

## The MLR Forum

### Remote Justice? Litigants in Person and Participation in Court Processes during Covid-19

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The impact of Covid-19 on the court system has been significant, substituting online and telephone hearings for face-to-face court proceedings. The implications of these forms of remote justice on the participative experiences of litigants in person is not yet well understood.

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In 2017, the *MLR* published an article by [Jane Donoghue on 'The Rise of Digital Justice'](#) in which it was argued that the efforts being made to improve litigant participation in digital court reform were tokenistic. Donoghue makes the case that ['\[t\]echnologies must ... be built and deployed in ethical ways which enhance rather than compromise court user participation, while simultaneously upholding fundamental legal principles such as fairness, impartiality and access to justice.'](#) This principled approach is contrasted against the [digital reform programme in England and Wales](#) where the Courts and Tribunals Service (HMCTS) has been prioritising digital transformation without [progressing a clear strategy](#) on what might constitute [the 'success' of this modernisation programme](#), beyond efficiency and cost reduction. Donoghue highlights how the drive for digital justice has been continuing despite the fact that little is known about how courtroom IT affects case outcomes, or what the differential impacts of virtual technologies are on different litigant populations. Her rallying call is to consider how participation is both manifested and weighted against economic rationalisation drivers in newly digitised court processes.

At the point at which Donoghue's article was published, courts retained discretion over the extent to which digital technologies were used. In the new Covid-19 reality, discretion has been overtaken by necessity, with [new video platforms being rolled out to enable more cases to be heard online in England and Wales](#). This [emergency move](#)

[to online or remote hearings](#) has prompted some urgent thinking about how effective remote justice can be, bringing Donoghue's concerns into even sharper relief.

The evidence gathering on remote justice during lockdown has been rapid and highly effective, focused on how lawyers, judges, litigants and lay participants are experiencing online and telephone hearings. The [Civil Justice Council's](#) rapid review examining the [impact of the changes mandated by COVID-19 on the operation of the civil justice system](#) showed that the impact was different for all court users, with professional users able to adapt more easily than lay users for whom participation was often problematic. The rapid consultation on the use of [remote hearings in the family court](#), conducted by the [Nuffield Foundation's Family Justice Observatory](#), raised concerns around the fairness of remote hearings and the difficulty in ensuring the participation of all parties. Beyond the civil and family courts, the [Public Law Project](#) has examined [judicial review in the Administrative Court in England during Covid-19](#), a relatively lawyer-heavy environment where technical difficulties have been the main cause of concern. In criminal proceedings, research by [Fair Trials](#) suggests defendants are receiving less effective legal assistance, less effective participation in hearings and are enjoying less opportunity to challenge information presented.

The overall finding from these reviews suggests that those courts dealing with questions of law rather than contestations of fact are better suited to remote hearings, compared to the lower courts involved in fact-finding based on lay participation, where there are significant challenges in ensuring that such participation is effective. Donoghue's paper identified legal advice and representation as necessary to enable litigant participation in remote court processes, raising the question of how litigants without legal advice or representation have been un/able to participate remotely.

Despite urgent pleas in the rapid reviews for evidence from litigants in person (LIPs), relatively little evidence of this sort has been available. In the absence of direct data, therefore, we have to look elsewhere to understand the potential implications for LIP participation. That needs to begin with Donoghue's call to understand what 'effective participation' should involve, whether via remote or face-to-face hearings. Research by the author and colleagues at Ulster University, working with the [Northern Ireland Human Rights Commission](#), provides both a theorisation of effective participation and empirically-based insight into how to deal with the [barriers that block legal participation for LIPs](#), both of which can help address the current evidence gap.

## **I. Barriers to participation in civil and family courts pre-Covid-19**

Pre-Covid-19, the Nuffield Foundation funded [research on the experiences of LIPs in civil and family courts](#) focused on identifying the barriers to their participation in court hearings. This research was built on two previous projects, the first reviewing the ability of [tribunal users \(represented and unrepresented\) to participate in dispute resolution processes](#) culminating in tribunal hearings,<sup>[1]</sup> and the second on research comparing the [participative differences between courts and tribunals](#).<sup>[2]</sup> These projects developed a model of legal participation for courts and tribunals, identifying the participative barriers litigants and tribunal users experienced.

