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# The snakes and ladders of legal participation: litigants in person and the right to a fair trial under Article 6 of the European Convention on Human Rights

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## Abstract

This article reviews the right to a fair trial under Article 6 of the European Convention on Human Rights for litigants in person (LIPs). LIPs operate in a system that was not designed for them and so challenge the norm of fully represented parties that the system has evolved to expect, creating potential risks for their Article 6 rights. The jurisprudence on Article 6 reveals the centrality of effective participation as a requirement for fulfilling the right to a fair trial. The article views the jurisprudential interpretation against original and significant empirical research data on how LIPs participate in civil and family court processes. It applies a conceptual analysis of legal participation to consider what might constitute effective participation in court proceedings and, through the empirical evidence, categorizes the intellectual, practical, emotional, and attitudinal barriers that LIPs face in their legal proceedings, which can constitute risks to their rights under Article 6.

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## 1 | INTRODUCTION

Acting as a litigant in person (LIP) can be a complex and fluid process.<sup>1</sup> Some LIPs enter the court system without any prior involvement with legal services, some come from a more experienced position of having litigated with legal support that has then been abandoned or removed, and some float in and out of legal representation as needs and resources require, with variations in the nature of support sought or achieved before and after hearings. Regardless of these fluctuating states, however, the common factor defining a LIP is their appearance in a court hearing without a qualified legal representative.<sup>2</sup> It is this moment of litigating in person – the point at which a judge holds the state’s duty to protect the LIP’s right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR) – that provides the focus of our research.<sup>3</sup> The seminal case on Article 6(1) is the European Court of Human Rights decision in *Airey v. Ireland* in which Ireland was found to be in breach of Mrs Airey’s Article 6 rights because the procedural complexity of the litigation meant that she was unable to conduct her own case effectively as a LIP, despite the judicial assistance that she had been given.<sup>4</sup> The court’s decision relies on the need for the LIP to be able to participate in a way that allows her ‘to present her case properly and satisfactorily’ as a means of ensuring that the court can make a just decision.<sup>5</sup> This article explores what constitutes the effectiveness of participation by examining the European and United Kingdom (UK) jurisprudence around Article 6(1). The limitation of this analysis, however, is that the requirements for what we are calling ‘effective participation’ are general rather than specific, making it difficult to develop a bright-line test for what is or is not effective participation for LIPs.

There is an increasing focus on the predicament of individuals litigating without a lawyer, concerned as much with the impact on the efficiency of the court system as on the rights of the individual LIP.<sup>6</sup> This dual focus is not unmerited, as the courts have a duty to protect the Article 6

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<sup>1</sup> The term ‘litigant in person’ has been defined in *Practice Guidance (Terminology for Litigants in Person)* [2013] 2 All ER 624 to describe individuals who exercise their right to conduct legal proceedings on their own behalf. In research, it covers a number of scenarios that take account of a litigant’s changing status and levels of legal support. See for example R. Hunter et al., *The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia* (2002) 75, at <<http://www.lawfoundation.net.au/ljf/site/templates/reports/>file/Changing-face-of-litigation.pdf>>, examining the difference between fully and partially self-represented and variations within the latter category; L. Trinder et al., *Litigants in Person in Private Family Law Cases* (2014) 22, at <<https://www.gov.uk/government/publications/litigants-in-person-in-private-family-law-cases>>.

<sup>2</sup> K. Williams, *Litigants in Person: A Literature Review* (2011), at <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/217374/litigants-in-person-literature-review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217374/litigants-in-person-literature-review.pdf)>.

<sup>3</sup> Article 6(1) of the ECHR states: ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’ Articles 6(2) and 6(3) are concerned with the right to a fair trial for those charged with criminal offences, which are not the focus of this article.

<sup>4</sup> *Airey v. Ireland* [1979] 2 EHRR 305.

<sup>5</sup> *Id.*, para. 24.

<sup>6</sup> K. L. Richardson and A. K. Speed, ‘Restrictions on Legal Aid in Family Law Cases in England and Wales: Creating a Necessary Barrier to Public Funding or Simply Increasing the Burden on the Family Courts?’ (2019) 41 *J. of Social Welfare and Family Law* 135; Civil Justice Council, *Access to Justice for Litigants in Person (or Self-Represented Litigants)* (2011), at <<https://www.judiciary.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf>>. For Northern Ireland, see Department of Justice, *A Strategy for Access to Justice: The Report of Access to Justice (2)* (2015) 7.28–7.34, at <<https://www.justice-ni.gov.uk/publications/access-justice-review-part-2-final-report>>; Office of the Lord Chief Justice, *Review of Civil and Family Justice in Northern Ireland*:

rights of all litigants and to uphold the proper administration of justice; anything that impacts on their ability to do so has a corresponding impact on all litigants. Defining the line where the risk to the human rights of a LIP can be drawn, however, remains problematic, a point evidenced by the statutory provisions in England and Wales to determine when this line may be crossed. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) enables ‘exceptional funding’ to be provided by the state to pay for legal representation where the individual’s ECHR rights are at risk.<sup>7</sup> The Lord Chancellor’s originally published view of where funding must be provided under the terms of Article 6 was found to be unduly restrictive, but exactly where that line is located remains difficult to determine.<sup>8</sup> A further limitation in protecting Article 6 rights in practice is that determination of a breach requires the case in question to conclude before any claim of a breach can be raised. While efforts to meet state obligations for Article 6 can be implemented to ensure systemic compliance, the test of that compliance occurs per force after the fact rather than pre-emptively or reactively. Even post-hoc systematic compliance may be questionable; the right to a fair trial is one of the most commonly contested entitlements in the history of the ECHR, suggesting a lack of agility or attentiveness of states to address potential breaches as they happen.<sup>9</sup>

The challenge is to articulate the rights of LIPs in the terms of Article 6 in a way that enables the prevention of breach rather than remedy after the fact. This article responds to that challenge by examining the issue in live court proceedings where risks of breach could be observed, using a model of legal participation designed to describe the different participative experiences of court and tribunal users.<sup>10</sup> Drawing on the body of empirical evidence on LIPs’ experiences, including original data from a two-year qualitative and quantitative study of LIPs in the civil and family courts in Northern Ireland,<sup>11</sup> the article identifies the barriers to legal participation that block LIPs’ enjoyment of the right to a fair trial under Article 6. The rigorous empirical analysis offers practical insight into what the content and meaning of the legal standard ought to be and how addressing the barriers to legal participation could mitigate the risks faced by LIPs in realizing their Article 6 rights. This is significant at a point where state funding for legal representation is restricted but the ability to participate in the proceedings in which LIPs are involved remains a basic facet of access to justice. Reconceiving the problem in this way means that the solution does not depend entirely on a high level of resources. The model of legal participation utilized

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*Review Group’s Report on Family Justice* (2017) s. 19, at <<https://judiciaryni.uk/sites/judiciary-ni.gov.uk/files/media-files/Family%20Justice%20Report%20September%202017.pdf>>; Office of the Lord Chief Justice, *Review of Civil and Family Justice in Northern Ireland: Review Group’s Report on Civil Justice* (2017) s. 12, at <<https://judiciaryni.uk/sites/judiciary-ni.gov.uk/files/media-files/Civil%20Justice%20Report%20September%202017.pdf>>. For Scotland, see Scottish Civil Justice Council, *Access to Justice Literature Review: Party Litigants, and the Support Available to Them* (2014), at <<http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-publications/literature-review-on-party-litigants-and-the-support-available-to-them.pdf?sfvrsn=2>>.

<sup>7</sup> Ministry of Justice, *Lord Chancellor’s Exceptional Funding Guidance (Non-Inquests)* (2013) para. 18, at <<http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf>>.

<sup>8</sup> *R (on Application of Gudanavičienė & Ors) v. Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622. See also S. Choudhry and J. Herring, ‘A Human Right to Legal Aid? The Implications of Changes to the Legal Aid Scheme for Victims of Domestic Abuse’ (2017) 39 *J. of Social Welfare and Family Law* 152.

<sup>9</sup> European Court of Human Rights, *Overview 1959–2020* (2021), at <[https://www.echr.coe.int/Documents/Overview\\_19592020\\_ENG.pdf](https://www.echr.coe.int/Documents/Overview_19592020_ENG.pdf)>.

<sup>10</sup> G. McKeever, ‘A Ladder of Legal Participation for Tribunal Users’ (2013) July *Public Law* 575; G. McKeever, ‘Comparing Courts and Tribunals through the Lens of Legal Participation’ (2020) 39 *Civil Justice Q.* 217.

