



## A Ladder of Legal Participation for Tribunal Users

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## **A Ladder of Legal Participation for Tribunal Users**

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In his report on the review of tribunals in 2001, Sir Andrew Leggatt highlighted the role of participation as the means by which tribunal users could "prepare and present their own cases effectively", so contributing to the overall objective of 'tribunals for users'.<sup>1</sup> Participation was thus regarded by Leggatt as a pathway to the effectiveness of tribunals. There is an obvious common sense meaning in this notion of 'participation', yet the stress being laid on the concept suggests that it might be valuable to interrogate more thoroughly just what is implied by participation in the context of tribunal use. Such interrogation has already been conducted in relation to notions of 'participative democracy', that is, in the realm where politics and participation intersect, where typologies of participation have been created in an attempt to clarify the conceptual field and therefore to encourage patterns of greater participative value. Particularly well known is Arnstein's 'ladder of participation', with its identification of 'rungs' (levels) of participation running from the non-participative to the enabling, ending ultimately with the equal distribution of power.<sup>2</sup> It would perhaps be feasible to transplant this model to the tribunal arena, yet there hangs over such a venture the shadow that perhaps the specifically 'political' (power-based) flavour of the Arnstein model is not entirely suited to the task, especially given that 'participation' in the legal field generally denotes access rather than decision-making power.

This paper accepts the plausibility of the idea that conceptual clarification in this area could lead to positive change in tribunal practice and tribunal user experience. Accordingly, it sets out to accomplish three inter-related tasks. First, it attempts a critique of the existing conceptual field partly based on a review of ideas of 'participation' as a legal rather than political concept, and partly based on primary research on the participatory experiences of tribunal users. Secondly, it develops the conceptual position that tribunals should be regarded as a 'hybrid' form in terms of participation; political insofar as power is at stake, legal insofar as norms and access are at stake, yet with further qualities (in particular as regards user *emotional* rather than just practical or intellectual experience) that indicate the need to develop a

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<sup>1</sup> Sir A Leggatt, *Tribunals for Users: One System, One Service* (London: TSO, 2001) para.1.11.

<sup>2</sup> S. R. Arnstein, "A Ladder of Citizen Participation", (1969) 35 *Journal of the American Planning Association* 216-224.

particular *sui generis* participatory model. The third step is to propose precisely such a model.

### What is participation?

Participation is widely regarded as a form of democracy, allowing individuals to play a part in decisions affecting them which are made by others. Central to this idea of participation is the notion of power: power can be withheld, so that power-holders retain control, or it can be shared so that individual citizens may be empowered. Within this analysis, the more that power is shared, the greater the level of citizen participation. A spectrum of participation can therefore be imagined. At one end of the spectrum the modes of participation are governed by the powerful, for the benefit of the powerful, and an illusion of participation is created, allowing indirect governance through apparently legitimate and inclusive means.<sup>3</sup> At the other end of the spectrum, the purpose or goal of participation is to empower individuals, realising their citizenship rights and respecting their dignity and autonomy.<sup>4</sup>

Where empowerment is the purpose of participation, there may nonetheless be a gap between measures designed to empower individual citizens and the actual empowerment that these measures produce: the gap between opportunity and outcome. To establish whether such gaps exist, a form of measurement that identifies where participatory approaches move from opportunity to outcome may be necessary. One of the most influential tools for measuring participation comes from Arnstein's seminal work in which she developed a typology of 'citizen engagement'.<sup>5</sup> Arnstein viewed participation as "a categorical term for power", and citizens who were empowered to participate were able to be included in political and economic processes that impacted directly on them.<sup>6</sup> Her 'ladder of participation' set out eight rungs or levels along which participation could progress, from 'manipulation' and 'therapy', which Arnstein categorised as non-participation, to 'placation', 'consultation' and 'informing', which she defined as 'tokenistic' forms of participation, through to 'delegated power', 'partnership' and ultimately 'citizen control' as the highest level of participation, with each of these being categorised as 'citizen power' (see Figure 1). Arnstein intended her typology to be provocative, and it has been subjected to criticism that, among other things, it is too hierarchical,

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<sup>3</sup> H. Shier, "Children as Public Actors: Navigating the Tensions" (2010) 24 *Children and Society* 24, p.32; I. Young, *Inclusion and Democracy*, (Oxford University Press, 2002); M. Foucault, "Governmentality", in G. Burchell, C. Gordon and P. Miller (ed.s) *The Foucault Effect: Studies in Governmentality* (Hemel Hempstead: Harvester Wheatsheaf, 1991) pp.87-104; B. Cooke and U. Kothari (eds), *Participation: The New Tyranny?* (London: Zed Books, 2001).

<sup>4</sup> K. Bell, "Social Security Tribunals – a general perspective" (1982) 33 *Northern Ireland Legal Quarterly* 132; J. Mashaw "Administrative Due Process: The Quest for a Dignitary Theory" (1981) *Yale Law School Faculty Scholarship Series*, Paper 1152; N. Harris, "Empowerment and State Education: Rights of Choice and Participation" (2005) 68 *M.L.R.* 925-957; D. Heater *What is Citizenship?* (Bristol: Polity Press, 1999); D. Heater, *Citizenship. The Civic Idea in World History, Politics and Education* 3<sup>rd</sup> ed. (Manchester University Press, 2004).

<sup>5</sup> S. R. Arnstein, "A Ladder of Citizen Participation", (1969) 35 *Journal of the American Planning Association* 216.

<sup>6</sup> S. R. Arnstein, "A Ladder of Citizen Participation", (1969) 35 *Journal of the American Planning Association* 216, p.216.

privileging some types of participation over others – in particular her decision to set citizen control as the primary goal of citizen engagement – and that it relies on a dichotomous relationship between power-holders and citizens.

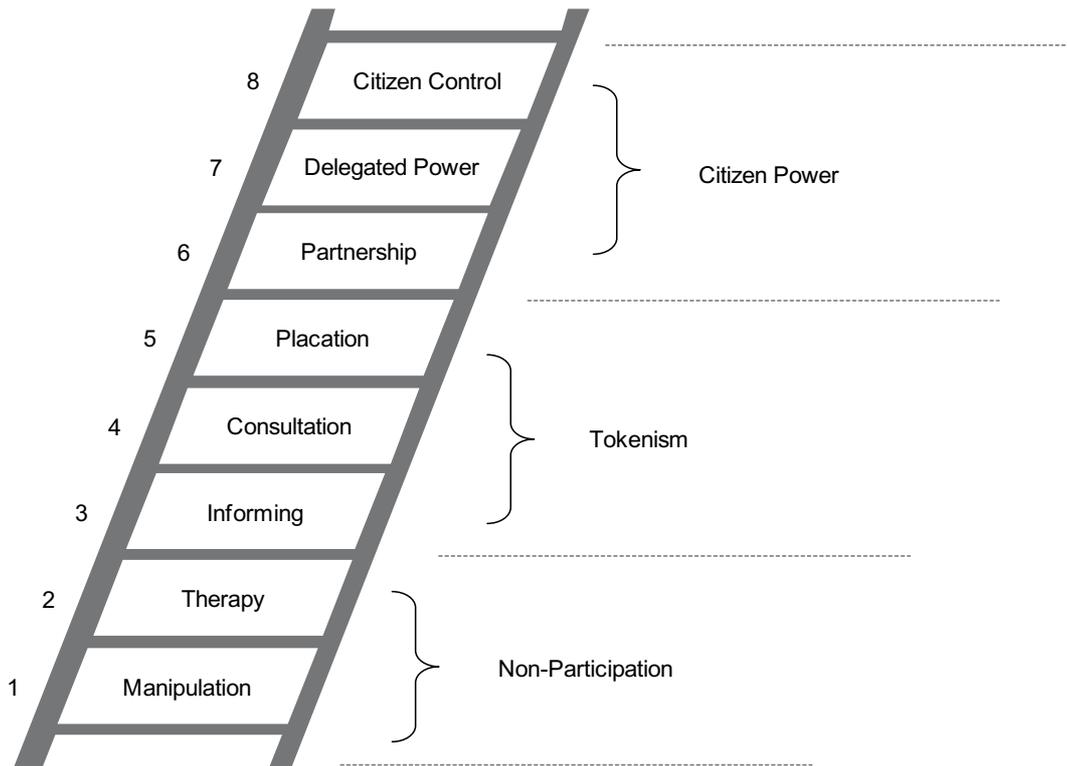


Figure 1: Arnstein's ladder of citizen participation

The focus of Arnstein's citizen engagement – and of many of the models of participation that have stemmed from her work – has been on the concept of political participation, envisaging the extent to which individuals can participate in and influence decisions made by governments and their agents.<sup>7</sup> Political participation also feeds in to the legal arena, most notably in the process by which the legality of state action can be questioned. The ability of individuals to initiate or engage in legal proceedings that provide this function – generally the right to appeal against government or administrative decisions – may therefore be indicative of participation. Within this analysis legal processes and procedural fairness provide formal recognition of the dignity, autonomy and civic competence of users. Participation here supports a complementary reading of Habermas' views on participation – with a focus on communicative action as ensuring consensus through public dialogue rather than the exercise of power, and avoiding a privileging of bureaucratic structures<sup>8</sup> – and Rawls' theory of justice – which dictates that justice can be achieved through the maintenance and equal application of general rules of law.<sup>9</sup> Secker articulates this form of legal participation as a human right to participation that is more expansive than political participation, and involves participation in areas impacting on private as well as public issues, and in the areas of social and economic rights, as well as civil and political rights.<sup>10</sup> Arnstein's model may categorise participation in legal

<sup>7</sup> Fields of participative democracy range from criminal justice, to environmental planning, to child development.