The focus of the empirical research on civil and family courts was on the impact that litigating in person could have on access to justice. This was framed in human rights terms as the right to a fair trial under Article 6 of the [European Convention on Human Rights](#), which encompasses a right for all litigants to participate effectively in civil litigation in which they are involved. The research established that self-representation posed risks to the rights of LIPs under Article 6 ECHR to participate effectively in their

legal proceedings. The risks were generated by different barriers to participation faced by LIPs, which the research defines as [intellectual, practical, emotional and attitudinal](#):

- **Intellectual barriers** are those which prevent the individual from understanding how the legal process works. The main intellectual barriers were that LIPs did not comprehend the legal language used in court documents and proceedings. This included many commonly-used legal phrases that were put to LIPs without any awareness by court actors that they might not be clear. Commonly, the LIPs did not understand how to apply legal rules to their case or the legal framework the court would use to make decisions. The consistent theme that emerged for LIPs was that of 'not knowing', in common with the finding from [other LIP research of 'substantive and procedural naivety of unrepresented litigants'](#), which raises a fundamental question over how can LIPs participate in a process they do not understand.
- **Practical barriers** relate to not knowing how or where to get help to deal with the legal process and associated issues, ranging from the significant to the mundane. The most obvious and common issue was that of cost—LIPs who felt unable to afford the cost of legal representation and yet who did not appear to be eligible for legal aid. Practical issues beyond this arose from the lack of support for LIPs, including the absence of any central information point. This highlighted two major problems: first, that there was a lack of information and resources to assist either with the general legal issues or the task of self-representation; and second, that the information sources that existed were disparate, unknown and LIPs were unclear as to the extent to which they could be trusted. Added to this was the 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) while LIPs saw a continual need to attend court as a practical difficulty. A final but important practical barrier for LIP participation was that the court service did not know if a litigant was going to be represented until the court hearing, making it more difficult to address some of the practical solutions that could be targeted at LIPs.
- **Emotional barriers** arise from the negative feelings associated with both the process and the issue being litigated, and these can then be exacerbated by being unable to overcome intellectual or practical barriers. The most obvious emotional barriers included LIPs struggling to be objective about their case, dealing with the anxiety about the facts of the case that they were living through beyond the court room. This could translate into a struggle to manage emotions to engage with the judge.
- **Attitudinal barriers** exist where the LIP is not seen as a legitimate court actor, but rather one who is disrupting the system. This arose from having to deal with court actors' [stereotypically negative view](#) of LIP behaviour, which resulted in the default assumption (and behavioural consequence) that LIPs would be difficult to deal with. This [negativity was not without basis](#), with some LIPs equally strident in their negative views about court actors and equally unwilling to engage with court actors for this reason, but what it pointed to was a resentment by both LIPs and court actors that the system was not adapting to this breach of the legal 'norm'. Both cause and effect were evident, with court actors unhappy about adapting to accommodate LIPs' needs fed by an overall unwillingness to recognise LIPs as a legitimate part of the court system.

## II. Maximising the ability of LIPs to participate effectively in hearings

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The ability of LIPs to participate in all hearings, whether face-to-face or remote, reflects [power imbalances](#) between the parties and between the LIP and the judge, the [lack of legal capability](#) including [digital exclusion](#), the in/adequacy of [access to support services](#), [procedural demands that exacerbate litigant vulnerabilities](#), and the [failure to make adjustments for the non-practitioner status of LIPs](#). For these issues to be addressed, we need to address Donoghue's fundamental question over what effective participation means.

Participation in legal hearings is not a binary process, whereby a litigant either participates or does not participate. Rather, there are different types of legal participation, defined by the extent to which the intellectual, practical, emotional and attitudinal barriers to participation can be managed or overcome. The different types of legal participation have been modelled as a ladder of legal participation (Figure 1).

