once a year and discuss legal problems with the HSCs in this Land (Respondent 8 2012). There is also a yearly event in Kassel where judges from the LSCs and HSCs have the opportunity to come together and discuss cases and benefits.

Oral hearings are held in each case. The aim of these hearings is to discuss legal problems (Respondent 8 2012). Not every complainant wish to travel to Kassel, however, and in these cases all documents are sent to the lawyer, which is obliged to share them with his client (Respondent 8 2012). Hearings are normally ended with a verdict. Legal representation is seen as an absolute necessity in the FSC (Federal Ministry of Labour and Social Affairs 2012: 128). As this could imply high costs for the complainant, a compensation must take place in some way in order to secure justice for the poorer members of society and equality of law (Foster and Sule 2010: 128). Two provisions address this need: the Legal Advice Act (Beratungshilfengesetz) and the Law on Legal Aid (Gesetz über Prozesskostenhilfe). The calculations for these arrangements are very complex, and the expenses for legal aid are relieved from the complainant according to a table. Lower net income implies that less, or none, of the legal costs will fall on the complainant. The net income is calculated from gross

income minus a number of deductions, such as taxes, child support, a certain amount for each child differentiated by age, expenses for accommodation, and so on (Federal Ministry of Justice 2012). The highest amount of wealth that can be possessed except for property is 2600 Euro plus 256 Euro per child. There are no other costs of raising court action in the FSC, and if the complainant's case is successful, the responsible Jobcenter must bear all financial costs (Respondent 5 2012, Sozialhilfe24 2012).

For a case that goes through all the levels of the court system and ends up in Kassel, it may take several years before the final verdict is given (Respondent 8 2012). In 2011, a complaints case was ended within the average time of eight months from the case was received at the FSC (Respondent 8 2012). This implies quicker treatment in the FSC than in the other courts, but the FSC does not have to gather facts, such as the obtainment of expert statements, which can take up much time. Moreover, they do not deal with emergency cases, which also cause a delay on the regular cases because they move up first in line.

6.3.6 The Parliamentary Petitions Office

There is no equivalent to the Scandinavian Ombudsman in Germany, although a somewhat similar institution is the Parliamentary Petitions Office (Kofler 2008: 203-204). The Petitions Office started its work in 1949 after it had been given a constitutional basis by the new German Constitution (Kofler 2008: 204). This office deals with complaints on maladministration. The office handles complaints sent to the Bundestag. However, the Petitions Office differs from the typical ombudsman institutions in that the right to petition is first and foremost a *political right* of citizens to address proposals to their political representatives (Kofler 2008: 204). Citizens can also complain to the agency about a specific administrative act (German Bundestag 2007). The Parliamentary Petitions Office does not have authority to review court judgments, but can seek to influence the federal authorities involved in the court case. However, this institution is not used frequently in cases of individual problems; it is rather a tool to utilize for promoting changes in legislation (Respondent 8 2012). This is a rather different matter than what is dealt with in this thesis, and this institution is consequently not considered further with respect to criteria of procedural justice.

7. Procedural justice within and between the complaints systems

7.1 Introduction

Table 4 displays a summary of the data on the complaints systems in terms of the procedural justice criteria.

Criteria	Norway	Germany
<i>Consistency</i>	<ul style="list-style-type: none"> - Different complaints systems for social assistance and disability benefits. - There are 18 CGs, six agencies of NAV AU, while the SST is nation-wide. - The system for social assistance lacks a nation-wide agency. - Institutionalized professional networks in NAV AU. 	<ul style="list-style-type: none"> - The same complaints system applies for all welfare benefits. - There are 75 LSCs, 14 HSCs and a nation-wide FSC. - There may be problems with consistency in the LSCs and the HSCs, which is also related to the law formulation of Hartz IV. - The FSC has institutionalized arrangements for meetings with the HSCs.
<i>Independence</i>	<ul style="list-style-type: none"> - CG, NAV AU and SST are all part of the executive branch. 	<ul style="list-style-type: none"> - The Social Courts are part of the judicial branch.
<i>Voice</i>	<ul style="list-style-type: none"> - Written case proceedings and little contact with the complainant. 	<ul style="list-style-type: none"> - A right to oral hearing in all the court instances.
<i>Quality</i>	<ul style="list-style-type: none"> - The competence of adjudicators varies across instances and agencies. 	<ul style="list-style-type: none"> - Judges are trained within law and specialized within social law and one particular benefit.
<i>Transparency</i>	<ul style="list-style-type: none"> - Case files are sent to the complainant and written decisions are required in all cases, with the exception of the option for simplified reasons in the SST. 	<ul style="list-style-type: none"> - Decisions are usually announced at the end of the hearing or in a letter. - There is always given a written decision stating the reasons.
<i>Timeliness</i>	<ul style="list-style-type: none"> - Cases are handled within three months at the CGs, within ten weeks at NAV AU and by average within four months at the SST. 	<ul style="list-style-type: none"> - Cases take between one and three years in the LSC and the HSC, and in average eight months in the FSC.
<i>Financial risk</i>	<ul style="list-style-type: none"> - Legal help is not necessary in principle, but can make a difference. - An arrangement for legal aid exists, and there are no other expenses of the process. - Arrangements for interim benefits are poorly developed. 	<ul style="list-style-type: none"> - There is no compulsion for legal protection, but it can improve the case for the complainant, and is regarded a necessity in the FSC. - An arrangement for legal aid exists, and there are no other costs of raising a case. - Interim orders can be made.

Table 4: Comparative table of the complaints systems

This chapter contains a discussion of procedural justice within Norway and Germany, followed by a comparative discussion in section 7.4 and 7.5.

7.2 Within-case: Norway

7.2.1 Consistency

A dimension of consistency not discussed in the theoretical literature is apparent in the Norwegian case. This is the lack of consistency of the *system*, i.e., between different welfare

benefits. Procedural justice is arguably violated if claimants of different welfare benefits are referred to different complaints systems implying different treatment. Moreover, system inconsistency contributes to confusion and a lack of user-friendliness. An argument in favor of such a division is that complaints on social assistance decisions are so urgent matters that they require a system able to respond quickly. On the other hand, Kjønstad and Syse (2008: 195) and Kjønstad et al. (2000: 224) argue that this implies a continuation of the low-grade treatment of social assistance claimants stemming from the old poor law, because they are offered complaints mechanisms with lower legal protection than social security claimants. The variety of complaints mechanisms between benefits creates complexity and thus makes it more difficult for welfare claimants to operate in the systems and secure their own rights. Furthermore, it is a source of different treatment of welfare claimants within different benefit categories.