<sup>8</sup> J. Habermas, *The Theory of Communicative Action: Reason and the Rationalisation of Society* (Boston: Beacon Press, 1984).

<sup>9</sup> J. Rawls, *A Theory of Justice* (Oxford University Press, 1999).

<sup>10</sup> E. Secker, "Expanding the concept of participatory rights", (2010) 13 *International Journal of Human Rights* 697-715, p.705.

processes as being too narrow to be empowering for the citizen but any analogy of her ladder of participation in a public law context cannot simply set citizen control as the goal; legal action between citizens and state is more about access than control: about the correct application of criteria, the independent regulation of the application of those criteria, and effective remedy compliant with legally enforced standards.<sup>11</sup>

On the one hand, therefore, legal participation is not about control as articulated by Arnstein's conception of political participation, and may be more closely connected to formal legal processes that provide the means for citizens to challenge state decisions. On the other hand, however, democracy or empowerment (as participatory objectives) may not be guaranteed by legal processes. Waldron asserts that the process of judicial review (in America) constitutes a "disempowerment of ordinary citizens on matters of the highest moral and political importance", arguing that this is a form of political decision making that precludes public participation.<sup>12</sup> Cotterell echoes this to some extent for the UK, questioning whether courts promote participation in administrative processes, suggesting that judicial review as a form of democracy may be more aspirational than real.<sup>13</sup> While legal participation has the potential to be more expansive – and could arguably focus more on the process of rule development than is currently the case in the UK – the sites of legal participation have been narrowly constrained, a reflection of the shortcomings of the current ambit of the law rather than any inherent characteristics of legal participation. A further limitation of legal participation is that, as Arnstein argues in relation to political participation, the mere existence of a legal right to participate does not automatically translate into an ability to utilise that right effectively.

The concern over formal justice procedures masking an injustice has had particular significance for tribunals, with the suspicion that tribunals are created to enable government Ministers to avoid responsibility for politically unpopular decisions. Prosser argues that (social security appeal) tribunals exist to cloak oppressive state policies in legitimacy: legality here is an 'empty procedural device' providing formal but not substantive equality.<sup>14</sup> Adler's research, revealing that fair procedures can result in unjust outcomes,<sup>15</sup> reinforces the argument "that tribunals have been preferred to the courts on political and cost grounds rather than because it is believed they provide better access to justice".<sup>16</sup>

The appearance of participation in tribunals, set alongside suspicion that the reality is merely arms-length political control, highlights the general tension between participation as control and participation as empowerment. Within this dynamic, the space within which individuals may participate becomes significant, with power holders controlling not just the agenda but environment in which deliberation takes

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<sup>11</sup> J. Raz (1977) 93 "The Rule of Law and its Virtue" (1977) 93 L.Q.R. 195.

<sup>12</sup> J. Waldron, "A Right-Based Critique of Constitutional Rights" (1993) 13 *Oxford Journal of Legal Studies* 18-51, p.45.

<sup>13</sup> R. Cotterell, "Judicial Review and Legal Theory", in G. Richardson and H. Genn (eds), *Administrative Law and Government Action: The Courts and Alternative Mechanisms of Review* (Clarendon Press, 1994), pp.18-19.

<sup>14</sup> T. Prosser, "Poverty, Ideology and Legality" (1977) 4 *Journal of Law and Society* 39, pp.59-60.

<sup>15</sup> M. Adler, "Substantive Justice and Procedural Fairness in Social Security: The UK Experience", in P. Robson and A. Kjønstad, *Poverty and the Law* (Oxford: Hart, 2001) 121-147, p.126.

<sup>16</sup> M. Adler, "Lay Tribunal Members and Administrative Justice" (1999) P.L. 616, p.617.

place and decisions are made.<sup>17</sup> Where these 'invited spaces' are used problems of pre-existing disparities in power relations between the power holders and the individuals wishing to participate can effectively undermine efforts to participate.

The difficulties of participation in 'invited' legal spaces are well documented, where power disparities translate into an ability or inability to speak the language of law. O'Barr and Conley argue that judicialisation (in courts) blocks participation since users lack legal competency and cannot construct a narrative or produce the evidence that ticks the boxes legal adjudicators look for to determine facts and entitlements.<sup>18</sup> While tribunals may be different from courts, the perceived 'advantages' of tribunal procedures – speed, cheapness, informality, expertise – may not, in practice, be advantageous for users. Empirical research has exposed this appearance of participation in legal processes masking an inability to serve the needs of disparate users, with tribunal decision making reliant on "legally relevant and sufficient accounts", reinforcing the vulnerability of tribunal users without legal or specialist support.<sup>19</sup> The central problem is that, despite the relatively informal tribunal procedures, legal decision makers adopt a legal perspective on what constitutes relevant information. As Mullen states, "[t]he criteria tribunals apply in questioning administrative decisions are, as with the courts, essentially criteria of legality."<sup>20</sup> The result is that the appellant becomes an object in his/her own case rather than a participant in it.

While participation may be important for the citizen, Cane argues that participation is also important for the tribunal, offering a legal justification for genuine participation by tribunal users which echoes Fuller's conception of participation in adjudication.<sup>21</sup> Fuller's characterisation of adjudication as a form of decision making is that it must provide an opportunity for the parties to present "proofs and reasoned arguments" to a neutral third party, who must respond to these arguments in making his/her decision.<sup>22</sup> Cane distinguishes adjudication from initial decision making and internal review of this decision, but also from an independent merits review of the initial decision, on the basis that these processes may not involve adversarial presentation of arguments and proofs.<sup>23</sup> While this may be true in principle, tribunal users may still regard the hearing as adversarial, particularly within employment related tribunals which are party v party disputes. Nonetheless, tribunals adopt an approach which is more inquisitorial than adversarial, and the issue of participation therefore remains live. In a merits review Cane argues that "it is tactically necessary and so must be legally appropriate for the applicant to argue against [the original decision] as strongly as

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<sup>17</sup>H. Shier, "Children as Public Actors: Navigating the Tensions" (2010) 24 *Children and Society* 24, p.27.

<sup>18</sup> W. O'Barr and J.M. Conley, "Litigant Satisfaction versus Legal Adequacy in Small Claims Court Narratives" (1985) 19 *Law and Society* 661.

<sup>19</sup> H. Genn, "Tribunals and Informal Justice" (1993) 56 *M.L.R.* 393; H. Genn, "Tribunal Review of Administrative Decision Making" in G. Richardson and H. Genn (eds), *Administrative Law and Government Action* (Oxford University Press, 1994), pp.284-286; A. Christou, "The 'Good' Tribunal Member – An Aretaic Approach to Administrative Tribunal Practice" (2009) 28 *University of Queensland Law Journal* 339, at p.347.

<sup>20</sup> T. Mullen, "A Holistic Approach to Administrative Justice", in M. Adler (ed), *Administrative Justice in Context* (Hart, 2010), p.390.

<sup>21</sup> P. Cane, *Administrative Tribunals and Adjudication* (Hart, 2010).

<sup>22</sup> L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353-409.

<sup>23</sup> P. Cane, *Administrative Tribunals and Adjudication* (Hart, 2010), p.11.

possible."<sup>24</sup> This will require the applicant to produce new evidence, propose a different view of existing evidence, or highlight any unlawfulness within the original decision. The tribunal is then required to understand the applicant's argument in order that it may come to a decision on it, and for this the merits reviewer requires the applicant's participation. For Cane, the issue is not whether the applicant should assist the merits reviewer "but whether and when the latter should assist the former"; further, that to select the correct or preferable decision, "the applicant might then need to do more to 'assist' the tribunal".<sup>25</sup> Using Cane's logic, for an applicant to be able to do more than 'assist' the tribunal to discharge its legal duty, the applicant must be able to participate properly in the tribunal proceedings.