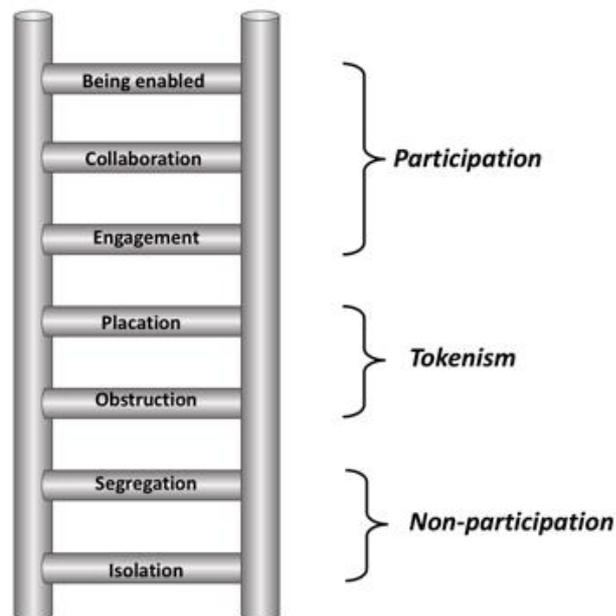


Figure 1: McKeever's ladder of legal participation

This model of legal participation groups the broad range of experiences of litigants as non-participatory, tokenistic or participatory, and identifies different types of participation within each of these categories.

Non-participatory experiences are defined as:

- **isolation**, which includes feeling excluded and unable or unwilling to engage with legal proceedings. In relation to our LIP findings, the ability to overcome practical barriers was limited by a lack of assistance by court actors to signpost or provide concrete forms of information or support that could address some of the legal and procedural deficits that LIPs suffer. As a result, LIP experiences evidenced a concern that their participation was unachievable, given how removed they felt from the court actors' understanding of law and process and the sense that they could never—or should never—be a part of the system, rendering any attempt to participate as futile.
- **segregation**, which includes feeling separate from the legal process, or secondary within it, without sufficient account being taken of the difficulties in participating. Segregation was evidenced by the powerlessness felt by LIPs compared to other court actors. The parallel track that LIPs were on, defined

by a lack of knowledge or awareness of law or process, was contrasted sharply by the track that court actors were able to follow, informed by education, training, experience and familiarity that the LIP could not emulate. Here, the attitudinal barrier was less about whether the LIP had a right to be part of the system and more of a sink-or-swim attitude that had the same effect.

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. Our research evidenced that fatigue, delays and the provision of inaccurate information were elements which were clearly present in LIP experiences. Fatigue was a particular feature of having to personally attend each hearing (as opposed to having representative attend on their behalf), often for prolonged periods as they waited for their cases to be called, and to bear the emotional as well as practical and intellectual burden of arguing their case.
- **placation**, where support that is provided, or referred to, is ineffective in assisting the individual. Our research showed clearly, for example, that in Northern Ireland there were very few sources of information or advice that LIPs could rely on to break down intellectual, practical or emotional barriers, a fact that sits uneasily with the expectation of court actors that it was the LIPs' responsibility to inform themselves about relevant law and procedure.

Participative experiences are defined as:

- **engagement**, where users can navigate the process and communicate with the actors to understand each other's role. There was an appreciation of the helpfulness of court staff who could explain what the initial or subsequent stages required: the ability to ask questions of those with experience and knowledge was seen by LIPs as helping to overcome or manage the intellectual, practical and emotional barriers that have been earlier identified. This applied across the board from judges and legal representatives on the other side, to more informal sources of help from friends, families or external organisations. An open line of communication evidencing engagement between LIPs and court actors could also reduce LIP feelings of alienation, reducing the impact of the attitudinal barrier.
- **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. Attitudinal barriers could be 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. Where this element of trust could be built, even where it was fragile, there was progress to be made in managing all of the participative barriers.
- **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 recognised limits. This relates to the LIP being empowered to understand or to present their case in a meaningful way. While the role of the judge was often central to this—providing the LIP with clear explanations of what was being asked of parties and why—there were a number of ways in which LIPs could feel empowered, including simply by representing themselves in court. More substantively, the provision of support—whether through court actors, information or external organisations—gave LIPs confidence to make some sense of what the legal process required

and to understand where there were critical gaps in their legal and procedural knowledge. Trust in court actors was a key feature of LIPs being enabled, particularly trust in the judge.