The fact that the complaints system for disability benefits holds a nation-wide agency at the top of the complaints hierarchy - the SST – contributes to *geographical consistency* because decisions made here informally set precedence for further decisions within the administration. NAV AU is also organized in a relatively small number of regional offices dealing with these complaints, and they seek a development towards fewer and more specialized agencies. The problem of geographical disparities caused by factors such as different competence of employees and different organizational culture across agencies is thus acknowledged and a solution to the problem is sought. The monthly video conferences between the agencies also contribute to discussion of and awareness about different questions of law and judgment for conferment of welfare benefits.

Geographical inconsistency is a problem with the social assistance complaints system. Firstly, the fact that the CG cannot review the purposive discretion of the first-instance implies a blurry division between legal and administrative discretion which in turn creates uncertainty and room for different interpretations by decision-makers. Secondly, the 18 agencies of the CG hold different levels of competence and organizational culture. In this case, however, there is no opportunity for filing a further complaint to a nation-wide agency. The only measure against this problem of consistency is the guidance offered by the Norwegian Board of Health Supervision.

7.2.2 Independence

The organizational placement of NAV AU causes several problems regarding the independence criterion. The complaints agency carries the same name and is part of the same administrative hierarchy as the agency on which a complaint is filed. This is likely to imply some kind of common organizational culture that inhibits an independent review. Impartiality in the complaints handling could be compromised because the adjudicator may not wish to overrule the decisions of colleagues. There is of course a question of whether there really is that kind of loyalty between different sections of such a large organization as NAV. The system nevertheless risks appearing biased and impartial to the users. The SST, on the other hand, to a much larger degree resembles an independent court, although not part of the judicial branch. The CGs are the government's representatives in the counties, and hence belong of the executive branch, i.e., the CGs are part of the same branch as the welfare administration, although there is a different ministry in charge.

In sum, all the Norwegian complaints agencies belong to the executive branch - the same governmental branch as the welfare administration whose decisions they are set to review. This leads to problems of independence, and especially for NAV AU, being internal to the same organizational hierarchy as the initial decision-making agency.

7.2.3 Voice

Common to all the Norwegian complaints organs is the use of documentary case proceedings. There is little direct contact with complainants. In the SST, oral hearings can be conducted, but as these are held mainly for educational purposes rather than upon the request of the complainant, this does not contribute to fulfillment of the voice criterion. The lack of oral hearings is an important difference between the SST and the regular courts (Øie 2010: 14-15). The main feature of the Norwegian complaints systems regarding the voice criterion is thus the fact that nearly all the case procedures are based on written communication. Viewing orality and participation by the complainant as premises for fulfillment of the voice criterion, the Norwegian systems thus perform poorly in this respect. In surveys conducted in 1986 and 2001, 67 and 52 per cent of the respondents who had received a reasoned decision answered that they would have preferred oral proceedings, while 73 and 71 per cent of the respondents receiving a decision without reasons expressed the same preference (Øie 2010: 153).

7.2.4 Quality

An organizational framework fostering high-quality decisions must be based on competent employees. As a main task of the complaints agencies is to interpret and apply the law, a high proportion of jurists employed is arguably important. In NAV AU most employees are lawyers, and there is a lower threshold of 70 per cent jurists among the employees in each agency. There are, however, differences between agencies. For the CGs, the competence also varies between agencies. In contrast to NAV AU and the CGs, all employees at the SST are experienced jurists, except for medical and rehabilitation experts. Common for NAV AU, the SST and the CG is that they apply the *inquisitorial principle*, i.e., the unit has an independent responsibility for informing the case; the evidence of the case does not rest on what is provided by the involved parties. All agencies base their decision on preparations from the former decision-making body. The fact that all agencies have two or more adjudicators in each case, and that decisions are hence never made by one person alone, increases the chances of high-quality decisions.

7.2.5 Transparency

The case file received from the former decision-making instance is also sent to the complainant in all three complaints agencies. This increases the transparency of the decision-making process because the complainant is given an opportunity to oversee the information the decision will be based on. The complainant also has a chance to correct possible errors or deficiencies in the case file. Additionally, the complainant is informed about the reception of the case and about the expected date of a decision in all three agencies. Written statements of the reasons for the decisions are provided in all cases. The fact that some of the CGs send these letters addressed to the NAV Local Services can be problematic in the sense that the letter may be incomprehensible to the complainant as it is not addressed to him. The SST has the option to give simplified reasons. This implies that in these cases the transparency criterion may be jeopardized. Although simplified reasons can only be given in cases that are obvious not to succeed, the question remains whether this is always as clear to the complainant as it is to the adjudicators. By publishing verdicts in Lovdata and Innblikk, the transparency of the SST is improved in a wider sense because it provides an opportunity for the general public to inform themselves about and check the work of the SST.

7.2.6 Timeliness

Cases are closed within an average of three to four months in all the Norwegian instances of complaint. This cannot be considered an unduly long waiting period, taken into consideration that a thorough review is expected. For the SST, the time perspective was considerably longer before the establishment of NAV AU, which thus functions as a filter for cases to the SST.

7.2.7 Financial risk

None of the complaints organs charge fees for the complaints process. Charges for legal help are nevertheless placed on the complainant unless he falls below a certain threshold of income. If the complainant wins the case, the costs are transferred to the opposing administrative unit. There seems to be some disagreement as to whether it is necessary for a complainant to hire a lawyer. Although NAV Local Services are obliged to help the claimant to formulate a complaint, reluctance to make use of this opportunity by the complainant may be present as this is the agency towards which he or she is filing a complaint. The employees may also show reluctance or indifference to this task as it would not be considered in their interest to formulate a complaint against their own agency. Although there is no need for legal assistance in theory, it could nevertheless make a difference because it is difficult for the complainant to know and present all relevant arguments of his or her case. The fact that free legal aid is available to complainants falling below a certain threshold of income and wealth reduces the financial risk considerably for complainants with such eligibility.