### Participation in practice?

Understanding participation for tribunal users requires an understanding of how users experience the hearing, and the processes leading up to the hearing. Several significant studies evidence the tribunal user experiences in Britain, most of which are included within Adler and Gulland's review of the research evidenced barriers faced by users, their needs, and their views on the independence and impartiality of tribunals.<sup>26</sup> Of the research published since this review the most relevant (for this article) is Genn *et al*'s *Tribunals for Diverse Users*.<sup>27</sup> Other research on the general responses of the public to justiciable legal problems – such as the *Paths to Justice* surveys – also adds context to understanding the barriers to participation faced by tribunal users.<sup>28</sup> The landscape drawn by this research signifies the importance of understanding and improving tribunal user experiences, as a means of improving access to justice for tribunal users.

None of the research cited, however, encompasses the experiences of individuals seeking to challenge administrative and/or employment decisions in Northern Ireland.<sup>29</sup> While anecdotal evidence suggested a similarity of experience, the absence of research prevented any conclusions being drawn on the extent of this similarity or

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<sup>24</sup> P. Cane, *Administrative Tribunals and Adjudication* (Hart, 2010), p.246.

<sup>25</sup> P. Cane, *Administrative Tribunals and Adjudication* (Hart, 2010), p.246.

<sup>26</sup> M. Adler and J. Gulland, *Tribunal Users' Experiences, Perceptions and Limitations: A Literature Review* (Council on Tribunals, 2003).

<sup>27</sup> H. Genn, B. Lever, and L. Gray, *Tribunals for Diverse Users* (Department for Constitutional Affairs, 2006). See also D. Cowan and S. Halliday, *The Appeal of Internal Review: Administrative Justice and the (non-) emergence of disputes* (Oxford University Press, 2003); J. Aston, D. Hill, and N. D. Tackey, *The Experience of Claimants in Race Discrimination Employment Tribunal Cases* (Department of Enterprise, Trade and Industry, 2006); M. Adler, *The Potential and Limits of Self-Representation at Tribunals: Full Research Report* ESRC End of Award Report (2008); N. Harris and S. Riddell, *Resolving Disputes about Educational Provision* (Ashgate, 2011).

<sup>28</sup> H. Genn, *Paths to Justice: what people do and think about going to law* (Hart, 1999); H. Genn and A. Patterson, *Paths to Justice Scotland: what people in Scotland do and think about going to law* (Hart, 2001). See also R. Moorhead, M. Sefton and L. Scanlan, *Just Satisfaction? What drives public and participant satisfaction with courts and tribunals*, Ministry of Justice, Research Series 5/08 (2008); K. Williams, *Litigants in Person: a literature review* Ministry of Justice, Research Summary 2/11 (2011); C. Denvir, N.J. Balmer and A. Buck, "Informed Citizens? Knowledge of Rights and the Resolution of Civil Justice Problems" (2012) 41 *Journal of Social Policy* 591.

<sup>29</sup> The only research to focus specifically on tribunal users in Northern Ireland was J. Narain, "Social Security Appeal Tribunals in Northern Ireland: a Survey" (1979) 30 *Northern Ireland Legal Quarterly* 111, although some surveys of user experiences have been conducted by Northern Ireland departments with policy or administrative responsibility for tribunals.

the presence of particular differences. This research gap was the focus of two Northern Ireland tribunal studies conducted by the author, which aimed – on a much smaller scale – to evidence the experiences of tribunal users in Northern Ireland, with a view to understanding the issues faced by these tribunal users, and identifying commonality between each jurisdiction. These small qualitative studies focused on the tribunals with the largest caseloads – the Appeal Tribunals which deal with social security and child support appeals, and the Industrial and Fair Employment Tribunals (I/FET), which deal with employment related claims – as well as one of the smaller tribunals – the Special Educational Needs and Disability Tribunal (SENDIST). The first study aimed to understand the issues faced by Northern Ireland tribunal users through semi-structured interviews conducted by the author with 21 tribunal users, ten tribunal members and five tribunal representatives. Findings were used to develop recommendations for tribunal reform in Northern Ireland, including the reform of tribunal structures.<sup>30</sup> Among the recommendations was an identified need to understand better users' awareness and experience of tribunal proceedings and the associated information, advice and support services. The second study followed through this recommendation, focusing on understanding the information, advice and support needs of tribunal users prior to and including the tribunal hearing.<sup>31</sup> Semi-structured interviews were conducted by the author with 16 tribunal users and five tribunal/departamental officials, alongside a focus group with eight specialist legal and lay advisers, supplemented by questionnaire responses from an additional six advisers. The second study developed further recommendations to improve the user experience, identifying additional or improved support mechanisms, from the initial decision through to the tribunal hearing.

What emerged from the research is that participation is not just about the ability to participate in the tribunal hearing, but includes the dispute resolution processes that precede this. Participation therefore begins with the initial decision and continues through various stages until the dispute is resolved or avenues of redress are exhausted or abandoned. The barriers to participation faced by users throughout this process can be understood as intellectual, practical and emotional barriers.

### *Intellectual Barriers*

Intellectual barriers for tribunal users centred around the user's understanding of how the process of decision making and appeals operated. For Northern Ireland users, written information which sets out the requirements for initial decision making, the process of challenging adverse decisions and the procedures of the tribunal could all be problematic, particularly where the technical aspects had not been presented in a user-friendly manner:

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<sup>30</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010). Reform of tribunal structures was taken forward by Brian Thompson: see *Structural Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2011).

<sup>31</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011).

*Social security appellant*: "I got a big booklet from [the Appeals Service] ... but ... I'm not a great reader and just, things ... don't sink in properly ..." <sup>32</sup>

*Social security appellant*: "I couldn't really understand the booklet properly ... so there could have been [useful] information in that [but] a lot of things just don't register in my head." <sup>33</sup>

The forms used by decision makers to gather information were particularly problematic for social security appellants, who tended to lack confidence in their literacy and communication skills, and who felt they had ended up at a tribunal as a result of their confusion in completing complex claim forms:

*Social security appellant*: "the claim form I just did [myself] ... that was my problem; I should have just went straight to the Citizens Advice and they would have helped me make sure it was right." <sup>34</sup>

Where written information from the decision maker or tribunal was voluminous, users often were intimidated or overwhelmed, resulting in their disengagement from the process that sought to identify for them the means by which they could engage:

*SENDIST appellant*: "I just felt I had to wade through too much [information] ... I find that too exhausting." <sup>35</sup>

*SENDIST appellant*: "there's so much stuff that comes from the [Education] Board ... [W]hen you're so frustrated with a body ... you don't even want to ... read every ... single word." <sup>36</sup>

Consequently, informal resolution could become more difficult as users became disenchanted with the ability of decision makers to listen to, and understand them; hopes were instead placed with the tribunal. <sup>37</sup>

The intellectual barriers at the tribunal hearing mimicked those of the decision making process: the language used, the formality of proceedings, the need to address certain issues and disregard others:

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<sup>32</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.24.

<sup>33</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.24.

<sup>34</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.31. See M. Adler and J. Gulland, *Tribunal Users' Experiences, Perceptions and Limitations: A Literature Review* (Council on Tribunals, 2003), pp.3-4 on the general lack of understanding of procedural rights and entitlements by social security appellants.

<sup>35</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.26.

<sup>36</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.27.

<sup>37</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.37. See N. Harris, "You're only going to get it if you really shout for it": education dispute resolution in the 21<sup>st</sup> century in England", (2011) 23 *Social Policy Review* 233, with users describing an on-going fight with decision makers, extending into alternative dispute resolution procedures.

*Social security appellant*: "some of the phrases in [the hearing] went completely over my head ..."38

*Social security appellant*: "you're at a loss anyway 'cause you don't know what you're talking about. You're saying a certain thing and then she's referring back to the legislation, so then ... you think what's the point?"39

*SENDIST appellant*: "I know it was supposed to be an informal hearing but I found that ... [i]t was quite intimidating."40

Overcoming these barriers relied heavily on tribunal panels being able to convince users of their independence and impartiality; to explain clearly why certain processes had to be followed; to adapt the legal language of decision making so that users could understand what they were being asked and why; and to enable tribunal users to tell their story in ways that users as well as panel members felt was relevant:

*Social security appellant*: "[You need] a person to listen to you and be able to talk to you ... [I]f they want to be able to hear things about the person ... they've got to put them at ease, make them feel they're not under pressure."41

Where these barriers were not overcome the lack of trust in the appeal process mirrored the lack of trust in the initial decision making process, and the hearing came to be regarded as adversarial rather than a participatory inquiry into the relevant facts.