<sup>11</sup> G. McKeever et al., *Litigants in Person in Northern Ireland: Barriers to Legal Participation* (2018), at <[https://www.ulster.ac.uk/\\_\\_data/assets/pdf\\_file/0003/309891/179367\\_NIHRC-Litigants-in-Person\\_BOOK\\_\\_5\\_LOW.pdf](https://www.ulster.ac.uk/__data/assets/pdf_file/0003/309891/179367_NIHRC-Litigants-in-Person_BOOK__5_LOW.pdf)>.

in this article is not designed as a cost-saving response to a problem of austerity, but as a user-focused response to a participative need with the clear aim of improving access to justice, creating the potential to consider how to look beyond traditional and increasingly restricted solutions. As such, an understanding of legal participation by LIPs offers some potential to improve the user experience of justice as well as shaping the definition of effective participation under Article 6.

The article begins by setting out the current norms of the legal system as they apply to litigants who have no legal representation for their court hearings, exploring the participative challenges that such norms now create. The doctrinal basis for the right to a fair trial under Article 6 is examined, establishing effective participation as the ability to influence the outcome of a case so that the judge can reach a fair decision.<sup>12</sup> A model of legal participation, which was developed from the participative experiences of LIPs who encountered intellectual, practical, emotional, and attitudinal barriers in their cases, is used as a foundation for unpacking the fair trial standard of effective participation. The article argues that this empirically evidenced model of legal participation can help us to understand the components of effective participation and creates the potential to operationalize practical interventions to mitigate the risks of LIPs' Article 6 rights being breached.

## 2 | THE UK COURT SYSTEM

The UK court system, the product of centuries of evolutionary change, is now premised on the norm of litigants being represented by lawyers before a judge, constructing a legal narrative that applies particular laws to particular facts.<sup>13</sup> The system of adjudication is formally understood to be an adversarial one, with opposing parties presenting different legal narratives and the judge adjudicating to determine the 'correct' version of the legal truth.<sup>14</sup> The system of legal education in the UK (and in other common law jurisdictions) follows this norm, so that lawyers and judges are trained to respond to the variations within this model, rather than beyond it. The result is a cultural entrenchment that may be prejudiced against LIPs who exist outside of this model. Any change to the status quo to accommodate the layperson may be weighed in terms of the economic efficiency of a competing, alternative model.<sup>15</sup> The low governmental investment made in post-LASPO family court procedures in England and Wales to adapt to the presence of greater numbers of LIPs, the burden placed on the courts, and the difficulties that LIPs continue to face<sup>16</sup> suggest that any purported economic efficiency gains to be made by changing the prevailing culture have not had sufficient weight to bring about such a transformation.

This norm of representation has created a system of public access to justice that is contingent on accessing a (frequently private) legal service as the gateway. The history of legal aid speaks to the

<sup>12</sup> Id., Appendix 1, 'An Analysis of the Right to a Fair Trial and Litigants in Person'. See also Choudhry and Herring, op. cit., n. 8.

<sup>13</sup> K. Leader, 'From Bear Gardens to the County Court: Creating the Litigant in Person' (2020) 79 *Cambridge Law J.* 260; A. Paterson, *Lawyers and the Public Good: Democracy in Action* (2011); J. Langbein, *The Origins of the Adversary Criminal Trial* (2013) ch. 5.

<sup>14</sup> A. Zuckerman, 'No Justice without Lawyers: The Myth of an Inquisitorial Solution' (2014) 33 *Civil Justice Q.* 355; W. M. O'Barr and J. M. Conley, 'Litigant Satisfaction versus Legal Adequacy in Small Claims Court Narratives' (1985) 19 *Law & Society Rev.* 661.

<sup>15</sup> A. Ogun, 'The Economic Basis of Legal Culture: Networks and Monopolization' (2002) 22 *Oxford J. of Legal Studies* 419.

<sup>16</sup> J. Mant, 'Litigants' Experiences of the Post-LASPO Family Court: Key Findings from Recent Research' (2019) 3 *Family Law* 300; K. A. Barry, 'The Barriers to Effective Access to Justice Encountered by Litigants in Person in Private Family Matters Post-LASPO' (2020) 42 *J. of Social Welfare and Family Law* 416; Richardson and Speed, op. cit., n. 6.

state's recognition of the significance of this gateway service through the development of publicly funded support for those accessing their social, civil, and political rights.<sup>17</sup> More recent developments in legal aid policy in the UK focus increasingly on the need to rationalize this support, limiting access to free legal advice and representation only to those with the most meagre financial means while, ostensibly, maintaining a general commitment to the principle of open access to justice. Notably, the level of access to legal aid has been significantly impacted by LASPO, which substantially reduced the scope of work covered by legal aid funding in England and Wales,<sup>18</sup> although the scope of legal aid remains at pre-LASPO levels in Scotland as well as in Northern Ireland where the empirical work for this article was conducted.

While a commitment to the principle of open access to justice is clearly in the public interest, it is also the case that the current gateway to the legal system is not exclusively about supporting public interests. There are private interests at stake here too, both for litigants and lawyers, and there are litigants who do not wish (and are not required) to go through a gateway service to access courts.<sup>19</sup> This can create a tension between litigants without legal representation and lawyers, where each see the system as one that is being held back by the demands to accommodate the other.<sup>20</sup> Regardless of whether this tension can be resolved, it remains clear that LIPs are having an impact on a system that is based on access being provided through legally qualified intermediaries and that has not been designed with LIPs in mind.<sup>21</sup> What is less clear is whether this impact includes impairing LIPs' access to a fair trial.

### 3 | THE RIGHT TO A FAIR TRIAL

The overall objective of the right to a fair trial under Article 6 of the ECHR is focused on ensuring the proper administration of justice, including the protection and guarantee of the duty of the

<sup>17</sup> See H. Genn, 'Do-It-Yourself Law: Access to Justice and the Challenge of Self-Representation' (2013) 32 *Civil Justice Q.* 411; F. Kaganas, 'Justifying the LASPO Act: Authenticity, Necessity, Suitability, Responsibility and Autonomy' (2017) 39 *J. of Social Welfare and Family Law* 168; Richardson and Speed, *op. cit.*, n. 6.

<sup>18</sup> House of Commons Justice Committee, *The Future of Legal Aid* (2021), at <<https://committees.parliament.uk/publications/6979/documents/72829/default/>>; House of Commons Justice Committee, *Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (2015), at <<https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2010/laspo/>>; T. Cornford et al., *Access to Justice: Beyond the Policies and Politics of Austerity* (2016); A. Flynn and J. Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (2017); G. McKeever et al., *Destitution and Paths to Justice* (2018), at <<https://research.thelegaleducationfoundation.org/wp-content/uploads/2018/06/Destitution-Report-Final-Full-.pdf>>; Mant, *op. cit.*, n. 16.

<sup>19</sup> N. Cambrell, 'Self-Represented Litigants, Balancing Impartiality and the Right to a Fair Trial: The Judge's Duty' (2019) 38 *Civil Justice Q.* 232; D. Webb, 'The Right Not to Have a Lawyer' (2007) 16 *J. of Judicial Administration* 165; R. Assy, 'Revisiting the Right to Self-Representation in Civil Proceedings' (2011) 30 *Civil Justice Q.* 267; R. Engler, 'Reflections on a Civil Right to Counsel and Drawing Lines' (2010) 9 *Seattle J. for Social Justice* 97; B. Toy-Cronin, 'A Defence of the Right to Litigate in Person' (2017) 37 *Oxford J. of Legal Studies* 238; N. Croquet, 'The Right to Self-Representation under the European Convention on Human Rights' (2012) 3 *European Human Rights Law Rev.* 292; J. Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (2013), at <<https://scholar.uwindsor.ca/lawpub/85/>>.

<sup>20</sup> McKeever et al., *op. cit.*, n. 11.