There are no special arrangements for interim decisions in social assistance cases, but urgent cases are handled within a short period of time. For disability cases, the complaints process can last for a longer time than arrangements for temporary benefits are in force. Complaints do not have a postponing effect, i.e., a denied benefit is cut off immediately, and interim decisions cannot be made for an indeterminate time period. Applications for social assistance may thus become necessary to secure income while the complaints case is handled. This means that saved money and other assets must be exhausted before receiving any money, something that arguably impose negatively on procedural justice.

7.2.8 Does the Ombudsman increase procedural justice?

The Parliamentary Ombudsman can be regarded as a supplement to the ordinary complaints system for welfare claimants. The Parliamentary Ombudsman is an independent agency because it is part of the legislative branch rather than the executive. Complaining to the

Parliamentary Ombudsman has a low financial risk, as there are neither legal costs nor a requirement for a lawyer. The transparency of procedures is high, with information about the process published on the websites, and confirmation that the case is received as well as written decision with reason is provided in each case. The large disadvantage, however, is that the Parliamentary Ombudsman does not have any real authority, but rather rests on the confidence that the initial decision-making instance will follow their advice. Further, the mandate of the Parliamentary Ombudsman is general rather than specific for welfare complaints, and is only accessible when all other opportunities of complaints are exhausted. The Ombudsman provides many advantages with regards to procedural justice compared to the other complaints agencies. However, the agency does not have formal authority, is not part of the formal complaints system, and thus a small number of cases reach this instance.

7.2.9 Summary of the Norwegian case

Looking at the Norwegian case overall, the fact that the complaints system is two-tracked is obviously a complicating factor in the discussion. Allover, the Norwegian systems appear to satisfy the transparency criterion with reasons given in all cases and sufficient information being provided to the complainant. In the case of the SST, public transparency is also sought. The timeliness seems reasonable in all the complaints organs. Further, the financial risk is low, with no charges for the process and arrangements for free legal aid, but with poorly developed arrangements for interim benefits. There are problems of both systemic and geographical consistency, and the degree of satisfaction of the quality criterion varies between the different agencies. No oral hearings or meetings with complainants are held on a regular basis in neither of the agencies, imposing negatively on the voice criterion. Finally, the independence is low as the complaints agencies belong to the same governmental branch as the initial decision-maker.

7.3 Within-case: Germany

7.3.1 Consistency

The complaints system in Germany is consistent across different welfare benefits, i.e. the German case satisfies *systemic consistency*. The degree of *geographical consistency* varies for different levels of the judicial hierarchy – the lower levels have a larger number of courts. 75 LSCs imply considerable chances of different practice across the country. Unless the law is strict and easy to apply, as is not the case with the Hartz IV benefit, there is not necessarily

any unifying effects of the decisions of the LSCs relative to the Jobcenters' decisions, although each LSC covers several Jobcenters. The 14 HSCs do, however, supervise the LSCs as well as overruling their decisions in cases brought before these courts. Contact between the different courts may improve the consistency when uncertain cases are discussed between courts. This happens more frequently at the level of the HSC, but such practices of discussion and collaboration are not institutionalized. The FSC, however, does have unifying effects. The duty of this instance is primarily to secure legal uniformity and development of the law, and decisions made here constitutes a basis for later decision-making in the lower courts and the welfare administration. Further, the fact that each Land has a representative in the Federal Court who travels back to his Land on a regular basis opens for further discussion and corrections of the practice of lower-level courts. There is also a yearly event in Kassel where judges from different Social Courts meet to discuss social law and other professional questions. The downside is of course that few of the large number of cases that enter the court system reach the FSC. On the other hand, for benefits and points of law with much uncertainty, cases are more often brought up to this level. The Hartz IV benefit has been an example of this.

7.3.2 Independence

The Social Courts display formal independence from the initial decision-maker in the welfare administration, as it is part of the judicial rather than executive branch of government. The independence of the Social Courts is also obvious to the complainants, as it is clearly not a part of the administration they are complaining against.¹⁹

7.3.3 Voice

Many resources are used to satisfy the voice criterion in the German system. At all levels of the Social Courts there is a right to an oral hearing in each case. Informality of these hearings are sought both at the LSCs and the HSCs, in order to foster a discussion between the three parties of the case – the complainant, the Jobcenter and the judge – and to make self-representation possible. In the LSCs and HSCs, the aims of these hearings are to clarify facts,

¹⁹ There have been raised critique of the assumption that formal, or *de jure*, judicial independence implies *de facto* judicial independence (see for instance Melton and Ginsburg 2012). In the German case, however, Seibert-Fohr (2006) argues that there is strong judicial independence with regards to structural, personal *and* substantive aspects. The main concern here is with the independence and distance of the courts from the initial decision-making body. This is satisfied through the structural, i.e., organizational, independence of the executive.

to present of the case from the standpoint of involved parties, to discuss the case and to end with a decision from the judge. In the FSC, only legal matters are of interest. This institutionalized right to oral hearings and consistently high degree of inclusion of complainants implies that the system performs well on the voice criterion.

7.3.4 Quality

All judges of the Social Courts are specialized within social law, and in most cases further specialized on one particular welfare benefit. The Hartz IV cases are organized in separate sections of the Social Courts. At the LSC, a chamber comprises a professional presiding judge and two lay assistant judges, while a chamber in the HSC is constituted by a presiding judge, two additional professional judges and two lay judges. The FSC consists of a presiding judge, two additional professional judges and two lay judges in each case. There is also a *de novo* review of the case both in the LSC and in the HSC. This implies a thorough review of the case by an impartial and independent agency. The *inquisitorial principle* applies in all three instances. This implies that it is the responsibility of the judge, not the opponents, to provide sufficient facts about the case to make a decision. The German system can thus be argued to perform well with respect to the quality criterion.

7.3.5 Transparency

Written decisions with reasons are required in all cases in the Social Courts. Additionally, the decision is often announced at the end of the hearing in the LSC and HSC. The hearings provide transparency because the facts on which the decision is based are clarified, and the complainant has the opportunity to ask questions if he wishes to do so. Moreover, the procedures of the courts and their case treatment are clearly stated in the law and available to the public. In sum, the information accessible to the complainant both about the system in general and about their case specifically provides a large degree of systemic transparency.