### *Practical Barriers*

Practical barriers for users could exacerbate or reinforce intellectual and emotional barriers, but where the practical barriers were overcome this could have a positive effect on other barriers. In practical terms, the main barrier to, or means of facilitating, participation for users was access to good advice and representation. The Northern Ireland studies identified that good advice and representation could break down the intellectual barriers for users, by helping users understand what information decision makers needed and how the relevant legal provisions could be interpreted in light of that information. This could either take the form of demystifying the process for users, or translating the user's story into the legal language that decision makers and tribunal panels required:

*Social security appellant*: "all this form filling in and all that there, it's a mountain to climb for me without help."42

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<sup>38</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.31.

<sup>39</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.32.

<sup>40</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.34.

<sup>41</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.37.

<sup>42</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.44.

*SENDIST appellant*: "if you were a person who didn't have ... the understanding of procedures and ... the ability to write a good worded letter – you'd be stuck ... I didn't feel that the whole process was very user friendly."<sup>43</sup>

*SENDIST appellant*: "the whole process ... was in and around rules and regulations and procedures, ...when you could submit evidence and when you couldn't ... lots of wee things, technicalities, that without [the legal representative] I don't think I would have been able to manage."<sup>44</sup>

A further and considerable advantage was that advisers could help get the user's story across in the most effective way at the earliest possible stage, so that users might avoid having to go to a tribunal hearing:

*Representative*: "the earlier you get advice, the better, the more options you have ... the more opportunity there is to resolve it informally ..."<sup>45</sup>

Where a hearing was unavoidable, users had the comfort of knowing that a trusted adviser could at least put them on the right path, while representation provided users with confidence that their story could be heard.

An additional practical barrier for tribunal users was economic: where financial constraints prevented users from being able to source additional – usually medical – evidence, or pay for legal representation:

*SENDIST appellant*: "families have spent thousands and thousands of pounds, going to tribunals. I think we spent £800 on the psychology assessment ..."<sup>46</sup>

Where users were able to overcome these economic barriers they tended to feel their participation in the tribunal hearing in particular was improved, although for some users the engagement of legal representatives led to a more formalised, legalistic process which could have the effect of alienating the user, excluding their participation in the hearing:

*I/FET claimant*: "when the barristers were battling away you did ... feel like you weren't part of it ..."<sup>47</sup>

*I/FET claimant*: "briefings or preparation for the case was on the technical issues – what's detriment, has detriment been suffered – and there was no real space for me to say look, this is how it's affected me as a human being."<sup>48</sup>

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<sup>43</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.45.

<sup>44</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.43.

<sup>45</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.32.

<sup>46</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.29.

<sup>47</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.36.

There was a circularity to the practical barriers faced by the Northern Ireland tribunal users: they often did not know where to access advice and support, despite written information that signposted them to relevant advice sources, partly because they found the written information inaccessible and required advice and support to understand it:

*Social security appellant*: "I probably didn't know who to go to ... There's no help ... they don't say use this contact or this."<sup>49</sup>

Users described a process of luck or chance that led them to appropriate advisers, indicating the absence of a participatory process that enabled them to appreciate the role of, or access to, advice services.<sup>50</sup>

### *Emotional Barriers*

For the majority of the tribunal users in the Northern Ireland studies, there were considerable emotional barriers to their participation. The anxiety felt by users, particularly in terms of the tribunal hearing, was a significant feature of their experiences, and was variously categorised as stress, sleeplessness, nausea, and anger:

*SENDIST appellant*: "I was so nervous on the day, it is one of the worst experiences of my life ... didn't sleep the night before, felt physically sick."<sup>51</sup>

*SENDIST appellant*: "Once [the hearing] started ... I realised this isn't as bad as I thought it was going to be, but the anticipation was very difficult."<sup>52</sup>

*I/FET claimant*: "the stress of going through the process ... I cried in the witness box ... it was very intrusive ..."<sup>53</sup>

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<sup>48</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p. 36. See K. Bell, "Social Security Tribunals – a general perspective" (1982) 33 *Northern Ireland Legal Quarterly* 132, p.144; R. Moorhead, A. Sherr and A. Paterson, "What Clients Know: Client perspectives and legal competence" (2003) 10 *International Journal of the Legal Profession* 5, p.7.

<sup>49</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.17.

<sup>50</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), pp.17-18. See H. Genn, *Paths to Justice: What people do and think about going to law* (Hart, 1999), pp.69-70, and C. Denvir, N.J. Balmer and A. Buck, "Informed Citizens? Knowledge of Rights and the Resolution of Civil Justice Problems" (2012) 41 *Journal of Social Policy* 591, p. 597, revealing how the inability to access advice contributes significantly to difficulties in pursuing justiciable problems.

<sup>51</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.29.

<sup>52</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.29.

<sup>53</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.42.

Feelings of anger fed in to, and from, overall feelings of frustration with the decision making processes, which could leave users feeling hopeless, regarding their participation as futile:

*SENDIST appellant*: "If [the Education Board] are the ones that's telling me that [I could appeal], is [the tribunal] something to do with their body and I'm going to have to fight them, but a different department of them? ... Whenever you're in such a negative situation, I guess you don't even see anything positive in it, if it's coming from the same body."<sup>54</sup>

These anxieties and frustrations could be off-set by the sensitive handling of their case by decision makers, tribunal panels and by advisers and representatives.<sup>55</sup> Where users felt their cases were not well handled, however, particularly by initial decision makers, this could lead to a consequent breakdown of the relationship between the user and decision maker:

*Representative*: "the first point of communication is between parent and school, and if that breaks down ... the school ... will try to take control of the child's provision ... So the parent is disempowered at an early stage ..."<sup>56</sup>

The absence of trust tended to reduce opportunities for participation in the decision making process, or at least the perception of such.

Levels of need varied among users, but a common theme was a desire for some support: someone who could provide accessible explanations, reassurance and act as an objective intermediary in what was, for most users, an emotionally charged case:

*Social security appellant*: "you really do need ... somebody holding your hand and helping you out ..."<sup>57</sup>

*Social security appellant*: "It would be nice to have an advice line ... somebody that can give you a wee bit of support."<sup>58</sup>

Where this support was available users described feelings of relief as anxieties were dissipated, and a consequent increase in confidence that allowed them to feel they could participate effectively in their case.<sup>59</sup>

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<sup>54</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.27.

<sup>55</sup> See J. Aston, D. Hill, and N.D. Tackey, *The Experience of Claimants in Race Discrimination Employment Tribunal Cases* (Department for Enterprise, Trade and Industry, 2006) further evidencing how the performance of the Chair could positively affect the claimant's perception of the hearing.

<sup>56</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.19.

<sup>57</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.31.

<sup>58</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.38. Similar findings are noted in K. Bell, "Social Security Tribunals – a general perspective" (1982) 33 *Northern Ireland Legal Quarterly* 132, where users wanted someone knowledgeable to support them through their case.

<sup>59</sup> This echoes the finding in H. Genn, B. Lever, and L. Gray, *Tribunals for Diverse Users* (Department for Constitutional Affairs, 2006), p.242.

Overall, the findings from the Northern Ireland studies largely correlated with the findings from similar studies of user experiences in Britain. Users went to tribunal to resolve a grievance (which was often not distinguished from a justiciable case) that could arise as a result of user confusion, frustration or anger with the initial decision, including the decision making process. Users were often fearful of the tribunal experience, with little or no conception of how it might differ from formal court proceedings. User understanding of informality frequently differed from what tribunals presented as informal procedures, leading to user frustration and their sense that 'informal' was a misnomer. There was some limited evidence that tribunals in Northern Ireland were more formal than those in Britain, particularly regarding the use of raised platforms for I/FET members and the formality of SENDIST proceedings, although the differences do not appear to be extensive. The experience of taking a case to tribunal could be greatly improved for users with the assistance of tribunal staff, tribunal members and external advisers, who each recognised and attempted to respond to what they identified as their role in assisting users to overcome the barriers they faced. Difficulties remained for users, however, in accessing this support. Therefore, while the evidence base is not extensive, it seems reasonable to conclude that tribunal users within each jurisdiction have identified similar barriers to participation that can occur at successive stages of their administrative or employment dispute.

