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The Right to Litigate in Person

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The Right to Litigate in Person

Abstract

Litigation in person is a widespread phenomenon in common law jurisdictions. A right to litigate in person is treated as a fundamental right, regardless of whether the litigant has the financial means to hire a lawyer or the capacity to conduct litigation effectively. Due to the high numbers of litigants in person and the various burdens placed on judicial resources by their lack of legal knowledge, they pose a serious challenge to the effective and efficient administration of justice.

This thesis assesses the theoretical value of a right to self-representation, and challenges the position that courts should not impose legal representation on a litigant nor require him to obtain such representation as a condition for litigation. It argues that a litigant who lacks the professional knowledge and skills to present his case effectively cannot legitimately insist upon representing himself if in doing so he is likely to inflict disproportionate costs on his opponent and on the administration of justice.

This thesis advances the case for mandatory representation in civil proceedings on three main fronts: a comparison with the criminal context, an assessment of the value of self-representation in terms of outcome, and an examination of its possible intrinsic justifications.

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Table of Contents

Table of Cases

United Kingdom Cases

United States Cases

Canadian Cases

European Court of Human Rights Cases

Cases of the International Criminal Tribunal for the Former Yugoslavia

Cases of the United Nations Human Rights Committee

Table of Statutes

United Kingdom Statutes

United Kingdom Statutory Instruments

United States Legislation

Australian Legislation

German Legislation

Swedish Legislation

Treaties

Notes

Terminology:

This thesis follows the British terminology of 'litigants in person' to refer to self-represented litigants; in the United States of America, the term used is 'pro se litigants'. Furthermore, the terms 'counsel' and 'lawyer' are used in a generic way, without reference to the distinction between solicitors and barristers.

Gender:

The thesis is gender neutral. To avoid continual use of such cumbersome constructions as 'his or her', the male and female pronouns are used by turns in approximately equal measure.

Emphasis in quotations:

Unless otherwise indicated, all emphases in quotations are added.

Cross-reference:

Reference to a specific section in a chapter is noted as follows: for example, 'chapter 6.4.1' refers to section 4.1 in chapter 6.

Abbreviations:

USSC – United States Supreme Court.

ICTY – International Criminal Tribunal for the former Yugoslavia.

ECtHR – European Court of Human Rights.

CPR – Civil Procedure Rules (1998)

The right to litigate in person

Introduction

In common law jurisdictions everyone is entitled to litigate her own civil case in person. There is no formal requirement that litigants obtain legal representation and the court has no power to impose it on them. Regardless of whether the litigant has the financial means to hire a lawyer, or the capacity to conduct litigation effectively, she is entitled to proceed in person.

To date, there has been no serious attempt to assess the justifications for a right to self-representation in civil proceedings. Rather, such a right is taken for granted as a natural expression of the right of access to court. This lack of attention is unjustified, given the prevalence of litigation in person in most common law countries. Due to the high numbers of litigants in person (LIPs) and the various burdens placed on judicial resources by their lack of legal knowledge, they pose a serious challenge to the effective and efficient administration of justice.

In the light of the potential adverse consequences of an unfettered exercise of a right to self-representation, this thesis sets out to assess its theoretical value. It suggests that the value of the right is insufficient to outweigh those consequences and proposes, accordingly, that legal representation be formally required in cases where LIPs are unlikely to be able to litigate their cases effectively and without imposing disproportionate costs on the administration of justice.

The task of this thesis is only to establish a general principle that it is justifiable to require litigants to be represented by a lawyer when self-representation is likely to be both ineffective and inefficient. The details of such a requirement—that is, the circumstances in which it should be invoked, or the litigants to whom it might apply—are not explored here. These could be worked out only after coming to grips with the principles governing representation in civil proceedings.

The task set forth above may seem modest on its face; however, it represents a major conceptual departure from the longstanding enshrinement of self-representation as a fundamental right. This is a demanding undertaking, as it entails not only overcoming the intuitive appeal of self-representation and the compelling force of tradition and habit, but also, in the absence of a discussion in the literature, supplying possible rationales for the right in order to challenge them.

Roadmap of the argument

The right to self-representation in civil cases is treated in the literature as a fundamental right. Because it has been considered as a natural expression of the right of access to court and, as such, not considered to require any independent justification, its theoretical basis has escaped any critical examination. The prevalent conflation of access to court with self-representation could be the product of various factors. The long history of self-representation as the basic mode of conducting disputes seems to have led to its being regarded as a self-evident and natural good, a perception that may have been reinforced by the particular appeal of self-representation in the criminal context, where the individual with a liberty interest at stake is regarded as being entitled to choose to be the master of her own defence and stand alone in her hour of trial. Furthermore, the fact that procedural rights are conferred upon the litigants themselves implies that the rights are personal and, as such, intended to be exercised directly by the persons in whom they are vested, which could make the notion of mandatory representation counter-intuitive and objectionable. Moreover, the common perception that litigants who represent themselves do so because they cannot afford a lawyer lends itself to a view that self-representation is a minimum guarantee that may not be dispensed with. While these explanations may help us understand the entrenchment of an entitlement to self-representation, none of them would seem to justify giving it precedence over the legitimate interests of other litigants in *all* circumstances. A more balanced view is required, and to form one we must first seek to identify the values that may be served by self-representation in civil proceedings. (Chapter 1)

While the need to rationalise a right to self-representation in the civil context has not been recognised, there is substantial case law and literature devoted to the justification of this right in the criminal context. The main advocate of a fundamental right to self-representation in criminal proceedings has been the United States Supreme Court (USSC), which grounded this right in the value of free choice (to be referred to hereafter as 'the autonomy rationale'). The USSC's view has strongly influenced the International Criminal Tribunal for the former Yugoslavia (ICTY), before which a number of defendants charged with war crimes, most famously former Yugoslav President Slobodan Milosevic, insisted on representing themselves in person.

The experiences of both the USSC and the ICTY with self-represented defendants provide ample evidence of the need for a more balanced approach that would allow mandatory representation at least in certain situations. The value of free choice is neither absolute nor the sole value that a legal system needs to promote. Accordingly, to the extent that self-representation has some intrinsic autonomy value in civil proceedings, this value may be shown to be outweighed by the negative impact of self-representation on the administration of justice and on the right of other litigants to speedy and fair trials. (Chapters 2 and 3).