<sup>21</sup> Richardson and Speed, *op. cit.*, n. 6; Civil Justice Council, *op. cit.*, n. 6; Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), at <<https://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/interim/contents.htm>>.

court to make a just decision. Any civil court and its associated administrative, procedural, and legal mechanisms must operate to achieve this aim for all litigants, whether represented or not. What is under the spotlight here is how people who are not required in law to adhere to lawyerly standards and who come with their individual idiosyncrasies intersect with the procedural and legal provisions. It is appropriate, therefore, to examine the empirical evidence on how LIPs' experiences evince their fair trial rights. The empirical data that we explore focuses on civil and family law and is guided by Article 6(1) of the ECHR, which addresses civil claims and which makes no distinction between LIPs and legally represented parties.<sup>22</sup>

Article 6(1) consists of two broad elements, each positive rights with their own constituent parts. The first is the right of access to a court, which requires that procedural guarantees be in place for individuals to institute legal proceedings in a non-discriminatory manner.<sup>23</sup> It is left to states parties to decide how best to fulfil the obligation to provide access to a court. If the legal or procedural complexity is too great to ensure effective access, this may involve the provision of legal assistance or alternatively the simplification of procedure.<sup>24</sup> The complexity of the procedure or case must be determined, to some extent, in view of the personal characteristics of the litigant, unless the procedure is so obscure as to be beyond the ability of all but the most specialized counsel. The administrative and legal procedures should also be coherent, with the provision of sufficient information and assistance to make them implementable, including by LIPs.<sup>25</sup> A final aspect of the right of access to a court is the ability to participate in the proceedings to a level where the LIP is able to do justice to the case such that the court can grasp the facts and principles at hand to reach a just decision.<sup>26</sup> This means that in order to participate effectively, the LIP must have the opportunity to affect the outcome of the case, aligning participation with procedural and substantive justice.<sup>27</sup>

The second element of Article 6(1) relates to fair trial guarantees.<sup>28</sup> These include equality of arms, which is the fair balance between the parties in the opportunities given to them to present their case in a manner that does not disadvantage them with respect to the other side.<sup>29</sup> In the absence of a legal representative for one party, accommodations to reach equality of arms are permissible. If the procedures and law underpinning the case are too complex for equality of arms to be achieved, the court may direct legal assistance from the state or the judge may exercise judicial latitude towards the LIP to ensure balance in a way that does not interfere with judicial impartiality and neutrality.<sup>30</sup>

<sup>22</sup> Article 6(3)(c) contains provision for anyone charged with a criminal offence 'to defend himself in person or through legal assistance of his own choosing'.

<sup>23</sup> *Golder v. UK* [1975] 1 EHRR 524, para. 35.

<sup>24</sup> *Airey*, op. cit., n. 4, para. 26.

<sup>25</sup> *De Geouffre de la Pradelle v. France*, App. No. 12964/87 (ECtHR, 1992), paras 34–35; *Blumberga v. Latvia*, App. No. 70930/01 (ECtHR, 2008), para. 78. The right of access to a court also requires the court to exercise 'diligence' to make sure that a party has been informed of proceedings. *Colozza v. Italy*, App. No. 9024/80 (ECtHR, 1985), para. 28.

<sup>26</sup> *Perotti v. Collyer-Bristow (A Firm)*, [2003] EWCA Civ 1521, para. 32.

<sup>27</sup> E. A. Lind and T. R. Tyler, *The Social Psychology of Procedural Justice* (1988); T. R. Tyler, 'Social Justice: Outcome and Procedure' (2000) 35 *International J. of Psychology* 117; R. Moorhead et al., *Just Satisfaction? What Drives Public and Participant Satisfaction with Courts and Tribunals?* (2008) 5 MOJ Research Series; G. Leventhal, 'What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships' in *Social Exchange: Advances in Theory and Research*, eds K. Gergen et al. (1980) 27; L. Solum, 'Procedural Justice' (2004) 78 *Southern California Law Rev.* 181.

<sup>28</sup> A distinction is made between protections for parties in criminal cases and in civil cases. The former are more explicit than the latter, whose guarantees form the focus of this article.

<sup>29</sup> *De Haes and Gijssels v. Belgium*, App. No. 19983/92 (ECtHR, 1997), para. 53.

<sup>30</sup> *Steel & Morris v. UK*, App. No. 68416/01 (ECtHR, 2005), paras 69 and 72.

Effective participation rests on many practical, procedural, and individual factors. They include the participative and performative actions of the LIP (or any litigant) and how they interact with the procedural and infrastructural provisions of the court system, simultaneously depending on individual and systemic factors. Having access to a court, being able to present one's case, being given the opportunity to do so, and having access to the information necessary to understand, prepare, and process one's case are all routes to effective participation and all attach duties to the state to ensure that litigants, particularly those with no legal representation, are able to follow them. Remove or block one route and effective participation may be in jeopardy, which may in turn risk fair trial rights. Our question is whether the theory of legal participation can enrich our understanding of how LIPs' Article 6 rights are upheld or imperilled, bringing an original lens to the empirical evidence. This, in turn, lays the foundations for future reform initiatives to test whether the concept of effective participation can be mapped onto the evidence-based descriptive model of legal participation to develop operational standards that could help to pre-empt breaches of Article 6.

#### 4 | GIVING SUBSTANCE TO EFFECTIVE PARTICIPATION

Two central problems arise in operationalizing effective participation. The first is a conceptual issue: effective participation is not a legally defined concept, although elements of it can be drawn from the jurisprudence around Article 6 that identifies – retrospectively – when effective participation has been blocked. The second problem flows from this – namely, that there is no practical insight into the barriers that block a LIP's effective participation. Consequently, there is little guidance on when judges or others should act pre-emptively to enable participation, as Article 6(1) allows them to do. Both problems need to be addressed so that court actors can identify what effective participation is (or is not) and act to mitigate the impact of barriers to it. This article uses the conceptualization of legal participation, drawn from empirical analyses of court and tribunal user experiences, to give an original insight into how the legal standard of effective participation can be considered in practice.

Conceptualizations of participation have been created in different contexts, most notably in relation to political participation as an essential element of democracy, where Arnstein's seminal model of participation seeks to measure the gaps between citizens' opportunities to participate and the effectiveness or outcome of those opportunities.<sup>31</sup> The concept of participation by those on the margins of democratic processes of decision making – most notably, children – has also been the subject of significant research. Lundy's modelling of the right of children to be heard, under Article 12 of the UN Convention on the Rights of the Child, articulates how that right goes further than simply allowing access to the opportunity to speak and underpins a more substantive involvement that addresses gaps in children's knowledge and opportunities that would inhibit their ability to participate effectively.<sup>32</sup>

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<sup>31</sup> S. R. Arnstein, 'A Ladder of Citizen Participation' (1969) 35 *J. of the Am. Planning Association* 216.

<sup>32</sup> L. Lundy, "'Voice' Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 *Brit. Educational Research J.* 927. Other context-specific typologies of participation exist, from political participation in environmental rights (see N. Popovic, 'The Right to Participate in Decisions that Affect the Environment' (1993) 10 *Pace Environmental Law Rev.* 683) to legal participation within alternative dispute resolution (see J. Williams et al., 'Participation as a Framework for Analysing Consumers' Experiences of Alternative Dispute Resolution' (2020) *J. of Law and Society* 271).



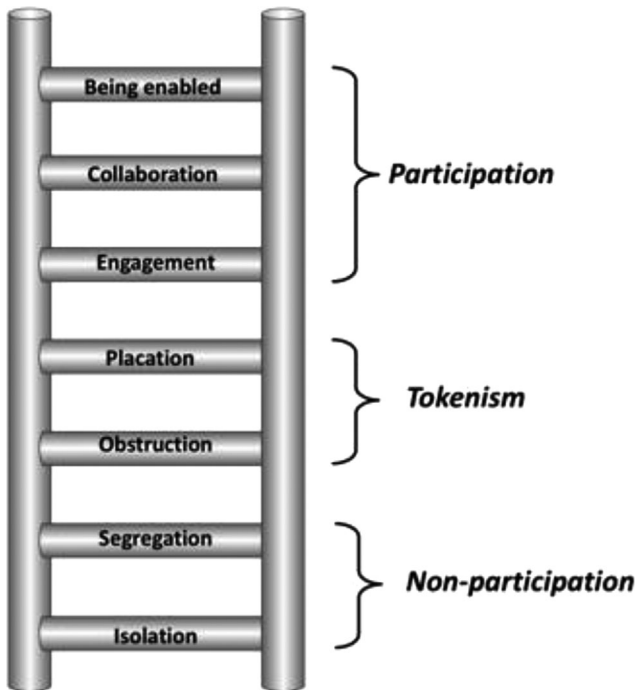


FIGURE 1 McKeever's ladder of legal participation

This substantive approach to participation can be extended to other domains, including legal processes. Drawing on the literature on political participation and procedural justice, McKeever identified a range of participative experiences that reflect how tribunal users experience legal proceedings, modelled as a 'ladder' of participation (Figure 1).<sup>33</sup> This model recognizes that legal participation is not a binary experience, with individuals either participating or not. Rather, the model represents the different forms of participation revealed by the empirical evidence of user experiences, both with and without legal representation. Legal participation, therefore, covers a range of experiences, none of which are static, in that individuals can move from one form of participation to another within the dispute resolution process. Nor are the categories dependent entirely on the availability of external resources; an individual also has agency to determine whether she or he wishes to participate. Where the autonomous choice is to participate, the model reflects the intellectual, practical, and emotional barriers that define the nature of the participative experiences.