### **A ladder of legal participation**

The user experiences provide an indication not just of intellectual, practical and emotional barriers to participation but of what the constituent elements of participation might be. The challenge is to improve participation, taking account of these experiences in the same way that Arnstein's model of participation was based on a conceptualisation of how a range of supposedly participatory practices effectively included or excluded citizen participation. In other words, the challenge is to construct a ladder of legal participation.

The tribunal user experiences range from fully participatory to those which render users unable to participate in any meaningful way. Consequently, the broad categories Arnstein identifies of participation, tokenism and non-participation can be adopted to denote the range of practices implemented within dispute resolution procedures. Within the ladder of legal participation, this categorisation is conceptualised as a progressive development of participation. Thus, within the category of 'non-participation' the intellectual, practical and emotional barriers remain; within 'tokenism', the barriers appear to be addressed but are not effectively removed; within 'participation' the barriers are most successfully overcome.

Unlike Arnstein's model, however, a ladder of legal participation is not concerned with the individual's ability to control systems of access to power, so the eight individual rungs within Arnstein's ladder are not automatically transferable.<sup>60</sup> To

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<sup>60</sup> T.R. Tyler, "Social Justice: Outcome and Procedure" (2000) 35 *International Journal of Psychology*, 117, pp.121-122. See J. Habermas, *The Theory of Communicative Action: Reason and the Rationalisation of Society* (Boston: Beacon Press, 1984), where concerns over juridification are not about ensuring that individuals can control social processes but that they should be able to participate,

devise new rungs for a ladder of legal participation, the individual experiences of tribunal users were listed within the three main categories of participation, tokenism and non-participation, and the nature of these experiences dictated how they would be collectively described within the main categories. The collective groupings that emerged thus became the seven new rungs of the ladder of legal participation. The rungs of 'isolation' and 'segregation' define the category of non-participation; 'placation' and 'obstruction' define the category of tokenism; and 'engagement', 'collaboration' and 'enabling' rungs constitute the category of participation (Figure 2).

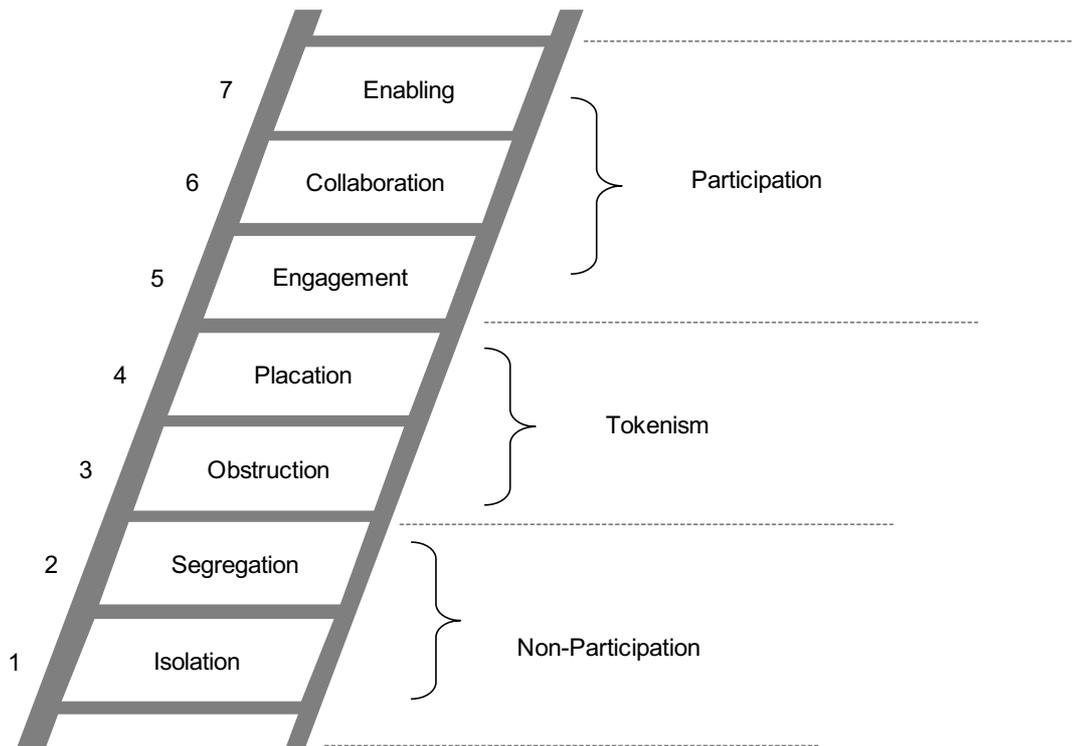


Figure 2: A ladder of legal participation

Arnstein's model also, controversially, saw the modes of participation as hierarchical. This article does not adopt that element of the model, in that while it should be an objective to work towards full participation, it must also be recognised that the ability of tribunal users to participate will vary: tribunal users are not a homogenous group, and user failure to participate at the 'highest' level may indicate a diversity of desire, unwillingness or lack of ability to participate at this level, rather than an inherent failure of the mechanisms designed to facilitate participation. The ladder is not a simple measuring stick.<sup>61</sup>

Participation in official processes raises questions over whether, and to what extent, individuals wish to participate. There are general difficulties in getting the public to participate, often due to difficulties in accessing socially excluded groups, but also as

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through channels of communicative action, to influence the law and social processes to which they are subject.

<sup>61</sup> R. A. Hart, *Children's Participation: From Tokenism to Citizenship* (Florence: International Child Development Centre, UNICEF, 1992) p.11.

a result of negative views by the public on the impact their views will have on official decision making processes.<sup>62</sup> This element of 'hopelessness' is also evident in legal participation, where individuals are often unaware that they can legally challenge decisions,<sup>63</sup> or feel that any challenge is so unlikely to be successful as to be pointless.<sup>64</sup> The engagement of tribunal users will need to take account of such a potentially low starting point for user participation and respect a user's decision, for whatever reason, not to participate. A further caveat against a hierarchical reading of the proposed ladder is that participation may (legitimately) hit different rungs at different stages of the process, and so an expectation that users will always need to reach the top rung is inappropriate. The ladder of legal participation is intended to be descriptive and non-judgemental, and so should not be taken to imply a hierarchy.

This article also reflects Hart's view that the ladder metaphor is "designed to serve as a beginning typology" to begin to consider the extent to which tribunal users may, or may not, be participating in dispute resolution processes.<sup>65</sup> The intention is to devise an initial model of participation, acknowledging that this is a starting point for such theorisation, rather than an end point. A further justification for utilising the ladder metaphor is that it corresponds closely to a discourse of participation that is overtly political, rather than social. Given Prosser's view of tribunals as proxy political decision makers, and the tension here between control and empowerment, participation for tribunal users may also be more closely aligned to a political than social discourse.

### *1. Non-participation: Isolation*

Isolation defines the lowest level of participation, where users are required to enter a process but are on their own within that process, with no support. These users are isolated from the decision making process in an intellectual, practical and emotional sense. Within this category of non-participation users describe an inability to engage or negotiate with decision makers, either because they are unaware of the option to do this, or unsure of how this can be done. In some instances this may also be because attempts to engage with decision makers have been unsuccessful and have generated feelings of futility for the user in the process of engagement:

*SENDIST appellant*: "[families have] had a big fight already ... to get children ... statemented. So ... families are already at a low ebb."<sup>66</sup>

The 'rubber-stamping' of decisions which are seen to be partial and predictable rather than independent, and the confusion engendered in users when attempting to navigate

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<sup>62</sup> K. Thompson, "General Duties to Consult the Public: How do you get the public to participate?" (2002) 22 *Nottingham Law Journal* 33.

<sup>63</sup> H. Genn, B. Lever, and L. Gray, *Tribunals for Diverse Users* (Department for Constitutional Affairs, 2006) evidence limited public awareness of redress mechanisms in administrative justice.

<sup>64</sup> H. Genn, *Paths to Justice: What people do and think about going to law* (Hart, 1999), Ch.3.

<sup>65</sup> R. A. Hart, *Children's Participation: From Tokenism to Citizenship* (1992, Florence, International Child Development Centre, UNICEF), p.9

<sup>66</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.29. User vulnerability is also evident in A. Buck and L. Curran, "Delivery of advice to marginalised and vulnerable groups: the need for innovative approaches" (2009) 3 *Public Space: The Journal of Law and Social Justice* 1.

the decision making process, combined with misinformation from decision makers on user entitlements and procedural issues leave users feeling isolated and excluded:

*SENDIST appellant*: "the letter [from the Education Board] ... didn't have my right to appeal on it ... It was only when I contacted [my adviser], he said, you've a right to appeal ... So are things like that mistakes, or are they things that they're doing to deter people ... from appealing?"<sup>67</sup>

Where users are unable to access support, including where there are geographical barriers to accessing support, the consequence is that users are unable to talk to anyone who could help them understand their case or even, at the most basic level, provide "a wee bit of support".<sup>68</sup> As cases progress towards tribunal hearing, users describe their feelings of anxiety, uncertainty and an inability to prepare their case for hearing, which, because of their isolation, they are unable to allay. This can also manifest itself in users feeling unable to speak out at their tribunal hearing, having felt unsupported and excluded up to that point.