Moreover, the case law recognising a right to self-representation in criminal proceedings provides important insights into the nature of the autonomy rationale. While the USSC has declared a commitment to protect the defendant's freedom, its position could be interpreted more narrowly as a function of the unique features of the criminal process. A close examination of the Court's reasoning supports the view that 'the voice is the voice of Jacob, yet the hands are the hands of Esau' (Genesis 27:22). The fundamental reasons for protecting the freedom to proceed in person have to do with the threat posed by the state to the individual's basic liberty. The gravity of the potential consequences of the criminal process underpins the intuitive appeal of allowing the defendant to exercise his 'moral right to stand alone in his hour of trial and to embrace the consequences of that course of action', as one US court would have it. Furthermore, the state's monopoly over the use of force, as manifested by the initiation of criminal proceedings, carries with it an implicit risk of abuse of state power; with that in mind, allowing the state also to regulate the accused's defence through the assignment of counsel may be regarded as suspect. This interpretation explains why the USSC has recognised a right that poses a substantial threat to the public interest in convicting and punishing only the guilty, an interest so paramount that public policy concedes that many guilty defendants may have to be set free to save a single innocent individual. (Chapter 2)

This reading of the autonomy rationale is even more persuasive in relation to the ICTY's case law. Not only did the proceedings before it involve charges of utmost gravity, namely war crimes, but its political background created an additional concern for legitimacy. Self-representation was a matter of particular importance to former political leaders who refused to acknowledge the authority of such tribunals and considered them politically driven and illegitimate. Under such circumstances, the ICTY found itself compelled to recognise a right to self-representation in order to avoid any impression that it was trying to muzzle defendants or promote a political agenda. As a result, it went farther than the USSC and granted a right to self-representation not only at trial but also on appeal. (Chapter 3)

Thus, the value of self-representation is not universal. Its most compelling justifications are limited to the criminal context; since civil proceedings pose no threat to individual liberty and involve no public interest other than the efficient and effective administration of justice, litigants are not entitled to such special allowances as might be accorded to criminal defendants. Even in criminal proceedings, the right to self-representation has been questioned extensively in both case law and literature, and its scope has been circumscribed in important ways: English and American courts have required defendants to assert the right at an early stage of the proceedings; the USSC has also denied it on appeal and empowered trial judges to appoint standby counsel with significant latitude for operation. These developments, which cast doubt on the desirability of self-representation even in its stronghold, the criminal process, further weaken the case for a similar right to exist in the civil context.

A fundamental right to self-representation in civil proceeding is unjustified also on its own account. First and foremost, self-representation is not effective. Several commentators have acknowledged this and tried to find ways to adjust the legal system in order to accommodate the needs of LIPs and enhance their access to justice. In so doing, they have identified two main stumbling blocks: the complexity of procedural and evidentiary rules, and the passive role assumed by judges in adversarial systems. To redress the imbalance between the self-represented and those represented by counsel, various proposals have been made, primarily having to do with simplifying procedural rules and requiring judges to render active assistance to LIPs.

Proposals to simplify the law and to provide LIPs with explanatory material give rise to the general questions of whether the legal system can be made accessible to laypeople and whether the law can speak directly to its subjects. These questions are topical in the light of the rise of the Plain English Movement, which seeks to make the law immediately intelligible to the layperson. While this is a laudable aim, it is largely unachievable. Using the law effectively requires expertise that goes far beyond understanding the meaning of the words used to communicate legal rules. Coming to grips with its complexities requires specialised skills over and above the ability to penetrate technical language. Such skills include the ability to identify the pertinent legal rules, principles and doctrines, to recognise the relevant facts and classify them into the pertinent legal categories, and to engage in a particular type of interpretation and reasoning. Such skills are based on a comprehensive knowledge of the law. (Chapter 4)

Nor can litigation in person be made effective and efficient simply by requiring judges to intervene in the process. Neutral judicial assistance might alleviate some of the difficulties faced by LIPs but would fall short of obviating their need for partisan advocacy, which impartial judges are precluded from rendering. Furthermore, extensive judicial assistance is not cost-effective; 'judicial aid' is more expensive and less effective than legal aid. This is particularly true when operating under Anglo-American civil procedures that are designed to facilitate partisan combat. Judges in these systems do not have sufficient procedural tools to assist LIPs effectively because the systems are designed to be used by self-interested rivals, not by a neutral official. But this is also true of civil law systems. While the role of litigants is more demanding in party-based adversarial procedures, partisan advocacy is indispensable even in judge-based civil law procedures. Indeed, many reputable civil law systems, while allowing substantial judicial activity in the conduct of litigation, nevertheless require litigants to be legally represented. (Chapter 5)

The conclusion that, from the standpoint of outcomes of legal proceedings, self-representation is all but devoid of practical benefit for LIPs gives rise to the question of whether such a right might still be defended based on its serving other values. Although the autonomy rationale articulated by the USSC is limited to the criminal context, it remains open whether a more general justification could be developed on that basis. It may be thought that respect for autonomy requires respect for the litigant's freedom to proceed in person. However, self-representation is indefensible even on these more general grounds. Not every choice may be justified as an expression of autonomy; nor does unfettered procedural freedom per se promotes autonomy. What respect for autonomy requires is the provision of a fair and reasonable procedural system that allows citizens to protect their interests and enforce their substantive rights. A requirement of legal representation is fully compatible with this obligation insofar as it preserves the ability of the legal system to fulfil its function. A litigant who wishes to avail herself of the legal system remains free to do so through legal representation. The procedural activity per se is not normatively valuable in a way that justifies insistence upon personal performance or that precludes delegation to others. (Chapter 6)