7.3.6 Timeliness

The timeliness is an obvious weakness of the German system in terms of procedural justice. In 2011 the average time for a decision to be made in an internal review, i.e., *before* the case enters the legal system, was 2.3 months. Cases are handled by degree of urgency in the LSCs and the HSCs. This implies that some cases can be dealt with within one or two weeks. However, regular cases take between one and two years in the LSCs. In the HSC, regular

cases take between one and three years, adding to the time spent in the internal review and the LSC. If the case proceeds to the FSC, the case will be in the system for several years before the final decision of the FSC is made. These are unreasonable amounts of waiting time, and the timeliness criterion cannot be said to be fulfilled for the German complaints system.

7.3.7 Financial risk

Help from a legal expert is considered a necessity at the FSC, but not at the LSCs and the HSCs. However, legal representation may contribute to a successful outcome for the complainant in these instances as well. In theory, the use of the inquisitorial principle should lessen the need for a lawyer, because the judge has an independent responsibility for illuminating the case. Free legal aid is offered when the complainant falls below a certain threshold of income and all costs are covered by the welfare administration if the complainant's case is successful. Interim decisions can be made in the LSCs and the HSCs in order to secure the complainant an income while the case proceeds. Such benefits are granted in cases where the complaint is considered likely to be successful.

7.3.8 Summary of the German case

The German case displays systemic consistency, but there are both pros and cons with respect to geographic consistency; the vague law formulation of the Hartz IV benefit and the lack of consistency in the LSCs and the HSCs are negative factors. The FSC greatly contribute to unity, however. The German system can, in sum, be argued to satisfy the criteria of independence, voice, quality, transparency and financial risk. The timeliness criterion is clearly a problem.

7.4 Between-case comparison and discussion

The following sections contain the comparative discussion. Firstly, more general characteristics of the complaints systems, i.e., the presence of internal review and the court-tribunal distinction, are discussed. Further, the systems are evaluated on each procedural justice criteria. The chapter is closed off by a summary of the comparative discussion.

7.4.1 General about the systems

Internal review

The systems are similar in that an internal review is a required first step in all cases. An advantage of required internal review is that it can give a quick solution if obvious mistakes have been made in the initial decision (Harris 1999: 46, Redlich 1971-1972: 62). However, if one considers this as the first stage of the complaints process, it must be judged by the same criteria as other phases of the complaints process. An internal review obviously does not satisfy requirements of independence and impartiality (Harlow and Rawlings 2009: 457). Internal review can also be seen to block the immediate access to an external complaint (Harris 1999: 47, Swain and Bigby 2009: 342). If the position of the initial decision-making agency is clear, internal review may be a waste of time and energy for both the agency and the welfare claimant (Redlich 1971-1972: 63), thus imposing negatively on the timeliness criterion as well. A further question is whether the case is sent directly to the next instance if the complaint is rejected, or whether the complainant must file another complaint. In the latter case, there may be problems with “appeal fatigue” (Harris 1999: 53). This applies to the German system, where the complainant must file a new complaint to the Social Court. In the Norwegian complaints systems, on the other hand, complaints are sent directly to the next instance if rejected in the internal review. Internal review has an important role to play as a filter to the complaints agencies, viz. that cases with obvious mistakes or factual misunderstandings are weeded out. If this function is fulfilled, the capacity and hence timeliness and quality of the complaints agencies can be improved.

Court versus tribunal

The most apparent difference between the Norwegian systems and the German system is that administrative tribunals are central in Norway, while specialized courts play the main role in Germany. Compared to courts, tribunals are often cheaper and speedier, freer of technicalities and more accessible. However, there may be problems with lack of real independence from the administrative unit that made the initial decision. Although a common criterion for tribunals is that they are independent from the agency making the first decision, this is not always the case, as is apparent with NAV AU. If the tribunal is simply an agency higher in the same administrative hierarchy, problems related to independence, such as lack of impartiality and neutrality may be present. Another aspect is that the qualifications of adjudicators in

tribunals tend to be lower and less standardized than in the courts, where all judges are trained within law.

A great advantage of court proceedings is the clear structural independence from the administration. The courts are independent of the administration regarding the four aspects accountability, financial responsibility, appointments and managerial responsibility. The qualifications of the judges are generally high, and this is particularly the case with specialized courts, where the judges are trained lawyers in a particular legal area. This is likely to contribute to high-quality decisions. A third advantage with courts is the effect on consistency, as the final court instance covers the entire country and decisions made here generally provide benchmarks for future decisions. Financially, however, there is often a higher risk for the complainant, as well as a greater need for professional help, which may or may not be covered by the state. The aspect of time is also normally a large problem with judicial review compared to tribunals.

One of the main goals with welfare complaints systems is the opportunity to control discretion. As such, the complaints organs arguably should be of a judicial character.²⁰ Selznick (1980: 15-16) claims that the objective of judicial discretion is to “find a rule or a rule-set that will do justice in a special class of situations.” Administrative discretion, on the other hand, also takes into account questions of diagnosing and classification of the world: “The aim is not justice but accomplishment, not fairness but therapy” (Selznick 1980: 15-16). While judges may also have room for discretion, the central point is that a judicial decision is self-contained; if the parties want questionable facts taken into account, they must face the “gauntlet of the opposing cross-examiner” (Wade 1963: 122). An administrative decision, on the other hand, is different because it is based on executive policy and “any facts that may feed the policymaker’s fancy” (Wade 1963: 122).

The participation of complainants is usually stressed to a larger degree within courts than administratively based complaints organs. At the same time, however, the participation may become difficult in a legal setting as the procedures and rules are complex. Titmuss (1971: 122) asserts that: “as the hearings became more “legal” (*i.e.*, as the presence of lawyers at the hearings increased) the content became more esoteric and mystical to clients.”

²⁰ An objection to this is that it implies «judicialization» of politics, because review of discretionary decisions by the judiciary can be argued to imply stepping into the political sphere, as most of these decisions concern prioritization of scarce resources (Bragdø 2005: 88, Feiring 2006). However, when clear, positive rights to welfare are formulated by law, a counter-argument is that there is no longer a question of competition about scarce resources, but rather about administration of these rights.

In the following sections, the complaints systems will be discussed with regards to the concrete criteria for procedural justice. The overall system structures show a difference between Norway and Germany related to the first principle, namely the lack of systemic consistency in the Norwegian case compared to the German system which is unified across welfare benefits.