The legal participation model groups the broad range of experiences as non-participative, tokenistic, or participative, and identifies different types of participative experience within each of these categories.<sup>34</sup> Non-participative experiences are defined as isolation, which involves feeling excluded and unable or unwilling to engage with legal proceedings; and segregation, which includes feeling segregated from the legal process, or secondary within it, without sufficient account being taken of the difficulties in participating. Tokenistic experiences are defined as obstruction, where the individual's journey through legal proceedings is obstructed by delays or inadequate information, or through fatigue at having to search for assistance; and placation, where the support that is provided, or referred to, is ineffective in assisting the individual. Participative experiences encompass engagement, where users can navigate the process and

<sup>33</sup> McKeever, *op. cit.* (2013), n. 10.

<sup>34</sup> *Id.*

communicate with the actors to understand each other's role; collaboration, where individuals are supported in their journey through the process, with their understanding of proceedings taken as the starting point, and difficulties dealt with as they arise; and being enabled, where individuals are put in the position where they feel supported and equipped to engage in the process as equals, with an element of self-determination within recognized limits.

There is value in understanding the range of different participative experiences, reflecting the diversity of the litigant population and recognizing that participation should accommodate the different levels of desire, willingness, or ability to participate, as well as any inherent failure of the mechanisms designed to facilitate participation. Perhaps more significantly, however, an appreciation of the different ways in which LIPs experience legal participation in court proceedings helps us to understand the extent to which their participation is effective and the particular barriers that contribute to varying levels of participation. The LIP research reveals participative experiences in line with those of tribunal users, allowing us to apply the legal participation ladder to family and civil court users. As with the original model, the categories drawn from the empirical evidence may overlap and participation may (legitimately) hit different rungs at different stages of the process, so LIPs can move between the categories within their court journey, and indeed within a single court hearing. The model does not provide a generalized assessment of where most LIPs' experiences sit, but rather offers a chance to identify the range of participative experiences, and the barriers that underpin them, creating the potential to modify court system responses to affect those experiences.

## 5 | THE RESEARCH STUDY: LIPS IN NORTHERN IRELAND

The research on which this article is based is a two-year empirical study, gathering qualitative and quantitative data on LIPs and court actors in the civil and family justice system in Northern Ireland.<sup>35</sup> It builds on existing empirical studies and justice policy reviews on LIPs in other jurisdictions,<sup>36</sup> but interrogates this empirical evidence through an original lens of participation and is focused on Northern Ireland to help to bridge the significant evidence gap for justice policy there. Civil and family law in Northern Ireland is broadly similar to that in England and Wales, with predominantly mirror-image legislation, although there are some differences in substance and procedure, while Scotland has a different legal system. Most notably, the Civil Procedure Rules 1998 for England and Wales, which establish an overriding objective for courts to deal with cases 'justly', do not apply in Northern Ireland, which is subject to a series of older procedural rules that apply to different areas of law. While a similar overriding objective can be distilled, the rules are disparate and often obscure,<sup>37</sup> making it difficult for LIPs to familiarize themselves with which rules apply where, and raising the question of whether the *Barton* threshold that a LIP would not

<sup>35</sup> McKeever, et al., op. cit., n. 11.

<sup>36</sup> Williams, op. cit., n. 2; Trinder et al., op. cit., n. 1; Mant, op. cit., n. 16; R. Lee and T. Tkacukova, *A Study of Litigants in Person in Birmingham Civil Justice Centre* (2017), at <[http://epapers.bham.ac.uk/3014/1/cepler\\_working\\_paper\\_2\\_2017.pdf](http://epapers.bham.ac.uk/3014/1/cepler_working_paper_2_2017.pdf)>; Barry, op. cit., n. 16. International studies include Macfarlane, op. cit., n. 19; B. Toy-Cronin, *Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person* (2015); N. A. Knowlton et al., *Cases without Counsel: Research on Experiences of Self-Representation in US Family Court* (2016), at <<https://iaals.du.edu/publications/cases-without-counsel-research-experiences-self-representation-us-family-court>>.

<sup>37</sup> Department of Justice, 'Court Rules Publications' *Department of Justice*, at <<https://www.justice-ni.gov.uk/publications/court-rules-publications>>.

be expected to adhere to ‘particularly inaccessible or obscure’ rules is met.<sup>38</sup> In addition, while the scope of legal aid was vastly reduced in England and Wales under LASPO, the same approach was not adopted in Northern Ireland, which in effect continues to implement the pre-2012 system of legal aid. As Mant has argued, however, the empirical research on LIPs’ experiences in family courts since LASPO evidences an entrenchment of pre-LASPO problems, exacerbated by the increased number of LIPs denied the safety net of legal aid, rather than revealing new types of participative barriers.<sup>39</sup> This is not to dismiss the significance of post-LASPO participative problems for LIPs, but rather to underline the necessity of understanding their impact on Article 6 rights given their increased prevalence, particularly for ‘the competent poor, the unacknowledged vulnerable and the unassertive who are most affected’.<sup>40</sup>

Since the advent of the COVID-19 pandemic, the landscape has shifted further with a significantly increased number of hearings taking place online, and the growing empirical evidence indicates a combination of pre-existing and new participative barriers.<sup>41</sup> While our research was conducted pre-pandemic, it can at least testify to the demonstrative effects of appearance in person, aligning the findings with those of other studies on both acting and appearing in person to understand the barriers to effective participation facing LIPs in face-to-face civil and family proceedings.

Based on data from the Northern Ireland Courts and Tribunals Service (NICTS) indicating where the highest volume of litigants without legal representation appeared, the research focused on LIPs engaged in civil proceedings in divorce, ancillary relief, family homes and domestic violence, family proceedings, bankruptcy, and civil bills<sup>42</sup> between September 2016 and September 2017. In total, 179 LIPs participated in the research, which was both qualitative and quantitative. LIPs were interviewed and observed during their court hearings as well as completing a questionnaire on their levels of confidence and capability, and a general health questionnaire was used to indicate propensity towards psychiatric morbidity. In addition, 59 court actors were interviewed: court staff, legal representatives, judiciary, Court Children’s Officers, and McKenzie Friends.

<sup>38</sup> *Barton v. Wright Hassall LLP* [2018] UKSC 12, para. 18.

<sup>39</sup> Mant, op. cit., n. 16; Leader, op. cit., n. 13; Lee and Tkacukova, op. cit., n. 36.

<sup>40</sup> Kaganas, op. cit., n. 17, p. 169. Kaganas and others also make the argument that the removal of legal aid for private family disputes has a gendered focus, in relation to both justification and effect of LASPO. J. Mant and J. Wallbank, ‘The Mysterious Case of Disappearing Family Law and the Shrinking Vulnerable Subject: The Shifting Sands of Family Law’s Jurisdiction’ (2017) 26 *Social and Legal Studies* 629; J. Mant, ‘Placing LIPs in the Centre of the Post-LASPO Family Court Process’ (2020) 32 *Child and Family Law Q.* 421; R. Hunter et al., ‘Access to What? LASPO and Mediation’ in eds Flynn and Hodgson, op. cit., n. 18, p. 239.

<sup>41</sup> N. Byrom et al., *The Impact of COVID-19 Measures on the Civil Justice System* (2020), at <<https://www.judiciary.uk/wp-content/uploads/2020/06/CJC-Rapid-Review-Final-Report-f.pdf>>; Nuffield Family Justice Observatory, *Remote Hearings in the Family Justice System: A Rapid Consultation* (2020), at <[https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/nfjo\\_remote\\_hearings\\_20200507-2-.pdf](https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/nfjo_remote_hearings_20200507-2-.pdf)>; Nuffield Family Justice Observatory, *Remote Hearings in the Family Justice System: Reflections and Experiences* (2020), at <[https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/remote\\_hearings\\_sept\\_2020.pdf](https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/remote_hearings_sept_2020.pdf)>; Nuffield Family Justice Observatory, *Remote Hearings in the Family Court Post-Pandemic* (2021), at <<https://www.nuffieldfjo.org.uk/wp-content/uploads/2021/07/remote-hearings-in-the-family-court-post-pandemic-report-0721.pdf>>; G. McKeever et al., *The Impact of COVID-19 on Family Courts in Northern Ireland* (2020), at <<https://www.ulster.ac.uk/courtsurvey>>. The new barriers to effective participation, such as digital exclusion, can also exacerbate the existing barriers. G. McKeever, ‘Remote Justice? Litigants in Person and Participation in Court Processes during COVID-19’ *The Modern Law Rev. Forum*, 2020, at <<https://www.modernlawreview.co.uk/mckeevers-remote-justice/>>.