One might accept that in order to treat litigants as worthy individuals a legal system may have to allow them to have a voice in the proceedings, or even to have some control over the presentation of their cases. A right to a voice may also be said to enhance the satisfaction of litigants, their subjective perception of the process and their acceptance of its outcomes. However, the right to a voice is not the same as a right to self-representation. Furthermore, represented litigants are better able to control the presentation of their case and enjoy a more meaningful voice in the proceedings because of the availability of professional assistance. In fact, in certain complex cases the participation of LIPs may be poor, ineffective and costly to such an extent that it fails to satisfy even minimal requirements of participation and control. (Chapters 6 and 7)

The main argument of this thesis draws on the case law of the European Court of Human Rights (ECtHR), which has affirmed the laws of several civil law countries that require mandatory legal representation in both criminal and civil proceedings. In stark contrast to the approaches taken by the USSC and the ICTY, the ECtHR holds that the right to litigate (or make a defence) is not necessarily personal. Rather, Article 6 of the European Convention on Human Rights (ECHR) guarantees a right to have an effective opportunity to influence the outcome of the proceedings; as such, this right need not be exercised in person, and the primary criterion for assessing compliance with Article 6 is whether a litigant (or a defendant) has had the opportunity to participate effectively in the proceedings. This understanding of the right to representation as an outcome-oriented and impersonal right renders the question of self-representation an ordinary procedural matter that bears little normative significance. (Chapter 8)

Litigants who are unable to afford legal representation pose a challenge for this thesis. In a procedural system that requires mandatory representation, lack of financial means could translate into lack of access to court. It might be thought that self-representation is better than no access at all and, therefore, this minimal degree of participation should be guaranteed. Preserving such litigants' access to justice is an important value, but it is highly doubtful whether it is sufficiently served by an unrestricted right to self-representation. There are many complex cases in which self-representation falls short of being even a 'bare minimum'. Such participation might even give the false assurance that LIPs are at least gaining some benefit, when in fact they are gaining none. Not only is self-representation in complex cases unlikely to benefit the LIP, but it also stands to harm other litigants through its obstruction of court proceedings. If society is intent on protecting the interests of people who lack financial means, it should do so by providing legal aid or subsidy schemes to render legal services affordable, or by making litigation cheaper; indeed, the high cost of litigation in England and Wales is a separate problem that should be addressed on its own account. A minimal access to court is hardly guaranteed by leaving LIPs to muddle through to the best of their ability with little hope of success. Recognising this, the ECtHR has not faulted mandatory representation; on the contrary, it has considered the formal requirement of mandatory representation as a factor that enhances the state's obligation to provide the litigant with legal aid.

The upshot of this analysis is that a rule requiring legal representation in complex cases, where LIPs are unlikely to benefit from proceeding in person, and are further likely to strain court resources, is defensible and justified. In England and Wales, such a rule would also be compliant with Article 6.

The scope of this thesis

To focus the discussion on the specific question of self-representation, exceptional circumstances and complications must be eliminated. First, the discussion shall proceed against the background of ordinary disputes concerning ordinary private matters (such as contracts, wills, torts), involving two individuals who have no particular legal knowledge. Situations giving rise to special considerations—including cases before special tribunals such as family or employment tribunals; administrative, constitutional or judicial review proceedings; proceedings involving corporate entities (whether private or state-owned)—are not considered. Nor does this discussion deal with situations involving representation by incompetent or negligent lawyers, or disputes in which either party is a paralegal or a non-lawyer with substantial legal knowledge.

By the same token, this thesis does not discuss the English procedural device of a 'litigation friend', also known as a 'McKenzie friend', because it has no bearing on the theoretical analysis conducted in this thesis. McKenzie friends are laypersons who do not normally have a right to address the court on behalf of the LIP. Their role is mainly confined to assisting the LIP in preparing her case and providing practical support by, for example, taking notes. This thesis argues that laypeople are generally unable to conduct effective litigation, an argument that applies also to lay representatives. It would be a factual matter whether in a given case the assistance of a McKenzie friend were able to obviate the need for legal representation in order to conduct effective and efficient litigation.

Furthermore, when this thesis argues that self-representation is ineffective or inefficient, this argument should be read as referring to cases involving complex factual and legal aspects; small claims or cases involving straightforward matters that may be handled without extensive legal assistance are excluded. Although various features that characterise legal complexity are described (chapters 4 and 5), a precise and detailed definition of 'complex' and 'simple' cases is not needed. For this thesis's argument to be valid it is sufficient to accept that there *are* complex cases that are beyond the capacity of laypeople.

In ascertaining the value of self-representation as a general right, the issue of financial means may be added to the list of elements that need not be considered at this stage. However, given that the right is generally perceived as an entitlement of the indigent, this factor receives some attention. Nonetheless, self-representation is a general right that is afforded to all litigants, regardless of means and should be assessed as such, without reference to financial ability. Thus, the focus here is not on legal aid or impecunious litigants but, rather, on the theoretical value of self-representation, *all other things being equal.*

While this thesis focuses on the right to litigate in person in civil proceedings, a significant portion of the analysis deals with the right to self-representation in criminal proceedings. This is so for two reasons. First, the distinction between criminal and civil proceedings provides important insight into the nature of a right to self-representation. As we shall see, the specific features of the criminal process account for much of the intuitive appeal of self-representation. Second, the only available examination of the value of a right to represent oneself has been conducted in the criminal context. Thus, a review of the implications of this discussion for the civil context is necessary.

A final note is on context and methodology. This thesis is theoretical and discusses the principles underlying the question of representation on a relatively abstract level against the background and the broad features of common law legal systems. While the choice of a specific jurisdiction is not critical for this kind of inquiry, for illustrative purposes the thesis shall refer primarily to the legal systems in England and Wales and in the United States. Furthermore, in discussing case law, this thesis focuses more on the ideas and principles used by courts to justify their decisions than the formal legal rules on which such decisions were based.

CHAPTER 1

REVISITING THE RIGHT TO SELF-REPRESENTATION IN CIVIL PROCEEDINGS[*]

INTRODUCTION

An unqualified right to self-representation is guaranteed in several common law jurisdictions, including England and Wales[1] and the United States.[2] However, much criticism has been levelled in the literature at the way that litigants in person (LIPs) fare in civil litigation. It is said that the system is not impartial where LIPs are concerned because they fare worse than represented litigants. It is widely believed that LIPs tend, due to a lack of legal knowledge and skills, to be unable to represent themselves effectively, and a number of studies have shown that they are more likely than represented litigants to be subject to an adverse decision, irrespective of the merits of their cases.[3]

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[*] A modified version of this chapter has been published under the same title in (2011) 30 Civil Justice Quarterly 267.