7.4.2 Consistency

Systemic consistency

The German complaints system is more consistent and perspicuous than the Norwegian. In contrast to the Norwegian case, the complaints system is consistent across all welfare benefits. An argument presented in favor of the Norwegian division is that there are differences between benefits and degree of urgency. However, in the German system, although a unified system dealing with all welfare benefits, cases are treated differently according to characteristics such as degree of urgency. Even *within* the Norwegian complaints system dealing with social assistance, cases are differentiated based on the degree of urgency. Hence, this argument is not sufficient to support the inconsistent Norwegian approach. Perhaps a more important argument for the two-tracked system is the split responsibility of benefits between state and municipal authorities, namely that social assistance is administered by the municipalities and the disability benefits by the state, and that these benefits consequently need different complaints systems. This affects the procedural justice negatively because it makes the system difficult to comprehend for welfare claimants, and because it implies different treatment across different benefits which could be argued to maintain the old differentiation between “deserving” and “undeserving” claimants.

Geographical consistency

The German system and the Norwegian complaints system for disability benefits both hold a nationwide agency at the top of the complaints hierarchy. In both cases the decisions made at this agency have informal authority beyond the individual cases they deal with. Hence the effect for geographical consistency and equal treatment of equal cases is considerable, despite the lack of formal precedence. The lack of a nationwide agency is a main critique of the Norwegian complaints system for social assistance. The 18 CGs practice their roles differently. The same is the case for the LSCs and the HSCs of Germany. Although the CG is supervised by the National Board of Health, there is no institutionalized cooperation between

agencies aimed at increasing consistency. This is similar for the LSCs and the HSCs. However, the FCS in Germany contribute to lower-level consistency by a yearly gathering, as well as regular visits to the states by Federal Court Judges. NAV AU also come out strongly in this respect, as a national professional network of employees working with disability cases exists and is utilized on a regular and institutionalized basis.

There is, however, an important complicating factor in this discussion. The formulation of the law regulating the eligibility for the welfare benefits in point might be as important as the complaints system to the fulfillment of this criterion. This is apparent in the German case, where judges in Berlin LSC and Berlin-Brandenburg HSC point out that differences exist between judges in the same courts as much as between courts. This is due to the lack of clarity in the law about the Hartz IV benefit. The same applies to the Norwegian CGs. The law formulation of social assistance leaves room for much discretion, and this is deteriorated by the blurry division between legal and administrative discretion – the latter not being subject to the review of the CG while the former is.

In sum, the Norwegian and German systems seem to perform equally well with regards to geographical consistency, with an exception for the system for the Norwegian social assistance, which lacks a nation-wide agency.

7.4.3 Independence

This second criterion divides the two countries, first and foremost as a consequence of the administrative-judicial cleavage. NAV AU can to a large degree be regarded as an agency internal to the same organizational hierarchy as the initial decision-maker. Furthermore, it is not hierarchically superior, but lateral to the agency which decisions it is established to review. The SST is much more independent than NAV AU, but is also subordinate to the Ministry of Labor. Although the responsible ministry does not have instructional authority, all organizational functions are determined by the ministry. Similar to the two other agencies, the CG is part of the executive branch of government, although subordinate to a different ministry than the initial decision-making agency. In contrast, the German complaints system belongs completely to the judicial branch of government, and the independence from the welfare administration providing the initial decision is thus much clearer. The separation of powers ensures the independence of the courts. The consequences are that decisions in the Norwegian complaints systems risk being hamstrung by organizational culture and loyalty, and in addition risk causing distrust and repugnance among the complainants.

7.4.4 Voice

The German system relies on oral hearings in all the Social Courts. This contrasts with the Norwegian system where all cases are handled mainly or completely in writing. The argument in the Norwegian case is that oral hearings are too resource demanding and expensive. This may, however, be mitigated by its virtues. If the chances that the complainant leaves with “peace at heart” are increased, this has several advantages both regarding procedural justice *and* efficiency considerations. An oral hearing is important to satisfy the voice criterion and procedural justice because it allows the complainant to participate, to present his case and to be informed about the case. Moreover, the complainant will more easily settle with the solution and comply with the decision if he has had the chance to present all his evidence to the judge. Thus the case may not be further pursued within the complaints system, and the welfare claimant may also be more inclined to accept future decisions from the agency. The legitimacy of the system as a totality is increased, which again feeds into a positive circle.

Oral hearings also contribute to the satisfaction of other criteria. Firstly, transparency may be increased by more open procedures and explanations, as well as the opportunity for the claimant to ask questions. Secondly, the quality criterion will be improved because of lower risk of misunderstandings and because it is easier to clarify facts and other components of the case. There is a large catch to this, however. The conduct of oral hearings seems to impose negatively on the timeliness criterion.

Whether the procedures of the complaints agency are based on the adversarial or inquisitorial principle has been discussed as a component of the quality criterion. This dimension is also, however, relevant to the voice criterion. Much critique against court procedures rests on the assumption that the procedures are based on the adversarial principle which leaves the task of providing the relevant evidence and facts to the involved parties while the judge has a passive role. The adversarial principle to a greater degree than the inquisitorial allows the complainant to present his or her case orally, which offer more process control for the disputants (Thibaut and Walker 1978: 546), but at the same time, more responsibility for enlightenment of the case is laid on the complainant. This raises financial aspects because there may be a need for legal assistance. However, the Norwegian and German complaints agencies are all based on the inquisitorial principle. The responsibility of case enlightenment is hence placed on the judge or decision-maker, in principle reducing the need for a lawyer. The German system based on oral hearings *and* the inquisitorial principle may thus be claimed to be particularly strong with regards to the voice criterion.

7.4.5 Quality

The competence of workers is different both between the Norwegian agencies and between these and the German courts. In Germany, all judges are trained within law and specialized within welfare law and one specific benefit. The decision-makers at the Norwegian CG have competence that range from jurists to social scientists and social workers. NAV AU seeks to employ a substantial share of jurists. However, social scientists and other professionals are also employed. The SST resembles the German Social Courts in that only experienced jurists are employed as judges. Given the assumption that being a jurist is superior to these other educations, the German courts and the SST performs better than the other agencies with regards to this criterion.