Isolation may also be self-imposed. Tribunal users may decide not to engage with the decision making process beyond the bare minimum required to bring them in to, and through, that process.

*Interviewer*: "What information did you get about the hearing?"

*Social security appellant*: "I didn't read it ... It was just a couple of pages to say what it was ... I threw it in the bin."

*Interviewer*: "Why?"

*Appellant*: "Just pissed off."<sup>69</sup>

The reasons for self-imposed isolation may be negative, but this does not delegitimise the individual's decision to opt-out, rather than -in.<sup>70</sup> As Cleaver notes:

"Contrary to the ubiquitous optimistic assumptions about the benefits of public participation, there are numerous documented examples of where individuals find it easier, more beneficial or habitually familiar not to participate. Non-participation and non-compliance may be both a 'rational' strategy and an

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<sup>67</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.19. See also G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), pp.48-49; C. Denvir, N. J. Balmer and A. Buck, "Informed Citizens? Knowledge of Rights and the Resolution of Civil Problems" 41 *Journal of Social Policy* 591; N. Harris and K. Eden, *Challenges to School Exclusion* (London: RoutledgeFarmer, 2000); N. Wikeley, S. Barnett, J. Brown, G. Davis, I. Diamond, T. Draper and P. Smith, *National Survey of Child Support Clients* (DSS Research Report No.152, The Stationery Office, 2001).

<sup>68</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.38.

<sup>69</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.27.

<sup>70</sup> K. Thompson, "General Duties to Consult the Public: How do you get the public to participate?" (2002) 22 *Nottingham Law Journal* 33-45. See also H. Genn, *Paths to Justice: What people do and think about going to law* (Hart, 1999), particularly Ch.3.

unconscious practice embedded in routine, social norms and the acceptance of the status quo."<sup>71</sup>

The model of tribunal participation cannot ignore this view. Such self-imposed isolation also undermines any view of the model of participation as hierarchical.

## 2. *Non-participation: segregation*

Segregation as a form of non-participation occurs where users feel that they are part of an official dispute resolution process but separate from the core of that process where decisions are made, or who feel that their role within the process is secondary or inferior. Users here recognise that there is an official process for resolving disputes, that they are formally within that process and have the ability in principle to participate in it. The reality for users, however, is that the process does not take account of their difficulties, is not derailed or impeded by user problems in engaging, and proceeds regardless of failed attempts by users to fully engage. In this category, users see the process as favouring decision makers and power holders, so users have a 'separate but equal' role within that process with all the attendant difficulties that such an approach brings, where separation does not provide equality but inferiority of process and, therefore, rights.<sup>72</sup>

A number of user experiences come within this category, including where the right to appeal a decision is reliant on economic support.<sup>73</sup> In this scenario, users are given the legal right to challenge a decision, and provided with information on what is required on their part to take that challenge forward. Users here feel that the legal right to participate is fraught with difficulties, which are often not possible to surmount. While they share with all users (including decision makers) the formal right to participate, there is a separation of users between those with financial means and those without. This could include where users are unable to access advice and representation due to financial constraints.<sup>74</sup> The absence of an equality of arms is one of the most contentious issues raised by users, particularly where the 'other side' has legal representation at a tribunal hearing:

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<sup>71</sup> F. Cleaver "Institutions, Agency and the Limitations of Participatory Approaches to Development", in B. Cooke and U. Kothari (eds), *Participation: The New Tyranny* (Zed Books, 2001), p.51.

<sup>72</sup> See M. Adler and J. Gulland, *Tribunal Users' Experiences, Perceptions and Limitations: A Literature Review* (Council on Tribunals, 2003) on the segregation resulting from user difficulties in understanding the complexities of the appeal process.

<sup>73</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.50; G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), pp.29-30. User financial capacity is also linked to an ability to enforce rights in N. Harris and S. Riddell, *Resolving Disputes about Educational Provision* (Ashgate, 2001) p. 96. See also S. Blandy, I. Cole, C. Hunter and D. Robinson, *Leasehold Valuation Tribunals: Extending the Remit* (Centre for Regional Economic and Social Research: Sheffield, 2001).

<sup>74</sup> Financial barriers may include tribunal fees (which are not, currently, levied in Northern Ireland). Fees can contribute to user decisions to opt for paper rather than oral hearings, with consequentially negative implications for a successful outcome: V. Gelsthorpe, R. Thomas, D. Howard and H. Crawley, *Family Visitor Appeals: An Evaluation of the Decision to Appeal and Disparities in Success Rates by Appeal Type* (Home Office Report 26/03, 2003).

*SENDIST appellant*: "there are two massive public bodies that have their own legal departments. And there's wee me going in ..."75

In SENDIST hearings in Northern Ireland for example, it seems standard practice for the authority whose decision is being challenged to instruct solicitors and, often, barristers for the hearing, with this legal advice being paid for by the Department for Education.<sup>76</sup> Users who are advised that legal representation is unnecessary as the tribunal hearing is informal have argued that they feel disadvantaged by this advice which they see as failing to represent the reality of the tribunal experience:

*SENDIST appellant*: "I felt that [legal representation] was something we needed on the day, but because we thought it was informal we didn't have."<sup>77</sup>

For these users, the separate experience of an informal, legally unassisted process is substantially different from, and inferior to, the legally driven and supported process that decision makers have access to.<sup>78</sup>

Users may also feel segregated where they physically participate in the process but their level of participation relegates them to the role of bystander. Users here follow the formal process for challenging a decision they disagree with, all the while failing to understand the fundamental mechanisms of this process. This includes a lack of awareness by users of the rules around time limits and procedures, the information needed to make their case, the fact that a legal issue is under dispute, the relevant statutory provisions and terms used by decision makers and by the tribunal:

*Tribunal staff*: "I can see things sometimes coming through where ... the [user] doesn't really understand, ... they don't really seem to have grasped ... what the process is."<sup>79</sup>

There is an argument that this may constitute isolation rather than segregation, and there is an inevitable possibility of overlap between categories. Nevertheless it has been categorised as segregation to include users who attempt throughout to engage with the process and who feel that they are participating up to a point, beyond which they are unable to progress. For example, a user who feels isolated may not feel able to speak at a tribunal hearing; a user who feels segregated may speak freely but may remain unaware of the need to address the legal issues and so engages in an aspect of the process but is unable to participate properly in all of it. This experience is

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<sup>75</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), pp.33-34; G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.36.

<sup>76</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.38.

<sup>77</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p. 43. See H. Genn, "Tribunals and Informal Justice" (1993) 56 M.L.R. 393, pp.401-402.

<sup>78</sup> Tribunal members have also borne witness to this view: H. Genn, B. Lever, and L. Gray, *Tribunals for Diverse Users* (Department for Constitutional Affairs, 2006) p. 294.

<sup>79</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.24. See also H. Genn, B. Lever, and L. Gray, *Tribunals for Diverse Users* (Department for Constitutional Affairs, 2006), pp.44-48.

analogous to the divergence between the right of children under Article 12 of the UN Convention on the Rights of the Child (UNCRC) to have a 'voice' in all matters affecting them, and the reality of making that voice heard. Lundy's conceptualisation of this right makes clear that participation requires additional elements beyond 'voice' to be considered, namely space, audience and influence.<sup>80</sup> It is the interplay of these elements, alongside the specific consideration of the purpose of participation as a means of protecting other fundamental rights, that enables participation as articulated by Article 12 UNCRC to be realised. In the same way, enabling participation for tribunal users requires more than simply giving them a voice in the proceedings if their fundamental rights are to be protected.

Segregation may also include the use of paper-based hearings. In social security appeal tribunals, paper hearings are (statistically) less likely to result in a successful appeal. Within the tribunal information booklet given to social security appellants in Northern Ireland users are informed that they may be more likely to win their appeal if they attend the tribunal. There is no evidence on the extent to which users understand this 'advice' although the Northern Ireland tribunal studies indicate an intellectual barrier with users struggling with the content and format of the information booklet.<sup>81</sup> It can be argued that paper hearings constitute a segregated process since the tribunal is unable to conduct a full investigatory hearing to adduce additional evidence, as it would for an oral hearing. This segregation is particularly evident where users do not appreciate the implications of not opting for an oral hearing.