[1] See the Legal Services Act 2007 Schedule 3 paras 1 and 2 (replacing ss 27 and 28 of the Courts and Legal Service Act 1990). Corporations can now appear through an authorised employee, but they are required to obtain judicial permission: CPR 39.6 (in the past, however, they were required to act through legal representation only; see *Charles P Kinnel & Co Ltd v Harding Wace & Co* [1918] 1 KB 405). This thesis describes the right to self-representation as 'unqualified', 'absolute' or 'near absolute' in the sense that a litigant has unfettered freedom to choose whether to proceed in person or through counsel, and that such freedom is afforded in all cases, irrespective of complexity, and to all litigants, irrespective of professional competence. Children and other protected parties, however, must have a litigation friend to conduct proceedings on their behalf: CPR Pt 21.

[2] In the United States, a right to self-representation is guaranteed in Federal legislation, namely in 28 USC s 1654, which reproduces section 35 of the Judiciary Act of 1789. Whether such a right is constitutional remains unclear. See the discussion in chapter 2. In Hong Kong, a right to self-representation is guaranteed by Rules of the High Court Order 5 rule 6.

[3] A significant study on this point is C Seron, G Ryzin and M Frankel, 'The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment' (2001) 35 (2) Law and Society Review 419. It examined 268 landlord-tenant cases in the New York

Commentators have argued that this results from certain premises of the adversarial process, namely, that the rules of evidence and procedure are designed by and for lawyers and judges and, therefore, are difficult for LIPs to utilise to protect their rights. There is a widespread view that courts and the legal system as a whole do not do enough to help LIPs and redress the imbalance between them and represented litigants. Accordingly, it is often suggested that the rules of procedure should be simplified for the benefit of LIPs and that judges should actively assist them in presenting their cases effectively.

This chapter discusses this literature in order to reveal and assess its underlying assumptions regarding the status of the right to self-representation in civil proceedings. It suggests that the common view that the legal system fails LIPs is based on two assumptions. The first is that litigants should retain the power to decide whether to represent themselves in person or through counsel, regardless of such factors as the complexity of their case, their ability to present it, or the negative consequences their inexperience could impose on other litigants and on the administration of justice. The possibility of mandatory representation has not been debated, and legal representation has never been required as a formal prerequisite for conducting litigation in common law countries. The second assumption is that it does not suffice to permit litigants to represent themselves; rather, they must be assisted to represent themselves effectively. In

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Housing Court, all of which were estimated to have reasonable prospects of success. The judges who dealt with these cases had 'a particularly strong reputation as equitable and fair decision-makers who are willing to assist pro se defendants'. Only 22% of the represented tenants in this study received an adverse final judgment, compared with 51% of the self-represented tenants. Other similar studies are mentioned in: C Cameron and E Kelly, 'Litigants in Person in Civil Proceedings: Part I' (2002) 32 Hong Kong Law Journal 313, 317; D Swank, 'In Defense of Rules and Roles: the Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation' (2005) 54 American University Law Review 1537, 1539; Australian Institute of Judicial Administration, *Litigants in Person: Issues for Courts and Tribunals* (Victoria, 2001) 5 (http://www.aija.org.au/online/LIPREP1.pdf) (last visited 12.9.2011) (AIJA). Concerning England and Wales, see Moorhead and Sefton's empirical study of four first instance courts in civil and family cases (excluding small claims): R Moorhead and M Sefton, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (Department for Constitutional Affairs, 2005) 221–44.

other words, self-representation is so important a right that it makes demands on the system to ensure that its exercise does not place litigants at a disadvantage.

These assumptions have gone unchallenged for too long. A right to self-representation has been regarded as a natural expression of the right of access to court and, as such, has been thought to need no independent justification. This chapter suggests three possible factors that seem to have reinforced the conflation of self-representation with access to court: the long history of self-representation and the special role it has assumed in criminal proceedings; the conception of the right of access to court as a personal right that entitles its holder to utilise the procedural rights in person; and an assumption that LIPs are indigent and, therefore, only able to obtain access to justice if they are allowed to proceed in person. This chapter challenges the potential of these factors to justify an unqualified right to self-representation, suggesting that mandatory representation should be considered.

1. LIPs AND ADVERSARIAL ADJUDICATION

The basic premise of an adversarial system is that two self-interested opponents present their respective evidence and arguments before a neutral judge whose task is to establish the facts and apply the law. Stephen Landsman describes it as follows:

> The central precept of adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information from which a neutral and passive decision-maker can resolve a litigated dispute in a manner that is acceptable both to the parties and to society.[4]

This passage encapsulates three fundamental conditions that characterise an adversarial system: parties' freedom and responsibility for the presentation of evidence and

[4] S Landsman, 'A Brief Survey of the Development of the Adversarial System' (1983) 44 Ohio State Law Journal 713, 714.

arguments, judicial passivity and neutrality, and a highly structured forensic setting for the presentation of evidence and argument (including the rules of evidence and procedure, and the rules of ethics). A flaw in any one of these conditions is likely to undermine the functioning of such a system.