All the complaints agencies in Norway and Germany apply the inquisitorial principle. Another relevant aspect in obtaining good and sufficient information is whether the complaints agency performs a *de novo* or *on the record* consideration. The distinction between these two modes is often clearer in theory than practice (Shapiro 1980: 646). It has, however, consequences for the quality criterion, as a *de novo* reconsideration constitutes a more thorough case treatment and increases the chances that the decision is based on correct and sufficient facts. A *de novo* review is made in all Norwegian complaints agencies, except in cases brought into the regular courts. The LSC and HSC also perform *de novo* considerations, although the HSC also take the decision made in the LSC into consideration. The FSC only reviews the legality of a case in an *on the record* assessment.

The number of adjudicators involved in each decision is also relevant to this criterion. In the Norwegian cases, at least two people are involved in each case, with opportunities to increase the number of adjudicators in special cases. In Germany, there are three judges in the LSC and five judges in the two upper Social Courts. Although Germany performs somewhat better in this respect, none of the agencies leave decisions to one decision-maker alone. This is important to reduce chances of wrong and biased decisions.

7.4.6 Transparency

The transparency criterion seems to be rather well satisfied by both the Norwegian and German systems. The procedures are clearer in the German case, as the system is more consistent and clearly regulated by the law. Written statements of decisions and the reasons for the decision is standard and required by law in all agencies, with the minor exception of the SST, where there is an option of giving simplified reasons in some cases. Oral case

treatment may, however, contribute to higher transparency in Germany. The process becomes more available to the complainant, and there is also more likely that the complainant will understand the decision and the reasons behind it when he is presented with this orally and has a chance to get clarifications. The SST stands out when it comes to informing the public in general, as all cases with reasons are published in the Internet source Lovdata and they regularly publish an electronic journal with cases regarded of general interest.

7.4.7 Timeliness

What constitutes a fair amount of time spent on a single case is more easily discussed comparatively between systems rather than assessing the individual systems in isolation. The average time spent on complaints cases in the Norwegian and German institutions is displayed in table 5.

Norway			Germany		
<i>CG</i>	<i>NAVAU</i>	<i>SST</i>	<i>LSC</i>	<i>HSC</i>	<i>FSC</i>
3 months	3 months	4 months	1-2 years	1-2 years	8 months

Table 5: The average time spent on complaints cases

There is a large difference between the Norwegian and German systems with regards to this criterion. In the German system, disregarding emergency cases dealt with within a few weeks, the counting of time is in *years* rather than *months*. This could be seen as an obvious downside to the use of oral hearings, given the assumption that this is the reason for the long waiting period in the German system. Other factors could of course also be of relevance, such as the large number of cases reaching the Social Courts. This could again be traced back to German attitudes of bringing a case to court and a dysfunctional internal review process. The implication of inadequate internal review is that many cases involving simple factual questions or obvious mistakes made by the initial decision-maker are brought before the Social Courts, consuming time and resources.

7.4.8 Financial risk

Legal help is, in principle, not necessary in neither of the Norwegian complaints agencies nor in the German LSCs or HSCs. Legal aid can nevertheless improve the chances of success for the complainant. This may especially be so in the Norwegian case, where it is the responsibility of the initial decision-making agency to assist in filing a complaint. In contrast, employees at the LSC, rather than the Jobcenter, can help the claimant formulate their

complaint in Germany. Only at the FSC in Germany is a lawyer in practice required. The Norwegian and German cases show similarity in the existence of legal aid available to complainants with low income, but the arrangements differ. The generosity of these arrangements is difficult to compare due to different levels of income and prices in the two countries, and because the German arrangement does not provide one single lower threshold, but imply individual calculations. The Norwegian system, in contrast, offers clear and simple rules with a lower threshold for income and wealth. No fees are charged for the process itself in neither of the cases. In Germany, it is possible to make temporary decisions allowing complainants welfare benefits while a case is processed in the Social Courts. There are no such arrangements in Norway. With regards to social assistance, quick decisions by the CG are meant to ensure that a claimant does not go without any income. For claimants of disability benefits, their former benefit can be extended for up to eight months, but this is often insufficient to cover the entire complaints process. In such cases, the complainant is referred to social assistance. An important criterion for receiving social assistance is that own accumulated resources are exhausted. The complainant thus risks having to use saved-up money. This clearly imposes a larger financial risk on the complainant compared to the German solution.

7.4.9 System supplement: The Ombudsman

The Norwegian Parliamentary Ombudsman and the German Parliamentary Petitions Office cannot be considered equal supplements to the ordinary complaints system. The Norwegian institution is to a larger degree directed towards helping individual complainants and functioning as a safeguard against mistakes in the administration, and can thus be appraised for increasing the overall procedural justice of the Norwegian system. A weakness is that if the Ombudsman upholds a complaint, he can only *recommend* remedial action (Thompson 1999: 466). However, the Ombudsman has the advantage that he can bring publicity to issues he criticize (Wade 1963: 103). Such a supplementary institution may not be necessary in the same way in the German case because complaints go through three instances of specialized courts rather than administrative complaints agencies as in the Norwegian case. The Ombudsman can to some degree be seen as improving the limitations of administrative adjudication in the Norwegian complaints systems, but nevertheless plays a marginal role in the overall system.

7.5 Summary of the comparative discussion

The comparative discussion has revealed strengths and weaknesses of the Norwegian and German complaints systems with regards to the ideal of procedural justice. The aspects that clearly stand out from the discussion are that the Norwegian system is better in terms of timeliness, while the German system is closer to the ideal of procedural justice regarding voice and independence, as well as systemic consistency. The question remains whether some of these criteria are incompatible; is it impossible to satisfy timeliness and sufficient voice and independence simultaneously? For the Norwegian case, a unification of the complaints systems for social assistance and disability benefits would contribute to increase the procedural justice. Further, it would be desirable to improve the voice criterion by introducing oral hearings and to increase the independence of the complaints agencies, but without ending up with the same timeliness problem as Germany. By considering how the timeliness of the German case could be improved while retaining the oral hearings and the independent judicial system, a complaints system closer to the ideal of procedural justice might become visible. It is possible that a more functional review stage could reduce the arrears of the German system. A common suggestion to reduce the time spent on each case is to remove the oral hearings. The opposite answer to the timeliness problem would be the introduction of orality at an even earlier stage in the process, namely in the internal review. The question remains, however, whether this is achievable in practice. Further, if these aspects are not possible to attain simultaneously – which criteria should be prioritized? The answer depends on weighting of procedural justice criteria. The current situation reveals that timeliness is regarded most important in the Norwegian system, while independence and voice are prioritized in Germany.