<sup>42</sup> A civil bill is a procedure unique to Northern Ireland for issuing county court proceedings.

The transcribed interviews and typed observations amounted to 369 separate items of qualitative data along with 123 completed questionnaires. Using NVivo, the researchers conducted a two-tier analysis of the qualitative data: first a descriptive content analysis and then an inductive thematic analysis. The quantitative data were processed using SPSS to generate descriptive statistics for the demographics of the sample and frequencies for the questionnaire items.<sup>43</sup> The analysis did not distinguish between the different areas of family and civil law, focusing instead on the collective participative experiences.<sup>44</sup> Overall, the dataset generated from this project is substantial, and this article cannot do justice to it all, so focuses only on some of the key themes that emerged from the qualitative data – namely, the participative barriers that LIPs faced and the attendant risks to their Article 6 rights.

## 6 | BARRIERS TO EFFECTIVE PARTICIPATION

The type of legal participation experienced is largely determined by the nature and level of the barriers that face those bringing legal disputes to a court or tribunal. In McKeever's legal participation model, these barriers are defined as intellectual, practical, and emotional. Intellectual barriers are those that prevent the individual from understanding how the legal process works. Practical barriers relate to not knowing how or where to get help to deal with the legal process and associated issues. Emotional barriers arise from the negative feelings associated with both the process and the issue being litigated, and can be exacerbated by being unable to overcome intellectual or practical barriers. The barriers to effective participation that emerged from our research with LIPs included intellectual, practical, and emotional barriers along with an additional barrier that we have termed attitudinal, relating to the cultural antipathy towards LIPs in the court system. Categorizing our data by barrier, aligned with the existing research, helps to indicate the nature of the participative experience for LIPs.

### 6.1 | Intellectual barriers

The main intellectual barrier is that LIPs do not understand the legal language used in court proceedings and documents. This is a consistent finding across other jurisdictions and relates to both legal and procedural knowledge.<sup>45</sup> In our research, this was evidenced by many commonly used legal phrases that were put to LIPs without any awareness by court actors that they might not be clear, from questions to the LIPs such as 'Do you appear in this case?' to explanations that hearings were 'first directions' or 'interim reviews'. This disparity is vividly illustrated by an observation note taken at an ancillary relief hearing involving a LIP:

Judge explains that 35 days are allowed for LIP to submit an affidavit, and then six weeks for discovery – lists off the valuers, the joint letters, co-operation ... and says that the FDR [financial dispute resolution] hearing comes later after the discovery

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<sup>43</sup> McKeever et al., op. cit., n. 11.

<sup>44</sup> Further analysis of the dataset is being funded by the Nuffield Foundation to separate the participative experiences within family proceedings to establish a checklist of legal participation.

<sup>45</sup> T. Tkacukova, 'Communication in Family Court: Financial Remedy Proceedings from the Perspective of Litigants in Person' (2016) 38 *J. of Social Welfare and Family Law* 430, which focuses on the communicative difficulties faced by LIPs.

has been thrashed out. Core issues are filed and a proposal and a list of assets. There is no attempt to explain what any of this means – came out in the interview that LIP doesn't know what the judge is talking about, even though she said [to the judge] that she understood everything. (ancillary relief, LIP, observation note)<sup>46</sup>

The intellectual barriers mean that the path that LIPs are on, defined by a lack of knowledge or awareness of law or process, contrasts sharply with the path that court actors are able to follow, informed by education, training, experience, and familiarity that the LIP cannot emulate.<sup>47</sup>

Court actors can be critical and effective, however, in enabling LIPs to manage the intellectual barriers,<sup>48</sup> and there is evidence of how this is possible, including a case in our research where the LIP was a non-native English speaker and the interpreter was not legally trained. With both the judge and the legal representative using simplified English, taking care to ensure that the interpreter could render the meaning in the LIP's language, they helped to reduce the intellectual barrier that the LIP faced so that he was able to comply with the court directions.

Formal documents, including court forms, are problematic as LIPs do not know or understand what information is required. This finding across the existing research is illustrated in our study by a court service staff member:

[T]he terminology [that a Queen's Bench writ] uses is still stuff from nineteenth, eighteenth century sometimes even ... 'What's an affidavit?' is one of the biggest questions. 'What is that?' 'What is that word? What does it mean?' ... If you're calling a witness in a High Court case, the document you issue is called a subpoena – just call it a witness summons, or just a witness invite ... That takes away all the mystery behind it. (High Court, Chancery & Probate, court staff, interview)

Common also across the empirical studies is that LIPs do not understand how to apply legal rules to their case or the legal framework that the court uses to make decisions.<sup>49</sup> In family law disputes that were based on the 'best interests' of the child, for example, LIPs were unaware of the existence of legal tests to determine best interests, much less how to interpret, apply, and respond to them:<sup>50</sup>

[LIP] was aware of the concept of 'best interests' but had not had sight of the welfare checklist and stated it was interesting to see it 'broken down' in the legislation. (family homes and domestic violence, LIP, clinic note)

Intellectual barriers can be broken down where LIPs have access to effective external advice and support to prepare for the hearing, though this can be short lived if the proceedings in court move

<sup>46</sup> The direct quotes are attributed to study participants according to the business area in which they work or were litigating, their status (LIP, legal representative, or court staff), and the source of the quote (observation note, interview, or clinic note).

<sup>47</sup> Trinder et al., op. cit., n. 1, ch. 5. These LIPs could be anywhere on the spectrum between 'vanquished' and 'procedurally challenged' in the typology given in Hunter et al., op. cit., n. 1, ch. 9.

<sup>48</sup> While there is evidence of inconsistent practice, effective judicial interventions have been shown as helpful for LIPs. R. Moorhead, 'The Passive Arbitrator: Litigants in Person and the Challenge to Neutrality' (2007) 16 *Social & Legal Studies* 405; Macfarlane, op. cit., n. 19.

<sup>49</sup> Mant and Wallbank, op. cit., n. 40.

<sup>50</sup> R. Moorhead and M. Sefton, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (2005) Department for Constitutional Affairs Research Series 2/05, p. 154, at <<https://orca.cardiff.ac.uk/2956/1/1221.pdf>>.

off the path for which LIPs have prepared.<sup>51</sup> The common view of LIPs from court actors in our research was that they had not prepared for their case, but our findings showed that LIPs simply reached the limits of their knowledge and understanding, regardless of the preparation that they undertook:

[T]hings can quickly shift in the courtroom. So, there was a few occasions ... where the opposing party came in with what felt like a bit of a curveball, and I didn't know how to respond to them. And then afterwards, finding out that I could have maybe have said this, or requested this, from the judge, but not having any, kind of, prior legal knowledge, I didn't know that I could do that. (family proceedings, LIP, interview)

The invitations to LIPs to accept particular conditions or outcomes that they do not properly understand, accompanied by a feeling that there is little option but to accept, illustrate their limited ability to be heard or to influence outcomes. The consistent theme that emerges for LIPs is that of 'not knowing', defined by Moorhead and Sefton as 'substantive and procedural naivety',<sup>52</sup> raising a fundamental question: how can LIPs participate effectively in a process that they do not understand?

## 6.2 | Practical barriers

Practical barriers, ranging from the significant to the mundane, can also be sufficient to block the ability of LIPs to participate effectively. The most obvious and common issue is that of cost for LIPs unable to fund legal representation and ineligible for legal aid (an issue more prevalent in England and Wales post-LASPO).<sup>53</sup> Practical issues beyond this arise from the lack of support for LIPs, including the absence of any central information point, requiring LIPs to navigate an 'unintelligible network of legal options',<sup>54</sup> which, in the case of our research, did not include any specific guidance for Northern Ireland:

[W]hen they sent out the first letter, which was the civil bill ... to say they're taking me to court, I then had to do a notice to defend, and ... I was pulling my hair out over that. I was on to Citizens Advice. 'No, we ... can't help you with filling in them forms.' In [the court building], no advice either. 'No. Look online.' Look online. Look online where? Where do I look? And no one would help me ... I was just looking, and looking, and looking, and looking, and spending hours, and hours, and hours on the internet trawling through it. (civil bill, LIP, interview)

Those sources most likely to be trusted (such as Citizens Advice) are not always available, and there is much less pro bono or voluntary sector support than is appreciated by court actors, leading to frustration for LIPs who have been signposted to services that they cannot access.<sup>55</sup>

<sup>51</sup> McKeever et al., op. cit., n. 11, ch. 10; Lee and Tkacukova, op. cit., n. 36.