An adversarial mode of adjudication has been defended on several grounds. It is said to be more effective and more efficient in elucidating the relevant factual and legal aspects of a dispute because the process is operated by two self-interested rivals rather than a disinterested official inquisitor who has no direct knowledge of the facts. Furthermore, exempting the judge from the task of investigating the case helps to secure the cognitive benefits of suspended judgment and an even-handed consideration of the competing allegations. The adversarial mode of adjudication is also thought to promote public confidence in the system because by avoiding partisanship judges appear objective and professional.[5]

The extent to which adversarial adjudication delivers on its promises to minimise bias on the part of decision-makers, render justice on the merits, and promote public confidence has been the subject of considerable literature. Many have questioned these proclaimed advantages; a great deal of criticism has been levelled at the high cost of litigation in Anglo-American countries, which undermines access to the courts, and at the significant imbalance that excessive partisanship could produce, especially in situations of serious inequality between the parties. The classic target of such criticism is

[5] See e.g. L Fuller and J Randall, 'Professional Responsibility: Report of the Joint Conference' (1958) 44 American Bar Association Journal 1159, 1180; N Brooks, 'The Judge and the Adversary System', in A Linden (ed.), The Canadian Judiciary (Osgood Hall Law School, 1976), 90–116; Sir Jack Jacob, *The Fabric of English Civil Justice* (Stevens, 1987) 5–19; D Luban, *Lawyers and Justice* (Princeton University Press 1988) ch 5.

the situation in which one litigant is a large corporation represented by first-rate lawyers, with no expense spared, and the other is an individual who lacks those advantages.[6]

Where LIPs are involved, it is particularly clear that the elementary conditions of adversarial adjudication do not obtain. Because LIPs lack adequate understanding of procedural and substantive law, a passive arbiter is not presented with the 'sharp clash of proofs' that is necessary to establish a correct outcome. Their involvement renders the adversarial process largely dysfunctional and strips it of the cognitive, political and economical benefits for which it is celebrated.[7]

To what must we attribute this failure of LIPs to use the legal system effectively? The typical answer in the literature is that the adversarial system bears all the responsibility for their poor performance. Instead of enabling litigants to obtain justice, the highly structured forensic setting has become a source of hindrance, confusion and frustration to lay persons. As Cameron and Kelly observe:

> It is generally accepted that the civil justice systems in most common law jurisdictions are not 'user-friendly' for people who are unfamiliar with their machinations. The labyrinthine procedures coupled with complex legal language can render the system almost incomprehensible to anyone who is not versed in the law … [LIPS] appear to be at an immediate disadvantage because of their lack of skills and knowledge, leaving them ill-equipped to protect their interests.[8]

Such commentators do not hold merely *as a matter of fact* that LIPs fall short of protecting their rights in adversarial settings because of the complexity of the procedural

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[6] See in particular R Pound, 'The Causes for Popular Dissatisfaction with the Administration of Justice' (1956) 8 Baylor Law Review 1; J Langbein, 'The German Advantage in Civil Procedure' (1985) 52 The University of Chicago Law Review 823; M Damaska, 'Presentation of Evidence and Factfinding Precision' (1975) 123 University of Pennsylvania Law Review 1083; S Landsman, 'The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts' [1980] 29 Buffalo Law Review 487.

[7] For a detailed exposition of the failure of these benefits to accrue in cases involving LIPs, see R Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' (2007) 16 Social and Legal Studies 405.

[8] Cameron and Kelly (n 3) 318.

and evidentiary rules. They advance a further, normative dimension, namely that the complexity of procedural and evidentiary rules provides represented litigants with an unfair advantage.[9] To say that a 'system that routinely favors parties with lawyers over parties without, regardless of the merits of the cases, cannot be viewed as impartial'[10] is to say not merely that LIPs have not, as a matter of fact, fared well within adversarial settings, but also that the system is responsible for their poor performance and has a duty to help them. Holding the *system* to blame for the fact that LIPs fare worse than represented parties—and not, for example, the LIPs themselves for their poor mastery of legal rules—presumes that self-representation is a right that places demands on the system to adjust and facilitate it. Lord Woolf's observation in his Interim Report on Access to Justice (1995) reflects this line of thinking:

> Only too often the litigant in person is regarded as a problem for judges and the court system rather than *the person for whom the system of civil justice exists*. The true problem is the court system and its procedures which are still too often *inaccessible and incomprehensible to ordinary people*.[11]

Indeed, a longstanding Anglo-American tradition takes for granted the right to self-representation, considering it a natural and fundamental expression of the right of access to court. Not only has it been unthinkable to allow courts to require a litigant to hire a lawyer even when the litigant is clearly unable to conduct her own case in a meaningful way, but the legal literature has also been heavily preoccupied with finding

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[9] See e.g. J. Goldschmidt, 'The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance' (2002) 40 Family Court Review 36, 51–53, arguing that legal representation provides an 'unfair advantage' that needs to be 'eliminated' to 'secure [equal] access to justice' to the poor. Goldschmidt draws on a wider view that procedural and evidentiary rules were designed by and for professional bodies, lawyers and judges. Heber Smith best expressed this early in the last century: '[O]ur legal institutions were framed with the intention that trained advocates should be employed, and … no amount of reorganization or simplification, short of a complete overturn of the whole structure, can entirely remove the necessity for an attorney': quoted at Goldschmidt, fn 60.

[10] R Engler, 'And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks' (1999) 67 Fordham Law Review 1987, 2023. See also H Kim, 'Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to Be Heard' (1987) 96 Yale Law Journal 1641, 1644; R Moorhead, 'Access or Aggravation? Litigants in Person, McKenzie Friends and Lay Representation' (2003) 22 Civil Justice Quarterly 133, 134–5.

[11] Lord Woolf, *Access to Justice—Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) 119. See also Engler (n 10) 2069, arguing that the 'LIPs problem' is a misnomer, as it is more properly 'a *judge* problem and an *attorney* problem'.

ways to adjust the legal system to accommodate the needs of LIPs and render their representation more effective. This literature has never critically asked whether there should always be a right to appear in person, to what extent such a right requires the legal system to be adjusted to accommodate the needs of LIPs, and at what cost.