8. Conclusion

In this final chapter, the findings of the thesis are summarized, the contributions, implications as well as the limitations of the thesis are discussed, and, finally, suggestions are made for further research.

8.1 Findings and contributions of the thesis

The goals of this thesis have been to contribute to existing research with knowledge about the welfare complaints systems of Norway and Germany, and to discuss these systems in terms of an ideal of procedural justice. A concomitant task has been the systematization of procedural justice theory and subsequent derivation of criteria for the purpose of discussing empirical institutions. This systematization and operationalization of procedural justice provides a contribution to the theoretical field. Procedural justice was operationalized through the criteria consistency, independence, voice, quality, transparency, timeliness and financial risk. Put together, the content of these criteria can be argued to constitute an ideal of procedural justice. They assert that a fair complaints procedure must secure (1) similar treatment across geographical context and different categories of welfare claimants, (2) an impartial and complete review, (3) that the complainant gets a chance to present his case, (4) that the adjudicators have sufficient competence and appropriate methods for obtaining case information in order to maximize the number of right decisions according to the law, (5) openness and knowledge about the case, (6) that a decision is reached within a reasonable time, and (7) that the system of complaint is accessible to everyone.

A main difference between the Norwegian and German complaints systems is between the dominance of administrative or judicial procedures. Some similarities between the Norwegian and German systems are apparent, and the main divergences with regards to procedural justice are found in the criteria of voice, independence and timeliness. The German system performs considerably better on voice and independence, while the Norwegian systems are better with respect to timeliness. The answer to the research question, i.e., to what extent the complaints systems secure procedural justice for welfare claimants, is firstly, that the Norwegian case cannot be said to fulfill the ideal of procedural justice with regards to geographical and systemic consistency, nor the criteria of independence and voice. The Norwegian case secures procedural justice when it comes to timeliness and to a large degree also quality, transparency and financial risk. Secondly, as for the German case, the ideal of

procedural justice is to a large degree secured with respect to systemic consistency, independence, voice, quality and transparency. The answers to the criteria of geographical consistency and financial risk are more ambivalent, while the timeliness is far from attaining the ideal of procedural justice.

A sub-question raised was whether different ideals and goals are prioritized in Norway and Germany. The answer to this can be seen in the evaluation of the procedural justice criteria; while timeliness appear as an important prioritization in the Norwegian case, voice and independence are prioritized in Germany - at the expense of timeliness. It was further asked what consequences these differences have for procedural justice. Because weighting of the procedural justice criteria is difficult and implies a risk of arbitrary assessment, the conclusion cannot automatically be drawn that the German case secure procedural justice to a larger degree than the Norwegian case. There are strong reasons to argue that efficiency should not come at the expense of quality or the chance of claimants to present their case. On the other hand, although the German arrangement for interim benefits makes cases less urgent, waiting periods of several years cause injustice. Hence, the question remains whether there is an inherent practical trade-off in the fulfillment of these criteria. Prioritizations of some aspects of procedural justice on behalf of others might prove inevitable and perfect attainment of procedural justice thus infeasible.

This thesis nevertheless contributes to opportunities for informed system evaluations by highlighting how the system designs have consequences for procedural justice. Although comprehensive changes are difficult to attain, and unlikely to happen due to cultural and historical paths, certain system changes are attainable in both countries and could lead the systems closer to the ideal of procedural justice. In the words of Sen (2009: *preface*): “What moves us, reasonably enough, is not the realization that the world falls short of being completely just – which few of us expect – but that there are clearly remediable injustices around us which we want to eliminate.”

The most important change of the Norwegian system would be the establishment of an independent, nation-wide social court or tribunal for all welfare benefits with stronger rights to oral hearings. For the German system, the timeliness would have to be improved. This could be attained by higher quality of the first administrative review, thus diminishing the number of cases that reach the court and increasing the efficiency of the courts.

8.2 Limitations of the analysis

The thesis seeks to illuminate mainly systemic or institutional characteristics, consequently disregarding the empirical effects of these formal traits, with the exception of data on timeliness. This limits the scope of the findings. Further, there are inherent challenges in the application of normative theory on empirical systems. The criteria derived from procedural justice theory imply certain assumptions about what is normatively best. Complete agreement about such assumptions is not possible, and competing goals and insolvable trade-offs will continue to exist. Goals of economy and efficiency can stand in opposition to several criteria of procedural justice. Further, the requirement of independent complaints agencies clash with values of local democracy, and can be argued to imply judicialization of politics.

As for the geographical scope, the findings only apply to the two countries under investigation. The theoretical framework should nevertheless be applicable to similar cases. The overview of nine other cases in table 1 suggests some overarching characteristics of other complaints systems which could be elaborated further. This leads to the next topic, namely suggestions for further investigation.

8.3 Suggestions for future research

Broader knowledge can be obtained by larger comparisons of more cases within the same universe. The theoretical framework could for instance be extended to other Western democracies, e.g. the countries suggested in table 1. Such analyses could reveal whether there are patterns consistent with the judicial-administrative cleavage with regards to criteria of procedural justice. The empirical effects of the complaints systems, such as the number of complaints, the reversal rate and the amount of economic resources are spent on the systems, should also be further investigated, implying the acquisition of more knowledge in *depth*. Moreover, investigations covering all geographical units of the countries would provide more adequate and reliable data. It would be particularly interesting to look deeper into the suggested trade-off between satisfaction of the voice and timeliness criteria. Is it really so that it is the oral hearings that cause the long time lags in the German system, or can the lack of timeliness be explained by other factors such as a large number of complaints, insufficient internal review or some kinds of system rigidities other than the oral hearings?

This thesis has dealt with procedural aspects of the welfare state, taking the substantive aspects, i.e., the formulation of welfare rights and benefit eligibility, as given.