Finally, where users' experiences lead them to view the tribunal as lacking independence this may also constitute segregation. Users' views on tribunals' independence are normally tied to the outcome of their case, but there is evidence that where users feel involved in the hearing, and included within the process of decision making, their views on the independence of the tribunal may supersede or offset the outcome effect.<sup>82</sup> Within this category, users recognise the tribunal as something separate from the original decision making processes, and so it is not seen as a rubber-stamping of the original decision; the segregation is because the user sees this additional process as something which they are still unable to penetrate, with their attempts to engage thwarted by an inability to understand tribunal rules, procedures and language:

*Interviewer:* "Did the tribunal members help you set out your case?"

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<sup>80</sup> L. Lundy, "Voice is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child" (2007) 33 *British Educational Research Journal* 927. 'Space' requires children to be given the opportunity to express a view; 'voice' requires that children are facilitated to express their views; 'audience' requires that the child's view must be listened to; and 'influence' requires that the child's view must be acted upon, as appropriate.

<sup>81</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), pp.23-26.

<sup>82</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.49. See T. R. Tyler, "Social Justice: Outcome and Procedure" (2000) 35 *International Journal of Psychology* 117; R. Moorherad, M. Sefton and L. Scanlan, *Just Satisfaction? What drives public and participant satisfaction with courts and tribunals*" Ministry of Justice, Research Series 5/08 (2008), pp.37-39.

*Social security appellant*: "No, because I didn't know what I was talking about. I didn't know what I was doing."<sup>83</sup>

The tribunal proceeds, with the user as a secondary player in the process.

### 3. *Tokenism: Obstruction*

Users may be able to participate in the process of challenging a decision but their attempts to do so can become obstructed at different points. The most significant form of obstruction is through a process of continual referrals by different decision makers, whereby users are passed from one individual or agency to another to deal with discrete aspects of their case, or with the case in its entirety. Users then suffer referral fatigue which may lead to them disengaging from the process.<sup>84</sup> Obstruction may also occur where users are given incomplete or inaccurate information by power-holders, including misinformation about the procedural aspects of challenging a decision and the legitimacy of the user's case:

*SENDIST appellant*: "Even though the Education Act is there, the Board still do completely different things, and ... they would have you believe that's not ... a legal document. This is our law and we can ... bend it whatever way we like."<sup>85</sup>

Other forms of procedural obstruction include delays: in getting initial decisions, tribunal hearings and tribunal decisions.<sup>86</sup>

### 4. *Tokenism: Placation*

Placation can occur when users are provided with assistance that does not fully assist them. Decision makers are seen to discharge their responsibilities by providing this assistance, but without full regard for how effective the assistance is for users. In general, placation may be evident where users are given highly complex and/or voluminous information, which they are unable to digest, creating intellectual barriers to participation.<sup>87</sup> This may manifest itself, for example, through the distribution of procedural booklets that set out the rules and procedures of the tribunal, and the legal

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<sup>83</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.32.

<sup>84</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), pp.48-49; P. Pleasance and N. J. Balmer, "The Audacity of Justice: Recession, Redundancy, Rights and Legal Aid" (2010) 9 *Social Policy and Society* 485.

<sup>85</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), pp.19-20. Difficult relationships with decision makers are also evidenced in N. Harris, "You're only going to get it if you really shout for it": education dispute resolution in the 21<sup>st</sup> century in England", (2011) 23 *Social Policy Review* 233.

<sup>86</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), pp.49-51.

<sup>87</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), pp.23-25.

provisions under which decisions may be reviewed but which nonetheless fail to communicate fully to users what the procedure involves, and what their role is within it. This lack of accessibility does not prevent decision makers pointing to the existence of the booklets as a means of enabling user participation, but this is a placatory device rather than full participation. It should also be acknowledged that there are two other groups of users either side of this position: those who find the procedural booklets to be useful and for whom expectations are met, and those who find procedural booklets to be of no assistance because they can never meet the expectations of these users. For the latter group, the frustration is that the booklets do not provide legal advice that can be applied to their case:

*Tribunal staff*: "People are asking for a procedural booklet, what they really want to know is: give me advice on how to take my case."<sup>88</sup>

These users may more accurately fit the profile of segregated or isolated users. Placation may also apply where decision makers can engage with an informal dispute resolution process at any stage prior to a tribunal hearing, but despite this do not implement the process, or do so in such selective or *ad hoc* ways that it cannot be universally relied upon.<sup>89</sup>

Placation may also include where users get poor advice and representation, either from legally qualified or lay advisers. In common with other empirical studies of tribunals in Britain, the Northern Ireland tribunal studies indicate that representation and advice for users is only advantageous where the advice and representation is good. Poor advice and representation was often seen to disadvantage users, certainly in comparison to those who received good advice but also in relation to the unassisted and unrepresented user with whom the tribunal takes extra care:

*I/FET member*: "if you [are] unrepresented ... you get as good a shot at justice – might even get a better shot at justice."<sup>90</sup>

Poor advice and representation can leave users unable to participate where advisers do not empower users to make informed decisions in their own cases. The problem may be compounded where tribunals presume that this advice and representation enables user participation.<sup>91</sup>

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<sup>88</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.22.

<sup>89</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.38. Similar problems prevent the consistent use of alternative dispute resolution procedures in education: N. Harris, "You're only going to get it if you really shout for it": education dispute resolution in the 21<sup>st</sup> century in England", (2011) 23 *Social Policy Review* 233, p. 242.

<sup>90</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.38. See also M. Adler, *The Potential and Limits of Self-Representation at Tribunals: Full Research Report ESRC End of Award Report* (2008).

<sup>91</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.36. See H. Genn, B. Lever, and L. Gray, *Tribunals for Diverse Users* (Department for Constitutional Affairs, 2006) pp. 295-8.

### 5. *Participation – engagement*

User participation can be realised when users are able to engage with the decision making process and the actors within it. At its best this represents users who can successfully navigate the system, understand the language of decision making, and communicate with decision makers and tribunal actors so that at all times they can understand where they are in the process and what is required of them. While engagement may entail an active form of participation by users, it can also encompass more passive forms of participation, for example where decision makers engage users by giving them access to information that is clear, concise and understandable, that takes account of low levels of knowledge and builds on this:

*I/FET claimant:* "[the information pack] told me everything I needed to know and I needed to do ... [and] ... what I could expect ... I found it very simple to understand."<sup>92</sup>

This may include providing video documentation of a tribunal hearing, or allowing tribunal users to witness other tribunal hearings:

*I/FET claimant:* "I benefited from going [to the tribunal] beforehand ... [I]t let me know what the room was going to be like, and so on."<sup>93</sup>

Here users engage as passive observers of the process, but consequently gain more realistic expectations of the tribunal hearing and what it might involve for them.

### 6. *Participation: Collaboration*

Users feel that they are participating when the process is experienced as a co-operative venture between all the players, and users are supported in their efforts to collaborate in this venture. At the tribunal level, collaboration develops through accessible and informal tribunal hearings, which do not rely on judicial trappings, where tribunal panels and support staff identify the user's understanding and expectation of the tribunal process, so that this becomes the starting point to take users through what the process involves. Tribunals which adopt this practice ensure that users are following the process, and that user difficulties are dealt with as they arise, so the proceedings are seen by users as a partnership in which they have a positive role to play:

*I/FET claimant:* "the Chairman ... made everyone feel at ease ... because he was actually communicating directly with you, at all levels."

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<sup>92</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.25.

<sup>93</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.30. Others also endorse the use of audio-visual support: Sir A Leggatt, *Tribunals for Users: One System, One Service* (London: TSO, 2001), para. 4.2; H. Genn, B. Lever, and L. Gray, *Tribunals for Diverse Users* (Department for Constitutional Affairs, 2006) p. 242.