Proceeding from the assumptions that an unqualified right to self-representation is a natural good and that the legal system should render self-representation effective in obtaining justice on the merits, commentators have offered several ways in which the legal system could redress the imbalance between self-represented and legally represented litigants. One is to simplify procedural rules to render them workable by the uninitiated, such as by requesting courts to provide them with adequate facilities, written information, and explanations about procedural law by means of booklets, leaflets, CDs, web sites, computer kiosks, illustrative videotapes, etc.[12] Another category of solution focuses on the judicial role. Its proponents challenge the traditional notion of judicial impartiality-as-passivity, arguing that the requirement of passivity operates not so much as a safeguard for judicial impartiality as a factor that perpetuates the partiality of the system in favour of represented parties. To remain impartial, they further argue, judges should actively assist LIPs to present their evidence and arguments, and they should apply a more tolerant approach in addressing procedural non-compliance and admission of evidence by LIPs.[13] The proposal to assist the self-represented navigate the legal

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[12] See e.g. Lord Woolf (n 11) ch 17; D Rhode, *Access to Justice* (OUP, 2004) 81–6; Swank (n 3) 1550–1. One commentator suggests that lawyers should run classrooms, in which they would directly answer questions that LIPs have in relation to their particular cases: Kim (n 10). Bloom and Hershkoff describe an institutional solution adopted in one US federal district court in response to increasing numbers of claims filed by LIPs. A special magistrate was allocated to review all the cases filed by LIPs, with the aim of identifying frivolous claims and dispensing with them quickly, and identifying those meritorious claims that need to be re-pleaded or transferred to another district. This magistrate is expected to acquire specialisation in those specific fields in which pro se claims abound. See L Bloom and H Hershkoff, 'Federal Courts, Magistrate Judges, and the Pro Se Plaintiff' (2002) 16 Notre Dame Journal of Law, Ethics and Public Policy 475.

[13] R Zorza, 'The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications' (2004) 17 Georgetown Journal of Legal Ethics 423, 428; Engler (n 10) 2028–31;

process has been extended to court staff, mediators, and opposing lawyers, which would call for rethinking the prohibitions against unauthorised practice of law, mediators' ethical duties, and lawyers' obligations towards their clients.[14]

2. THE CONFLATION OF THE RIGHT TO SELF-REPRESENTATION WITH THE RIGHT OF ACCESS TO COURT

The need to explore the theoretical basis of a right to self-representation has been overlooked because self-representation has been considered traditionally as a natural expression of the right of access to court;[15] as such, self-representation is thought not to need any independent justification.[16] This section offers three factors—historical, conceptual and empirical—that seem to have contributed to the conflation of self-representation with access to court. While these factors may explain why self-representation has been taken for granted, they fall short of justifying a near absolute right that is immune from balancing against other legitimate interests and considerations.

Goldschmidt (n 9) 46 (arguing that citizens in a constitutional democracy have a legitimate expectation of assistance by administrative agencies, including the courts); Moorhead (n 7) 422 (arguing for relaxing the standard of relevance to facilitate better communication among the various participants in court).

14 See e.g. Engler (n 10) 2028–43; R Albrecht et al, 'Judicial Techniques for Cases Involving Self-Represented Litigants' (2003) 42 Judges Journal 16; Moorhead (n 7) 412; AIJA (n 3) 9. In *Nelson v Hilfax* [2008] EWCA Civ 1016 [59] Rix LJ (dissenting) noted that it is the traditional duty of lawyers and courts to help LIPs.

15 For example, while lamenting the heavy burdens imposed by LIPs on American courts, the United States Court of Appeal (2nd Circuit) noted that 'even given those potential burdens, there still remains a citizen's right of access to courts, a strongly held notion stretching back to the beginnings of our Republic': *Iannaccone v Law* 142 F3d 553 (1998) 557 (United States Court of Appeal, 2nd Circuit). See also Bloom and Hershkoff (n 12) 484–5; J McLaughlin, 'An Extension of the Right of Access: the Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule' (1987) 55 Fordham Law Review 1105, 1110. In the criminal context, such a right is said to be grounded in autonomy; this view is discussed in chapters 2 and 6.

16 The right of access to court is considered a constitutional right at common law: *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909, 977, [1981] 2 WLR 141 (Lord Diplock) ('*Bremer*'). It also has deep roots in the English constitutional tradition that can be traced back as far as the Magna Carta (ch 40). Furthermore, the ECtHR has recognised the right of effective access as essential to a fair trial under Article 6 of the ECHR; see *Golder v UK* (1975) 1 EHRR 524, 531–8.

2.1 The right to self-representation as a historical artefact and the influence of criminal procedure

One reason why self-representation may appear as a natural or axiomatic good is its long history. The idea that the litigant stands at the core of litigation and is free to decide whether to act in person or through counsel has remained impregnable throughout a long and dynamic history of change in almost every aspect of civil procedure. This remarkable survival of self-representation seems to have presented this form of representation as a self-evident and fundamental way through which the right of access to court can be exercised. The United States Court of Appeal (2nd Circuit), for example, highlighted the importance of a right to self-representation in civil proceedings by pointing to its long history in both English and American legal histories. In particular, it noted that such a right was recognised in the United States already in 1789, and has since 'remained constant for over 200 years'.[17] While a trial would 'almost certainly be calmer and easier for the judge to manage if [the litigant] had not decided to represent himself, such considerations do not justify refusal of the historic statutory right of self-representation'.[18]

History alone, however, does not obviate the need for normative analysis. The 'is', as we all know, does not dictate the 'ought'. That self-representation has been taken for granted for so long is not enough to justify an absolute right to self-representation. In fact, a more nuanced examination of legal history reveals that the entrenchment of self-representation derives more from its having been a matter of accepted practice—now a forgotten question—than from any deliberate recognition of its normative value as a right. While self-representation had been the common practice in litigation in early

[17] *Iannaccone v Law* (n 15) 557.

[18] *O'Reilly v The New York Times Company* 692 F2d 863 (1982) (United States Court of Appeal, 2nd Circuit) 870.