<sup>52</sup> Moorhead and Sefton, op. cit., n. 50, p. 265.

<sup>53</sup> Mant, op. cit., n. 16.

<sup>54</sup> E. Kirk, 'Justice and Legal Remedies in Employment Disputes: Adviser and Advisee Perspectives' in *Advising in Austerity: Reflections on Challenging Times for Advice Agencies*, ed. S. Kirwan (2017) 91. See also Macfarlane, op. cit., n. 19.

<sup>55</sup> The burden of providing free legal advice post-LASPO has fallen disproportionately on third-sector organizations and charities. See Mant, op. cit., n. 16; Kaganas, op. cit., n. 17; H. Sommerlad and P. Sanderson, 'Social Justice on the Margins:

Some very basic features of the court process can also act as practical barriers, including where LIPs are not aware of and therefore not able to accommodate the reality of how long court proceedings take – on the day, or overall.<sup>56</sup> In our research, court actors remained perplexed that a LIP would not understand that being told to be in court for 10.30 am did not mean that cases would be heard at 10.30 am, while LIPs remained worried and frustrated about what they saw as an unexpected and unexplained delay in starting and concluding their case:

They think their case is going to be heard at half ten, and then they say ‘I’ve an appointment at 12 o’clock’. And ... because we know, well you’ll probably say ‘Why on earth did you make the appointment for 12 o’clock? You should have known it’s all day.’ But, I suppose, how would they know that they have to allow a full day for it? (family proceedings, court staff, interview)

Added to this is a lack of information about the reality of how cases progress, with court actors expecting multiple hearings (often to accommodate the additional time that LIPs needed),<sup>57</sup> while LIPs saw the need to attend court repeatedly as a practical difficulty.<sup>58</sup> The issue of delay – less well understood by LIPs as a part of the court process – either generates or adds to the frustration that LIPs experience in not being able to progress their cases, particularly where delays are seen as tactical.<sup>59</sup> The practical barrier that this creates is also evidenced by LIPs’ fatigue at having to personally attend each hearing. Where difficulties lead to LIPs’ absences from court, this raises an issue about how absent LIPs can keep themselves informed if they cannot attend court on every occasion, especially where judges take the view that it is not the court’s responsibility to keep LIPs informed of developments.<sup>60</sup>

For those repeat LIPs, or those whose cases have been in the system for a prolonged period, there is an understanding – or a resigned acceptance – that the process is a marathon rather than a sprint, and in these instances the practical and emotional barriers can be reduced by their more realistic expectation of what successive hearing outcomes might be. For those less familiar with the process, there is an appreciation of the helpfulness of court actors who explain what the initial or subsequent stages require. In our research, the ability to ask questions of those with experience and knowledge was seen by LIPs as helping them to manage the practical barrier of not knowing what to expect, which in turn helped with intellectual and emotional barriers:<sup>61</sup>

[The court staff are] really lovely. I’ve emailed several times for different things, and when I’ve called in, they’ve always shown me the form, explained what I need to fill in. Yes, they’ve given me the help. (ancillary relief, LIP, interview)

There may, however, be a discrepancy between what court actors think can be done to manage the practical difficulties of not having a legal representative, and how LIPs see this advice. Judges

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The Future of the Not for Profit Sector as Providers of Legal Advice in England and Wales’ (2013) 35 *J. of Social Welfare and Family Law* 305.

<sup>56</sup> Several studies suggest that LIP cases take longer to resolve than fully represented cases. See for example Moorhead and Sefton, *op. cit.*, n. 50, pp. 257–258; Trinder et al., *op. cit.*, n. 1, p. 77.

<sup>57</sup> Trinder et al., *id.*

<sup>58</sup> McKeever et al., *op. cit.*, n. 11, p. 113; Macfarlane, *op. cit.*, n. 19, p. 54; Moorhead and Sefton, *op. cit.*, n. 50, p. 161.

<sup>59</sup> McKeever et al., *id.*; Macfarlane, *id.*, p. 91; Trinder et al., *op. cit.*, n. 1, p. 45.

<sup>60</sup> Trinder et al., *id.*, pp. 30–31; McKeever et al., *id.*, p. 148.

<sup>61</sup> MacFarlane, *op. cit.*, n. 19, ch. 9; Trinder et al., *id.*, ch. 5.

and lawyers in our study were frequently frustrated or bewildered at the inability of LIPs to take notes during the proceedings. LIPs, however, found this incredibly difficult, needing instead to focus on presenting their case, being attentive and responsive in an unfamiliar environment:

When you're in there, you can't listen, and be writing things down ... [Y]ou're just focused on what is being said, and things are happening so quickly that there's no way that you could actually ... do both. (family proceedings, LIP, interview)

LIPs also mistakenly assumed that there would be a court record of the hearing on which they could rely to understand what had happened or keep track of court orders or judicial directions, and so taking notes was often seen as unnecessary.

A final but important practical barrier preventing LIPs from participating effectively in their proceedings is that the court service does not know if a litigant is going to be represented or not until the court hearing, making it more difficult to offer some of the practical help that could have been targeted at LIPs prior to the proceedings.<sup>62</sup>

### 6.3 | Emotional barriers

Emotional barriers arise from many of the practical and intellectual barriers generating feelings of anxiety, confusion, frustration, anger, and fear due to not knowing what to expect, how to behave, and how other court actors are supposed to behave.<sup>63</sup>

[It has] a massive effect on my mental health, with the stress, and the anxiety, of having to represent myself in court, coming to court, and I'm fit for nothing after these days. (family proceedings, LIP, interview)

In Hunter and colleagues' analysis, 'lawyers ... re-construct their client's emotional reactions and sense of injustice into legal issues and language'.<sup>64</sup> LIPs find it difficult to do this and to be objective about their case, dealing with the anxiety about the facts of the case that they are living through beyond the courtroom. This can translate into a struggle to manage emotions to be able to engage with the judge, while the intellectual and practical barriers further exacerbate the emotional barriers:

I think no matter how many times you're in court, when you're having to represent yourself, because you're going up in front of a judge, and you don't know what way it's going to go, or you've no knowledge of the whole legal, you know, the ins and outs of it, ... you feel anxiety regardless. (family proceedings, LIP, interview)

These emotions can become heightened during delays – or even standard waiting times – in hearing the case.<sup>65</sup>

<sup>62</sup> This problem occurs across other common law systems and the need for better, real-time data has been raised elsewhere, including as a necessary response to evaluating how online courts are working. Byrom et al., op. cit., n. 41, p. 83.

<sup>63</sup> Trinder et al., op. cit., n. 1, pp. 80–82; Lee and Tkacukova, op. cit., n. 36, p. 14; McKeever et al., op. cit., n. 11, ch. 9.

<sup>64</sup> Hunter et al., op. cit., n. 1, p. 120.

<sup>65</sup> Trinder et al., op. cit., n. 1, p. 82.



The ability to remove emotional barriers is limited by the fact that the issue at stake is often one that generates high emotions, but reducing such barriers can be enough to make a difference for LIPs to trust the process to deliver a fair outcome.<sup>66</sup> Trust in court actors is a key feature of LIPs feeling able to engage with them, particularly trust in the judge who – in most instances in our research – was seen as being fair and impartial, giving equal weight to the arguments of each side.<sup>67</sup>

## 6.4 | Attitudinal barriers

The existing research studies evidence how LIPs frustrate the ‘normal’ workings of the court system and, perhaps inevitably, LIPs are regarded negatively as a result. Research by Trinder and colleagues, for example, identifies the frequently articulated (though largely unsubstantiated) concern with unmeritorious applications, non-appearances, and disruptive behaviour with which LIPs have become associated, even when they do not fit that profile. This suggests that LIPs face an attitudinal barrier.<sup>68</sup> In our research, many court actors tended towards an automatic and stereotypically negative view of LIPs’ behaviour, with the default assumption (and behavioural consequence) that LIPs would be difficult to deal with. This was particularly the case with legal representatives:

I just hate dealing with personal litigants. It’s, like, one of the worst parts of my job.  
(family law, legal representative, interview)

This negativity was not without basis, with some LIPs equally strident in their negative views of court actors and equally unwilling to engage with them for this reason, but ultimately it indicated a resentment on the part of both LIPs and court actors that the system was not adapting to this breach of the norm. Both cause and effect are evident, with court actors unhappy about having to accommodate LIPs’ needs fed by an overall unwillingness to recognize LIPs as a legitimate part of the court system:

[I]f I was dealing with a litigant in person twice, three times a week, I wouldn’t be practising family law, I’d be getting back into conveyancing . . . [I]t’s quite a novelty when it happens once in a blue moon, but to constantly have to try [to] educate some random who won’t pay a lawyer, I couldn’t be bothered, and to justify to them that I’m not out to get them, because . . . their immediate reaction is suspicion . . . I’m not a teacher, I’m not a law lecturer, I don’t want to give someone a crash course on family law and the family court system. (family law, legal representative, interview)

Often, the attitudinal barrier is less about whether the LIP has a right to be part of the system and more of a sink-or-swim attitude that has the same effect; if the LIP is to be part of the system, they need to get themselves up to speed, rather than the court actors being expected to make accommodations for them.<sup>69</sup>

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<sup>66</sup> *Id.*, pp. 82–83.