### III. Implications for LIP participation in remote hearings

The requirement for effective participation under Article 6 ECHR has not been removed by the need to revert to remote hearings. The difficulty remains, however, in understanding what effective participation looks like. Our research shows that the types of legal participation required for effective participation under Article 6 ECHR are engagement, collaboration and being enabled. Remote hearings therefore need to be attentive to the intellectual, practical, emotional and attitudinal barriers that block these types of participation.

Some of the barriers can be managed through pre-hearing support and our research drives home the fact that effective participation is not limited merely to what happens in a court hearing. The current court system is poor at identifying, in advance of hearings, whether litigants will be self-representing and for that reason it can be difficult for court services to direct support to LIPs that would assist their preparation for and participation in their hearings. Remote hearings may present a good opportunity for the court service to improve its data collection: making the necessary arrangements for remote hearings helps provides a mechanism for the court service to identify LIPs in time to direct them towards relevant resources, whether internal to the court system—for example, court clerks who can advise on some of the procedural issues including the nature of the hearing that has been listed and who will be attending—or to external support services, either through advice agencies where there is capacity and expertise, or online services that might exist.

Directing LIPs to support and providing them with trusted contacts within the court system could therefore help them to engage more fully in the hearing, addressing the participative barriers that exist. This comes with the caveat that judicial and court service staff should be realistic about what external support can provide. In our research, court actors often made generalised comments referring LIPs to advice, pro bono and other services that were not always consistent with what was available. Again, at a time when face to face advice and support is necessarily limited and advice services are under pressure (see [here](#) and [here](#)), expectations on how LIPs can be supported externally may need to be addressed.

The importance of trust was also critical to boosting the participative potential for LIPs. In face-to-face proceedings, this was often achieved outside of court through informal discussions between the LIPs and court actors. In our research, the judges spoke of [being responsive to litigants' reactions](#), including physical cues that the LIP was becoming upset, agitated, angry or confused. Interventions by judges to enable breaks in proceedings or refocusing the hearing could be helpful, although researchers also observed instances where the physical cues [from judges](#) and legal representatives towards LIPs—indicating frustration, impatience, annoyance—were themselves the cause of LIPs feeling alienated or isolated. The relative difficulty in responding to, misinterpreting or [missing visual cues in remote hearings](#) (either by LIPs or judges) may be an increased risk factor for effective participation.

Ultimately the most significant contributor to effective participation was communication that takes account of the LIP's non-practitioner status. This includes the practical aspects of case management and hearing procedures—for example, court timings, who will be present, how parties will be connected, who they can contact with queries, when to speak, when to remain quiet, whether the process will involve breaks in

proceedings, or break-out rooms for litigants and representatives to have ‘out of court’ discussions—as well as the procedural preparation that allows the case to progress—for example that the LIP has prepared (and been able to share where necessary) the paperwork and other submissions required for the hearings, as directed.

A potential advantage to LIPs of remote hearings is that they would no longer be required to attend court for an undefined period of time, which presents difficulties for work and caring commitments—dealing directly with the obstruction that can be a feature of face-to-face hearings—but other issues around connectivity, digital skills and having the space at home to focus on the hearing would need to be considered, along with broader concerns over the additional [needs of those with protected characteristics](#), [the contraction of public space](#) and the [impact on open justice](#). Our research evidenced the hard work done outside of court to settle and agree issues, but that there was a need for expectations concerning these out of court actions to be realistic. There may be greater difficulty in accommodating these more informal discussions via remote hearings and so judges may need to be prepared to either manage their usual expectations on what can be achieved or the court service will need to find ways to facilitate these discussions.

Effective communication during the court hearing covers a range of issues, including that the LIP understands the relevance of points raised, is able to follow the proceedings, is able to make him- or herself understood, is able to introduce and respond to relevant issues, and understand the consequences of decisions or court directions. The role of the judge is clearly central to communication in the hearing. For participative barriers to be mitigated, if not overcome, the judge needs: to ensure that the LIP understands the process, procedures and legal terms; to avoid replicating the familiarity that can be assumed with legal representatives; and to give the LIP space and time to consider his or her response.