However, this constitutes an important foundation of the procedural rights. The material rights of economic welfare to a large degree set the agenda for the procedural execution, and according to Mashaw (1985: 5), these questions of substance and process are functionally inseparable. Hence, this deserves more attention. The law formulations contribute to the degree to which procedural justice can be achieved. This is for the most part disregarded in this thesis in favor of the systemic characteristics, but is nevertheless apparent in the cases discussed. For social assistance in Norway, the weak rights formulations leave much room for discretion, and the additional provision that the complaints agency is only allowed to review the judicial, in contrast to the administrative, discretion further blurs the administration of these benefits. The law formulation on disability benefits is much clearer, but contains vague eligibility criteria in the definition of disability. In Hartz IV cases, consistency between different decision-makers has proved difficult to achieve due to the complicated assessments left open by the law formulation. Focus on and development of these aspects could improve the conditions for the just implementation of welfare benefits, especially with respect to consistency and timeliness.

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Appendix A: List of interview respondents

Respondent number	Country	Position and institution	Date of interview	Place of interview
Respondent 1	Norway	Judge at the Social Security Tribunal	02.10.2012	The Social Security Tribunal, Oslo
Respondent 2	Norway	Nationally professional responsible for disability cases, NAV Appeals Unit	17.10.2012	NAV Appeals Unit, Bergen
Respondent 3	Norway	Head of section, the County Governor of Oslo and Akershus	26.10.2012	The County Governor of Oslo and Akershus, Oslo
Respondent 4	Germany	Employee in the German Ministry of Labour and Social Affairs	05.11.2012	E-mail correspondence
Respondent 5	Germany	Judge in Berlin Local Social Court	12.11.2012	Berlin Local Social Court, Berlin
Respondent 6	Norway	Head of section, the Parliamentary Ombudsman	16.11.2012	Phone interview
Respondent 7	Germany	Committee Staff Member, the Petitions Parliamentary Office	14.11-16.11.2012	E-mail correspondence
Respondent 8	Germany	Judge in the Federal Social Court	19.11.2012	The Federal Social Court, Kassel
Respondent 9	Germany	Judge in Berlin-Brandenburg Higher Social Court	20.11.2012	The Berlin-Brandenburg Higher Social Court, Potsdam
Respondent 10	Germany	Official at Berlin Pankow Jobcenter	20.11.2012	E-mail correspondence

Appendix B: Interview guides

Interview guide for the Norwegian complaints agencies and the German Social Courts (Respondents 1, 2, 3, 5, 8 and 9)

Descriptive

1. Formally, how is an appeal promoted before your institution?
2. Can you describe the complaints handling from your reception of a complaint?
3. What is the main goal of your institution? What are your main priorities?
4. What can be achieved with a complaint? Can you only review the decision of the former decision-maker or can you make a *de novo* assessment of the case?

Consistency

5. What is done to secure geographical consistency in the treatment of cases?
6. Does your institution contribute to consistent decisions?
7. Do you communicate with other courts/agencies at the same level as yours or higher/lower?

Independence

8. Do you see your institution as completely independent from the rest of the welfare administration?
9. Organizationally, who are you accountable to? Financially, employment, etc.

Voice

10. How does the complainant present his case for you? Is there an oral hearing?
11. Does the complainant need legal expert help in order to achieve a successful result?

Quality of decisions

12. How do you gather all necessary case information?
13. What is the level of competency of people working with adjudication in your institution?

Transparency

14. Is there openness about your procedures?
15. How is the complainant informed during the case process?
16. Are written statements with reasons for your decisions always given?

Timeliness

17. What is the average time spent on each case? And what is your maximum time limit?
18. How is the complainant secured financially in the mean time?

Financial aspects

19. Are there any expenses falling on the complainant of the process itself?
20. How are arrangements for legal aid?

Evaluation of system

21. Have there been any changes for your agency since the Hartz/NAV reform?
22. What would you say is the main weakness of the system as it is today?
23. What are the greatest advantages with the system?
24. Have any other kind of organization of the system been discussed?

Questions asked respondent from the Ministry of Labour and Social Affairs, e-mail interview (Respondent 4)

1. How is an initial complaint made? Does it have to be in writing; are there standardized forms?
2. What is the average time used to make a decision on a complaint?
3. If the complaint is rejected, does the citizen have to make a new complaint in order to bring the case to the Social Court, or is the case sent directly to the Social Court for consideration if the complaint is rejected?
4. Is the information about the case easily available to the claimant?
5. Are there given a written statement of reasons for decisions that are made in the Jobcenters?
6. How detailed are the formal regulations of this benefit regarding who is eligible for the benefit, and regarding how much one is entitled to if eligible?

Interview guide for the Parliamentary Ombudsman, phone interview (Respondent 6)

1. What is the role of the Parliamentary Ombudsman in the complaints system for claimants of disability benefits and social assistance?
2. What does the process of complaints look like at the Ombudsman?

3. Which aspects of the case do you review?
4. How do you gather the necessary information about each case?
5. Do you have any contact with the complainant, and if so, is this in writing or orally?
6. What competency is required to work at the agency of the Ombudsman?
7. Is it necessary with legal help in order to file a complaint?

**Questions asked respondent from the Petitions Parliamentary Office, e-mail interview
(Respondent 7)**

1. What role does the Parliamentary Petitions Office have in the total complaints system for Hartz IV claimants? Do you handle such cases? Which aspects of the cases do you handle?
2. What is the main goal of the Parliamentary Petitions Office?
3. How are complaints handled at your agency?
4. Do you have any direct contact with the welfare claimant; if so, orally or in writing?
5. What is the competence required to work at the Parliamentary Petitions Office?
6. Do welfare claimants need help from a lawyer in order to raise a complaint before your agency?
7. Are any fees charged for lodging a complaint before the Parliamentary Petitions Office?

**Questions asked respondent from Berlin Pankow Jobcenter, e-mail interview
(Respondent 10)**

1. Practically, how does a Hartz IV claimant lodge a complaint on a decision made at the Jobcenter?
2. What are the procedures of the Jobcenter for handling such complaints? Is there an internal review of the decision first?
3. If so, and if the decision is upheld, what do the claimant has to do in order to get the case tried in the Social Courts?
4. Do the officials at the Jobcenter help the welfare claimant in lodging a complaint?
5. How is the case presented before the Local Social Court? What is the role of the Jobcenter when a case is handled in the Social Court?
6. Are the procedures for complaint open and easily accessible to the welfare claimant?
7. When a case is sent to the Social Court, how is it decided what kind of economic contributions the welfare claimant gets while he awaits a decision in the Social Court?

8. Do you regard the rules of the Hartz IV benefit as clear, or are there difficult assessments that have to be made in each case?