English legal history, for example in such primitive conflict-resolution methods as trial by battle, wager of law and trial by ordeal, around the middle of the thirteenth century lawyers started to appear in civil cases and began to gain power.[19] The law became so complicated that litigants could no longer conduct their own cases effectively. As self-representation became less effective, it lost its appeal and gave way to legal representation, which would gradually become the dominant form in which litigation was conducted.[20]

To understand the taboo on compulsory legal representation it may be useful to recall the only occasion in the long history of common law when legal representation was compulsory. This occurred during the Star Chamber which functioned as an instrument of political persecution through charges of libel and treason. The discredited practices of the Star Chamber led to a tendency to treat the denial of self-representation as synonymous with unfair proceedings and persecution of individuals by the state and, conversely, to consider the right to self-representation as signifying a minimal and elementary protection of liberty and autonomy. This line of thought is beautifully described by Eugene Cerruti:

> A certain unreconstructed mystique has unfortunately shielded the right of self-representation over the years. The iconic image it presents is one of a simple citizen, typically a social outcast or a proud political dissident, pleading for simple justice before a jury of his peers. It is a portrait of direct democracy at work, a self-represented individual throwing off the formal trappings of the state and its lawyers to present an unmediated narrative voice in the courtroom. It heralds the simple force of truth

[19] E Jenks, *A Short History of English Law* (3rd edn, Methuen & Co Ltd, London 1924) 203–4; F Pollock and W Maitland, *The History of English Law* (2nd edn, CUP, 1898) vol 1, 211; T Plucknett, *A Concise History of the Common Law* (5th edn, Butterworth & Co Ltd 1956) 113–8, 215; Landsman (n 4) 717–20.

[20] In the United States, this process was not straightforward because of prevailing feelings of distrust towards lawyers by newcomers to America, who viewed lawyers as responsible for ineffective and unjust delivery of justice. Commentators offer a number of explanations for these feelings: colonists had suffered legal persecution in England and therefore had animosity towards a profession that had assisted in their oppression; religious and political leaders did not want to share authority and perceived lawyers as likely to interfere with social harmony and provoke disputes; merchants and planters wanted to govern their own affairs without incurring the costs of lawyers. See in general Note, 'Right to Civil Counsel' (1966) 66 Columbia Law Review 1322, 1325–9; Rhode (n 12) 47–78; *Iannaccone v Law* (n 15) 557–8.

> against the overly rationalized power of the state, the freedom to say 'no' to both the power and the process of the prosecution. It champions a nostalgic sense of the simple liberties due the common man even in an age of highly regulated complexity.[21]

This symbolisation of self-representation may have well contributed to the perception that self-representation is a matter of general importance. The special role that it has assumed in the criminal context may have lent it an instinctive appeal that extends to the civil context as well. Indeed, proponents of self-representation often point out that it was not until 1696 that an accused in criminal cases had the right to be represented by a lawyer, and even then the right was limited to treason cases; legal representation was not allowed in felony trials until 1836.[22]

However, self-representation in the criminal context must not be allowed to shape our attitude towards it in the civil context. The former should be viewed in the context of a specific philosophy of stripping the government of as much power as possible when the physical liberty of the individual is at stake. The threat posed by the criminal process to the individual's liberty creates a significant risk of abuse of state power, and the imposition of legal representation by the same prosecuting state increases this risk. The defendant's vulnerable position is understood to entitle her to special treatment, and a right to self-representation is seen as part of this special treatment.

By contrast, this risk of abuse of state power is largely irrelevant in civil proceedings, where the parties alone, and not the state, have exclusive control over the scope and content of cases. The subject matter of typical civil cases and the remedies sought by the parties do not entail any threat to the litigants' liberty. The parties enjoy the same rights and are subject to the same obligations. Thus, since civil litigants do not

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[21] E Cerruti, 'Self-Representation in the International Arena: Striking a False Right of Spectacle' (2009) [40] Georgetown Journal of International Law 919, 921.

[22] See e.g. *Faretta v California* 422 US 806 (1975) 823, in which the United States Supreme Court recognised a constitutional right to self-representation in criminal proceedings.

enjoy special treatment, the transition from criminal to civil proceedings strips self-representation of most of its appeal. (Chapter 2 further develops this argument)

2.2 The conceptual bias: the right of access to court as a right to litigate in person

Another factor which may have contributed to the identification of the right to self-representation with the right of access to court is the intuitive notion that rights are personal and therefore should be available for exercise by their possessors directly, not only by proxy. Because procedural rights are conferred upon persons, they may appear to confer a right to exercise them *in person*, producing a right to litigate. Understanding the right of access to court in terms of a personal right makes it difficult to disentangle self-representation from access to court. For example, the Civil Procedure Rules 1998 (CPR) confer rights and impose duties upon 'parties', 'claimants' and 'defendants', while referring to them as entities separate from their 'legal representative'.[23]

This conceptual bias dominates legal discourse. Consider, for example, how Lord Diplock describes the right of access to court:

> Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to

[23] CPR 2.3 defines a 'claimant' as a 'person who makes a claim' and a 'defendant' as 'a person against whom a claim is made', while distinguishing them from their legal representative: a 'legal representative' means a barrister, a solicitor or an otherwise authorised person 'who has been instructed to act for a party in relation to proceedings'. In *R v Board of Visitors of HM Prison* [1988] AC 379 (HL) at 391–5, the House of Lords decided, in the context of a prisoner's right to counsel before a disciplinary committee, that self-representation was a necessary part of natural justice whereas legal representation was not. The view of self-representation as a 'natural right' was also noted by the United States Supreme Court in *Faretta v California* (n 22) fn 39.

> avail himself of this right of access to the court lies exclusively within the plaintiff's choice …[24]

So the right of access to court is given to 'every citizen' who is free to choose 'the role of plaintiff', and it is 'exclusively' up to that citizen 'whether or not to avail himself of this right of access to the court'. The personal nature of procedural rights has been highlighted in express terms by the United States Supreme Court in *Faretta v California* in relation to criminal proceedings:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature of the accusation', who must be 'confronted with witnesses against him' …[25]

The identification of self-representation with the right of access to court also manifests in the way Adrian Zuckerman describes the relationship between self-representation and legal representation. In his view, 'access to court would be of little value without an *additional* right to professional assistance in litigation'.[26] The right of access is distinguished from legal representation; the latter is identified as an additional right to the right of access to court, which may preclude the view that legal representation could well be an *exercise* of the right of access to court.

The supremacy of self-representation over legal representation in the understanding of the right of access to court is a conceptual fallacy. Legal representation need not be subordinate and secondary to self-representation; nor is self-representation conceptually warranted from the right of access to court. Access to court can be fully (and often more effectively) exercised through legal representation.

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[24] The *Bremer* case (n 16) 977.

[25] *Faretta v California* (n 22) 819; the Court further explained that: 'The counsel provision … speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant' (819–20).