<sup>67</sup> This does not override the more general findings that judges varied in how helpful they were (or were perceived to be), a factor attributable to ethical dilemmas over neutrality. Macfarlane, *op. cit.*, n. 19, ch. 11; Moorhead, *op. cit.*, n. 48.

<sup>68</sup> See for example Trinder et al., *op. cit.*, n. 1, p. 82.

<sup>69</sup> See for example *id.*, p. 75.

By contrast, where there is an open line of communication evidencing engagement between LIPs and court actors, this can reduce LIPs' feelings of alienation. In such instances, attitudinal barriers can be reduced or dismantled, either with the LIP viewing the various court actors as honest brokers, or with the court actors appreciating the LIP's willingness to be a collaborative partner in supporting the requirements of the process.<sup>70</sup> In our research, LIPs who felt that the judge had listened to them and taken their views on board as part of the decision experienced an increased sense that their role in the process was legitimate, helping to reduce the attitudinal barrier:

I felt like ... [the judge] listened to both sides. I didn't necessarily agree with everything the judge had to say, but I think ... it was free flowing enough that I felt I could speak up whenever I wanted to. (family proceedings, LIP, interview)

Where this element of trust can be built, there is progress to be made in reducing all of the participative barriers, helping LIPs to manage their emotions when making decisions, providing them with practical guidance on what is needed from them in relation to submissions or arguments, making sure that they understand and can follow what is being planned or discussed, and providing a basis on which parties can work together in a way that is realistic rather than aspirational. The attitudinal barriers vary from case to case, but they highlight a systemic issue: an unwillingness to assist LIPs can block pathways to being able to tackle the intellectual, practical, and emotional barriers. Without removing this attitudinal barrier, the likely ability of LIPs to participate effectively is further curtailed.

## 7 | THE IMPACT ON LEGAL PARTICIPATION

The main finding of our research – that LIPs had difficulty assimilating the norms of the court system and that the system often did not accommodate them – is consistent across the existing studies and helps us to understand how effective participation can be blocked. This central finding reveals a consistent expectation by court actors that LIPs need to be 'lawyer-like' and fit into the system, while at the same time any support provided for LIPs to become 'lawyer-like' is extremely limited. Not only is it difficult for LIPs to access resources to help them to prepare for their case, but there are also limits to their knowledge and understanding of legal issues, regardless of their efforts to prepare, and this applies even where significant resources (short of legal representation) are provided for LIPs.<sup>71</sup>

Given the mismatch between LIPs' expectations and how the system currently works,<sup>72</sup> it is unsurprising that most LIPs experience facets of non-participation: the alienation within the legal system pointing directly to isolation as a recognizable type of legal participation. Where LIPs feel that they are outside of the system with no support and significant attitudinal and emotional barriers in particular, we can see their experience as isolation. Where LIPs are unable to address the legal issues and cannot understand why their contributions are deemed to be irrelevant, and the process takes no account of their difficulties, we can see this as segregation. Where the costs of

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<sup>70</sup> See for example *id.*, p. 82.

<sup>71</sup> The procedural advice clinic provided as part of the research is a case in point. See McKeever et al., *op. cit.*, n. 11, ch. 10.

<sup>72</sup> *Id.*, ch. 5; Macfarlane, *op. cit.*, n. 19, ch. 11.

representation separate those who can pay from those who cannot, this is also segregation, an increasingly common experience since LASPO. The categorizations may overlap; for instance, someone who does not understand what is going on could be experiencing both isolation and segregation. The consistent outcome, however, is that their effective participation seems unachievable, given how removed they feel from the court actors' understanding of law and process and the sense that they can never – or should never – be a part of the system, rendering any attempt to participate as futile.

Tokenistic experiences relate most clearly to being placated by the assurance that there is help available where either this is not the case or the help is inadequate, including where LIPs are advised that the information that they need is 'online'. This reveals a systemic attitude that LIPs should be well enough informed on their own initiative if they are to play a part in court proceedings, a finding well established in the research. There are very few sources of information or advice that enable LIPs to break down participative barriers, a fact that sits uneasily with the expectation of court actors that it is the LIPs' responsibility to inform themselves about relevant law and procedure. Obstruction is perhaps less obvious but could potentially arise when delays in the resolution of cases are seen as tactical or where court forms and rules are linguistically confusing. In the time of COVID-19 when online hearings are becoming normalized, early evidence suggests that obstruction may become more prevalent as a result of technical problems with hearings.

Participative experiences, defined on the ladder as engagement, collaboration, or being enabled, while less prevalent than non-participation, are nonetheless evident across the research. Where a LIP is able to follow the language of the court, understand where they are in the process and what is required of them, and communicate effectively with court actors, their experience is one of engagement. This can be achieved where court actors take account of the LIP's level of knowledge and build on this, using simplified language to convey directions and explanations. Collaboration can be experienced where LIPs' understanding and expectation of the court process becomes the starting point to take them through what the process involves, identifying and dealing with difficulties as they arise. For LIPs, this can involve being made to feel at ease by judges, being able to raise issues of concern in hearings, or negotiating with court actors. There is also evidence of LIPs being enabled to understand or present their case in a meaningful way. While the role of judges is often central to this – providing LIPs with clear explanations of what is being asked of parties and why – there are a number of ways in which LIPs can feel empowered, including by representing themselves in court. More substantively, the provision of support – whether through court actors, information, or external organizations – can give LIPs the confidence to make some sense of what the legal process requires and to understand where there are critical gaps in their legal and procedural knowledge. Again, it is clear that the categories of participation can overlap as dynamic and fluid experiences but each offers a good foundation for LIPs to trust the system, where attitudinal barriers are not (as) apparent, intellectual barriers are acknowledged if not reduced, practical barriers are addressed, and emotional barriers are consequently diminished. The ability to remove all barriers for all LIPs may be unachievable, but the legal question is to what extent the barriers need to be removed or reduced to protect Article 6 rights.

## 8 | FROM LEGAL TO EFFECTIVE PARTICIPATION

To move our analysis of legal participation closer to effective participation, we need to understand whether we can infer effective participation from the performative aspects of legal participation. To reiterate, the ECtHR jurisprudence deems the personal characteristics of the litigant to be

relevant to the complexity of the procedure or case; the legal process should be coherent enough to be accessible by LIPs; LIPs must have the opportunity to affect the outcome of their case; and accommodations to reach equality of arms are permissible.

Courts should respond to how each LIP experiences the barriers to effective participation, taking into account different behaviours and personal characteristics. It is evident that the participative experiences described by LIPs are not consistent, either with each other or within a LIP's own experience. The ladder of participation indicates that LIPs can climb to a more participative rung, but we know that they can also slide down again, more akin to a game of snakes and ladders with setbacks and gains rather than a straightforward progression to the end of the case.<sup>73</sup> We also know that the legal process is not coherent from LIPs' perspectives and that it is not only the lack of substantive knowledge that trips them up but also the procedural aspects. Indeed, the point must be made that it does not matter to the LIP whether the barriers are the consequence of legal or procedural issues, if their effect is to act as a snake rather than a ladder.<sup>74</sup>

On the core function of effective participation – the ability to influence the outcome of the case – it seems *unlikely* that the non-participative experiences of isolation and segregation could help to achieve that outcome. The common theme of not knowing what is happening in LIPs' case provides a poor basis on which successful advocacy or persuasion could happen. It is perhaps *more likely* that tokenistic experiences of placation and obstruction could allow LIPs to affect the outcome, though the evidence points particularly to the limitations of non-legal support in helping LIPs to overcome barriers to effective participation. It seems *most likely* that the participative experiences of engagement, collaboration, and being enabled could help LIPs to affect the outcome, since they offer greater potential for LIPs to understand and contribute meaningfully to their case, helping to ensure that judges have clearer sight of LIPs' perspectives.