In non-remote LIP hearings that we observed, any explanations provided to LIPs were on the basis of what ‘usually’ happened in such hearings, with expectations premised on what the norm was in hearings where both parties were legally represented. Remote hearings provide an opportunity for judges to reflect on whether such comparisons with the old ‘norm’ are helpful or whether it would be possible to set out new ground rules (still rooted in existing evidential and procedural obligations) that assume an unfamiliarity by both parties with all aspects of how the hearing will be conducted. This may give greater potential for judges to ensure that an LIP has opportunities to communicate his or her views and needs, and to adopt a more inquisitorial approach in order to obtain the facts and information required, if they have not already been presented. The flow of questioning and discussion in a face-to-face hearing that would potentially elicit the necessary information may be more stilted in remote hearings, and so being attentive to the need to explore points beyond the questions and answers should be considered.

#### **IV. Conclusion**

Our research does not provide any basis for asserting that remote hearings are not compatible with effective participation. Indeed, as we have made clear here, our findings are that face-to-face hearings present risks to the LIP’s Article 6 ECHR right to effective participation and so should not necessarily be considered as the standard to be replicated in remote hearings. What we can say, however, is that there are barriers to participation that will need to be overcome. This includes addressing the ability of the LIP to understand the legal issues and process—whether the process is

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an online version of a face-to-face hearing, or a new approach to ensuring that parties can engage and work collaboratively to progress the legal issues.

There are additional practical barriers with remote hearings that may present substantial problems for participation, however, particularly where digital exclusions apply. This may further complicate pre-existing problems of access to advice and support services, where those services are no longer able to operate on a face-to-face basis. The pandemic has displaced economic rationalisation as the dominant driving force in digital justice, but it is equally clear that remote digital hearings are not economically rational in all jurisdictions, with [evidence of additional time costs for judges and lawyers](#), which should be considered alongside the access to justice costs of LIPs not being able to overcome digital barriers.

The emotional toll of remote justice beyond the court building also needs to be monitored. Our research reinforces concerns raised by [others](#) on the potential for this barrier to both increase and decrease with remote hearings. For some LIPs, the court building was an intimidating space in which their powerlessness was felt to increase and the waiting game necessitated by long court lists could increase their anxiety on the day. As already noted, remote hearings have the potential to remove these concerns, providing dedicated time slots for hearings, with the advantage that LIPs do not have to travel to unfamiliar surroundings. In the alternative, however, the emotional experience for LIPs could be improved significantly in face-to-face hearings by the humanisation of the process, achieved through human contact with court clerks, ushers, representatives and judges, in a neutral [environment that reflected the gravity of their dispute](#). LIPs were often upset at what they regarded as an over-familiarisation between representatives and judges that they witnessed at the hearings, and this has the potential to compound the relative lack of gravitas that online hearings might convey if [this behaviour is also observed for online hearings](#).

Perhaps the most significant barrier faced by LIPs is attitudinal and this is likely to be where the real test for participation in remote hearings is faced. If LIPs are automatically regarded as an aberration in a system designed to accommodate represented parties, then a new online system that regards their participation as less of a priority than the participation of legal representatives suggests that the prevailing alienation of LIPs will continue. If, however, the processes to accommodate remote hearings regard LIP participation as a priority, or at least as of equal value to the participation of other court actors, then that design feature will help to break down the view of LIPs as breaching the legal 'norm'. This would represent a considerable advance in ensuring effective participation.

We entered lockdown without having addressed the calls by Donoghue and others to evidence the impact of digital court transformations. The rapid reviews of impact since lockdown have provided a vital insight into the issues that remote justice presents. The government's obligation to ensure Article 6 ECHR compliance in court hearings means it must now take this insight forward, establishing what works, for whom and in what ways before remote justice can be allowed to become an enduring and effective substitute for face-to-face hearings.

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- [2] G McKeever, 'Comparing Courts and Tribunals through the Lens of Legal Participation' (2020) *Civil Justice Quarterly* 217.