Collaboration may also take other forms, including where users are given a role in identifying how best to access information and support, rather than decision makers and support staff assuming users can access support from designated sources. Working collaboratively with users may also enable power holders to identify the type of support that would be most useful, so that resources are directed in the most focused way.<sup>94</sup>

Collaboration as a form of participation can be applied more generally to populations beyond tribunal users, to prepare the general public so that they can participate more effectively as and when the need arises, and to facilitate better support for users.<sup>95</sup> Within the general population education about legal rights and dispute resolution processes specific to particular issues or groups, such as parents, employers or social security claimants can identify, in a collaborative way, what levels of knowledge exist and what additional (participatory) education may be required. For those who provide support to users outside traditional legal and tribunal networks – such as health care professionals – education on the role that their evidence plays in determining issues of entitlement, and the purpose that it is required to serve, may itself facilitate a greater collaboration between users and decision makers.<sup>96</sup>

### *7. Participation – enabling*

The enabling of tribunal users can be achieved in many ways – from the clarification of minor procedural issues by departmental or tribunal staff, through to the ability of tribunal panels to discharge their role in enabling users to set out their case – and has the effect of empowering users to determine their options within the dispute resolution process. In the Northern Ireland tribunal studies, as with other studies throughout the UK, the experience most valued by users was being able to talk to someone about their case:

*Tribunal staff:* "Sometimes you're more like a shoulder to cry on than anything else, but if you're able to offer that opportunity to them ... that in itself ... can help."<sup>97</sup>

The common and core benefit of this was to put users in the position where they felt supported and equipped to engage in the process as equals, with an element of self-determination within recognised limits. The option to enable users exists at all levels of the process. It begins with decision makers working with users to resolve their disputes at the earliest stage, including – where applicable – working with other agencies and individuals to achieve efficient and effective resolution.

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<sup>94</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.44.

<sup>95</sup> C. Denvir, N.J. Balmer and A. Buck, "Informed Citizens? Knowledge of Rights and the Resolution of Civil Justice Problems" (2012) 41 *Journal of Social Policy* 591.

<sup>96</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), pp.18-19.

<sup>97</sup> G. McKeever, *Supporting Tribunal Users: Access to pre-hearing information, advice and support in Northern Ireland* (Belfast: Law Centre NI, 2011), p.16.

Enabling users can also involve giving users access to early and good advice, which can be a complementary element of resolving disputes at an early stage but may also enable users whose cases proceed to tribunal. Good representation is recognised by users and tribunal staff as enabling, providing users with the necessary confidence and support during the hearing to address the justiciable issues and respond appropriately to the tribunal's requirements. It is also the case that users, represented or otherwise, can be enabled by the tribunal – particularly where tribunal members are able to put users at their ease so they can set out their case and participate in the hearing:

*Social security appellant*: "they ... made you feel like you were actually welcome to sit down and have your say."<sup>98</sup>

Users who have access to good advice and representation may benefit more from the tribunal's enabling role than unrepresented users since the tribunal is necessarily limited in what it can do to assist the user. In particular, the tribunal cannot overstep its duty of impartiality, and enabling users is more challenging where users struggle to understand the justiciable basis of their case and the relevant legal and administrative procedures:

*I/FET member*: "With unrepresented people, it's harder work for the [tribunal] panel to try and get an understanding across to the unrepresented person, what they can ... and can't do."<sup>99</sup>

In effect, this form of participation endorses, and may privilege, good representation for tribunal users, but 'good' representation here may not necessarily, or exclusively, relate to successful case outcomes: what clients want is to have a voice within a legal process that relates to their social world.<sup>100</sup> Without good representation, other modes of participation – particularly collaboration – may only facilitate participation up to a point, given the inevitability of some legal language being employed by the tribunal, the fact that legal decision making remains dependant on a legal narrative, and the need for the tribunal to remain impartial, factors which remain problematic for even the most enabling tribunal.

## Operationalising the ladder

Figure 3 (below) sets out the operational indicators for each of the rungs of the ladder of legal participation. This is designed to enable the identification of where current practices sit on the ladder, with a view to identifying and, if necessary, addressing participative gaps.

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<sup>98</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.41; M. Adler, *The Potential and Limits of Self-Representation at Tribunals: Full Research Report ESRC End of Award Report* (2008).

<sup>99</sup> G. McKeever and B. Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Belfast: Law Centre NI, 2010), p.35. See also H. Genn, B. Lever, and L. Gray, *Tribunals for Diverse Users* (Department for Constitutional Affairs, 2006) pp. 145-148; 165-167; 290-299; R. Moorhead and M. Sefton, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, (DCA Research Series 2/05, 2005).

<sup>100</sup> R. Moorhead, A. Sherr and A. Paterson, "What Clients Know: Client perspectives and legal competence" (2003) 10 *International Journal of the Legal Profession* 5, at 29.

<b>Participation</b>	
Enabling	<ul style="list-style-type: none"> <li>• tribunal staff clarifying user queries;</li> <li>• users knowing where to go for advice;</li> <li>• tribunal members enabling users in setting out their case;</li> <li>• users being put at ease;</li> <li>• access to early and good advice;</li> <li>• access to good representation;</li> <li>• users able to talk to someone about their case;</li> <li>• decision makers resolving disputes at earliest stage (including working with other agencies)</li> </ul>
Engagement	<ul style="list-style-type: none"> <li>• users able to witness other tribunal hearings (including video tribunals);</li> <li>• users getting clear, concise and understandable information which takes account of low levels of knowledge</li> </ul>
Collaboration	<ul style="list-style-type: none"> <li>• decision makers working with users to identify useful forms of, and access to, support;</li> <li>• public legal education for users and support workers;</li> <li>• informal hearings without judicial trappings</li> </ul>
<b>Tokenism</b>	
Placation	<ul style="list-style-type: none"> <li>• written information that is not in 'Plain English';</li> <li>• high volumes of information, with absence of summary information;</li> <li>• policy, but not practice, of informal dispute resolution</li> </ul>
Obstruction	<ul style="list-style-type: none"> <li>• referral fatigue;</li> <li>• delays in getting tribunal hearings and decisions;</li> <li>• users intimidated by tribunal members (attitude, language, approach);</li> <li>• misinformation from decision makers</li> </ul>
<b>Non-participation</b>	
Segregation	<ul style="list-style-type: none"> <li>• users' right to appeal reliant on economic support, particularly where decision makers have access to additional support;</li> <li>• lack of awareness that legal issue is under dispute;</li> <li>• lack of awareness of procedural aspects of lodging claim/appeal, including basis of initial decision, time limits, supporting evidence, legal tests and language;</li> <li>• lack of awareness of implications of paper hearing;</li> <li>• lack of awareness of right to challenge decisions</li> </ul>
Isolation	<ul style="list-style-type: none"> <li>• users unable to engage/negotiate with decision makers;</li> <li>• misinformation from decision-makers;</li> <li>• geographical barriers to accessing support;</li> <li>• users unable to talk to someone about their case;</li> <li>• users feeling anxious, agitated, unsure, unprepared;</li> <li>• users unable to speak out;</li> <li>• tribunal seen as lacking independence</li> </ul>

*Figure 3: operational indicators for the ladder of legal participation*

Many of the 'solutions' to participative problems are relatively straightforward – such as the increased use of 'Plain English' summaries of key information, including the basis of the decision under dispute; training for tribunal members on facilitating user participation; and increased use of video information for users. Other improvements may require further research and/or resources, for example identifying with users the best ways of providing relevant information, and the challenges inherent in the 'equality of arms' dilemma where economic barriers prevent users pursuing disputes.<sup>101</sup> Nonetheless, moving towards more participative practices will first require existing practices to be categorised, and the ladder of participation is designed to assist with that process.

## Conclusion

Twenty years ago Bell argued that:

“we need to build institutions which foster civic competence, personal responsibility and active involvement rather than over-dependency on professionals and a belief that people are not able to cope. Tribunals should be that kind of institution.”<sup>102</sup>

Much has been done in the last twenty years across the field of administrative justice to review the dispute resolution processes that users may access, from the initial decision through to the tribunal hearing, with an increasing focus on the needs of users. Participative tribunal practices were envisaged by Leggatt, and Adler's research in particular points to an increasingly enabling tribunal experience for users.<sup>103</sup> Improving administrative justice is no longer a choice between top-down or bottom-up processes, but a combination of these. Nonetheless, the empirical evidence demonstrates that Bell's aspiration has not yet been realised. The user experience, typified by the experiences described in the Northern Ireland tribunal studies, points to a series of barriers faced by users in accessing, navigating and participating in the processes of disputing administrative and employment decisions. The concept of legal participation allows us to identify the parameters within which these barriers may be addressed and to reconceptualise Bell's concerns through the prism of user participation. What emerges is a model of participation that takes account of how users experience dispute resolution processes, focusing on the objective of improving user participation in those processes, which offers a way forward to what has been a very long-standing problem.

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<sup>101</sup> Some of these 'solutions' are set out as recommendations in the Northern Ireland tribunal studies.

<sup>102</sup> K. Bell, "Social Security Tribunals – a general perspective" (1982) 33 *Northern Ireland Legal Quarterly* 132, p.147.

<sup>103</sup> M. Adler, *The Potential and Limits of Self-Representation at Tribunals: Full Research Report* ESRC End of Award Report (2008).