We have not tested this reasoning empirically and ultimately the determination of whether Article 6 has been met can only be made by a court retrospectively when a case concludes, rather than at a single point in time. What we argue, however, is the need to understand the potential overlap between the different forms of legal participation and the standards deemed necessary under Article 6 case law to operationalize practical measures to pre-empt breaches. There are numerous barriers and pressure points throughout the process that affect participation and Article 6 rights. The research establishes that if these elements are to be dealt with, then the barriers that inhibit effective participation must be tackled holistically rather than individually because they are cumulative and interlinked; breaking down one barrier has a knock-on effect on reducing another. Telling LIPs to act like lawyers is not the way to ensure effective participation in line with Article 6, but neither does the research suggest that appointing lawyers for LIPs is the only way to overcome these barriers, not least because of the right to self-represent.<sup>75</sup> *Airey* sets a broad standard for when the state is required to act in this way, but breaking down the barriers to effective participation points to other solutions as well, and the evidence is clear that the participative experience can be altered by different innovations and interventions.

Given that the most fundamental barrier faced by LIPs is attitudinal – the continued sense that they are not part of the system and not recognized as legitimate actors within it – the starting point for making participation more effective is in dealing with this attitude. This is not a glib statement but one rooted in the significance of the research findings that could act as the conduit to

<sup>73</sup> The idea of 'legal snakes and ladders' is borrowed from L. Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (2015) 119.

<sup>74</sup> It may, however, be easier to implement procedural reform than legal reform.

<sup>75</sup> See Toy-Cronin, op. cit., n. 19; Webb, op. cit., n. 19; Assy, op. cit., n. 19.

removing or reducing the other barriers to effective participation. LIPs feel alienated and become frustrated with the system largely because of the lack of intellectual, practical, and emotional support available to them. This lack of support is because the court norms do not require it and so providing the means to overcome the barriers is not treated as a necessary priority within the court system. The inability of LIPs to participate effectively in turn generates frustration among court actors, with this co-dependent dynamic often repeating on a continuous cycle. The cycle can, however, be broken when court actors recognize the barriers faced by LIPs and take account of them: acknowledging the fear and anxiety that LIPs suffer; recognizing that access to information and support is difficult if not impossible; compensating for the lack of legal and procedural knowledge by explaining the basics of what LIPs need to understand; and doing so as part of an acceptance of LIPs' right to self-represent and the court's duty to protect their Article 6 rights. It is under these circumstances that effective participation for LIPs is likely to flourish.

The attitudinal barrier is not only evident in the court system but is also itself a product of a legal system that has made it very difficult for people to legally represent themselves.<sup>76</sup> Restrictions on state support for legal assistance have not been matched in scale by compensating measures to make civil or family litigation more accessible. In England and Wales, the legal culture is preserved without making any adaptations to accommodate LIPs despite the resulting overburdening of the system and erosion of efficiency.<sup>77</sup> The state's duty, therefore, is something that rests not only with the judiciary and other court actors to discharge at the point when fair trial rights are at stake, but also with legislatures and policy makers to structure schemes of civil and family justice that are fair to LIPs and that ensure their effective participation in legal processes. More generally, there is a universal benefit that can be gained from making the legal system more responsive to the needs of the public, with or without lawyers. The original model of legal participation that describes experiences of isolation, segregation, tokenism, and obstruction was based on cases in which litigants were legally represented as well as in cases in which they were not, and shows clearly that these non-participative experiences are not confined to the LIP population. The complexity of legal procedures, the density of legislation, the inaccessibility of case law, and the lack of legal capability among the general public should be reason enough to pursue reform.<sup>78</sup> Those changes that our research identifies are necessary to meet the state's duty to protect Article 6 rights for LIPs are equally necessary to provide a publicly accessible legal system that can be used by anyone regardless of their resources. Building capacity for the public to understand whether the legal system is the most effective route for them to seek redress, and the reality of the choices that must be made to follow that route, is a reform that should not have to rely on breach of a LIP's Article 6 rights to be implemented.

## 9 | CONCLUSION

The overarching standards applied to how LIPs fare within a legal system are human rights standards, which require that system to serve all of its users in such a way that they all have the

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<sup>76</sup> Leader, *op. cit.*, n. 13.

<sup>77</sup> Ogus, *op. cit.*, n. 15; Richardson and Speed, *op. cit.*, n. 6.

<sup>78</sup> P. Pleasence and N. Balmer, *Legal Confidence & Attitudes to Law: Developing Standardised Measures of Legal Capability* (2018), at <<https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/02/Legal-Confidence-and-Attitudes-to-Law-Developing-Standardised-Measures-of-Legal-Capability-web-version-1.pdf>>; P. Pleasence and N. Balmer, 'Development of a General Legal Confidence Scale: A First Implementation of the Rasch Measurement Model' (2019) 16 *Empirical Legal Studies* 143.

opportunity to have their legal needs met. The right of access to justice – most clearly understood in human rights terms as the right to a fair trial, and specifically as the right of access to a court and fair trial guarantees – places positive duties on the state to ensure that all litigants are able to participate effectively in the litigation in which they are involved. This article has set out a potential map to navigate from the standard of effective participation inherent in Article 6 to the empirical evidence of legal participation, to help to realize the right to a fair trial in practice.

Our research reinforces that litigating in person generates a number of problematic experiences, not only for LIPs but also for court actors and the coherence of the system as a whole, even in a jurisdiction where access to legal aid is more generous than in England and Wales. The UK legal system is based on the premise that litigants will be represented; court effectiveness and efficiencies are built around familiarity with the legal system and what is required of its participants. This model is therefore disrupted when litigants with no legal representation, who lack procedural insight or legal capability, seek to present their cases to the court. While there are broad legal parameters on case complexity or individual litigant capacity to determine whether individual LIPs will be able to progress their case fairly, there is no systematic attempt to accommodate the non-practitioner status that disadvantages LIPs. What emerges, therefore, is a grey area between the absolute determination that a case is well beyond a LIP's competence and the practical reality that LIPs self-represent as best they can, in line with the existing model of court advocacy, in the face of obvious limitations.

Our research has helped to demarcate this grey area, where the line between effective and ineffective participation exists. Using McKeever's model of legal participation, we have identified the barriers that LIPs face in participating effectively in court hearings. These barriers can be intellectual (not being able to understand the language or legal issues), practical (not being able to access support to help to understand and manage the process), emotional (feeling overwhelmed by the process and balancing the emotional impact with the legal arguments of the case), or attitudinal (being stereotyped as problematic by court actors and having little or no trust in the process). Consequently, our research has identified the likely manifestation of different participative barriers that should generate a red flag for when a breach of Article 6 might take place – those points where intellectual, practical, emotional, and attitudinal barriers arise, where they are not properly addressed, and where their impact, individually or collectively, may block LIPs' effective participation. Where barriers persist throughout the process, the level of legal participation remains low. Isolation and segregation are evident forms of legal participation for those whose experiences leave them feeling excluded and powerless. Partial or tokenistic efforts to help LIPs to overcome the barriers are unsuccessful in removing the risk, merely placating them or resulting in their participation being obstructed, so that LIPs appear to be supported but that support is not adequate. Where more substantive efforts are made to address the barriers, this can increase the likelihood of effective participation and possibly reduce the risk of Article 6 rights being breached. More successful efforts can result in a removal or reduction of the barriers, enabling LIPs to engage and collaborate with other court actors and creating the potential to participate at a level where they can influence proceedings so that the court might ensure procedural and substantive justice.

While these forms of participation are not reliant on or do not presume a legal system that has departed entirely from the professional legal advocacy model, they do recognize and respond to the disadvantages faced by LIPs and the consequent risk to their Article 6 rights. More significantly, they rely on a legal system that has to be sufficiently robust and resilient to adapt to the participative needs of LIPs. There is a need to overcome the attitudinal barriers that appear to stand in the way of effective participation and prevent the removal of the intellectual, practical, and emotional barriers to Article 6 rights. Legal representation is preferable for most people, but

for the small number who cannot afford it or exercise their right to self-represent, their right of access to a court and fair trial guarantees obligates the state to ensure that they are not disadvantaged and are subject to just decisions. Cultural change is necessary to maximize the likelihood of effective participation, a concept that has been adjudicated but not defined. Our research offers an original and significant analysis of how effective participation can be understood, based on how LIPs experience participation in civil and family courts, and provides an important foundation from which future research might go on to consider specific agendas of reform to address the identified barriers and consequently pre-empt a breach of Article 6.

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