[26] A Zuckerman, *Civil Procedure: Principles of Practice* (2nd edn, Sweet & Maxwell, 2006) [2.148]; see also [2.147] and A Zuckerman, 'Practice and Procedure' in *All England Law Reports Annual Review 1999* (Butterworths, 1999) 273, 298–9.

In the light of this proposed perception of legal representation as a form in which the right of access to court can be exercised, it is possible to argue further that the CPR refer to the 'parties' as opposed to their lawyers merely because it is the parties themselves who would ultimately be legally liable and affected by the proceedings. Consequently, procedural rights are conferred upon them as legal entities; as such, another right to conduct litigation in person does not necessarily follow. As legal entities, litigants would be still accorded full access to court even when they are required to exercise this right through lawyers.

The upshot of this analysis is that the scopes of both self-representation and legal representation depend upon a normative analysis. It is not legitimate to assume that the right of access to court imposes an unqualified right to self-representation without allowing room for compulsory legal representation in certain circumstances, for example when the case is too complex to be dealt with by a legally untrained person.

2.3 Self-representation as a minimal protection for the poor

The tendency to take for granted an unrestricted right to self-representation cannot be fully understood without taking account of the widespread belief that LIPs are typically unrepresented because they cannot afford legal representation. This perception underlies the many suggestions made in the literature for improving their chances of prevailing. As one commentator notes:

> Recently … there has finally been some growing attention to the question of how judges should deal with [cases involving LIPs] and of their implications for the judicial role … The urgency of this attention has been highlighted by the growing realisation that those who appear in court without lawyers are, as a general matter, only 'choosing' to do so in the most formal sense. Rather, that 'choice' is a product of their economic situation and the cost of counsel.[27]

[27] Zorza (n 13) 424–5. See also Engler (n 10) 2027 (noting that LIPs at least in certain courts must be assumed as compulsorily rather than voluntarily self-represented); McLaughlin (n 15) 1132 (arguing that

In the light of such belief, commentators consider self-representation as a minimal protection for the vulnerable, any restriction of which would amount to an assault against those who are already at the margins of society; recourse to court is the last chance for the least protected to defend their rights. By the same token, the additional costs and delays caused by the ineptitude of LIPs and the extra resources required to make self-representation effective, would seem a necessary evil.[28]

2.3.1 The empirical aspect

The belief that LIPs are poor is problematic because it implies an overly simplistic division between affluent, represented litigants and poor, self-represented-litigants; clearly not all represented litigants are well off and not all the self-represented are poor. It is not even clear to what extent one could safely presume that LIPs tend to be poor. There is not sufficient empirical information to establish a general claim that LIPs choose to represent themselves out of financial necessity; financial considerations may be among the reasons for that choice, but financial considerations are not always tantamount to financial necessity. Nor may one presume that litigants do not opt for self-representation unless they are unable to afford legal representation. Litigants may be moved to proceed in person by a variety of reasons that have nothing to do with

'most pro se litigants represent themselves because of an economic inability to procure counsel'); J Bradlow, 'Procedural Due Process Rights of Pro Se Civil Litigants' (1988) 55 The University of Chicago Law Review 659, 669–70 (indicating that most LIPs are involuntarily unrepresented); Cameron and Kelly (n 3) 318 (indicating that 'Orthodox thinking has it that a [LIP] is someone who cannot afford to hire a lawyer'); R Pearce, 'Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help' 73 Fordham Law Review 969, 973 (arguing that millions of Americans lack access to justice by virtue of low or middle income); Lord Woolf (n 11) ch 17; Bloom and Hershkoff (n 12) at 512 fn 185 and accompanying text.

[28] This perception of LIPs coexists with another equally one-sided perception of LIPs as 'pests, nuts, or kooks', 'militia-affiliated constitutionalists', 'underprivileged' or 'uneducated' : see e.g. J Goldschmidt, 'Judicial Ethics and Assistance to Self-Represented Litigants' (2007) 28 The Justice System Journal 324, 325; Goldschmidt (n 9) 46 (and fn 83–4); Swank (n 3) 1547–8. Such descriptions imply more than that LIPs lack legal skills to present their cases; they also imply that the cases they usually bring forward are unmeritorious. Furthermore, LIPs are sometimes associated with the burdensome phenomenon of vexatious litigants who bring forward irrational, illogical or simply hopeless cases with the aim of harassing others: see e.g. Cameron and Kelly (n 3) 319; Moorhead (n 10) 133, 150.

financial capability, such as enhanced self-confidence or self-reliance, greater civic or political literacy,[29] individualism, a sense of consumerism, failure to find a lawyer who sees prospects of the case's success,[30] the hope of more indulgent treatment by the court,[31] a lack of confidence in lawyers or an inflated sense of confidence in the legal system expressed in the belief that justice will prevail with or without representation.[32] In Hazel Genn's comprehensive and wide-ranging empirical study, the most common reason for which the litigants surveyed in this study attended court or tribunal hearings in person was the belief that legal representation was unnecessary.[33] Likewise, Moorhead and Sefton's study of four first-instance English courts found that a significant portion of LIPs deliberately chose not to be represented due to believing in their ability to manage their cases alone or relying on the court's lenient treatment of LIPs. In this study, even those who mentioned legal fees as a consideration in their decision usually mentioned additional reasons, such as distrust of lawyers or self-reliance.[34]

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[29] See e.g. *Iannaccone v Law* (n 15) 558: 'This broad literacy and the people's political involvement in their democratic institutions transformed the average American into a citizen-lawyer'.

[30] ibid 557: 'sometimes a *pro se* litigant appears simply for the purpose of using the courtroom to advance a political or social agenda, or to pursue a matter that is legally unredressable'.

[31] For example, in *Tombstone Limited v Raja* [2008] EWCA Civ 1444, [2009] 1 WLR 1143, 1157 a litigant who decided to act in person had 'ample funding ... to obtain legal representation if he wanted to' but, instead, 'he always gave anxious consideration to whether it suited his ... interests and whether it was tactically advantageous to be legally represented and decided accordingly'.

[32] For a discussion of these potential reasons see e.g. Swank (n 3) 1572; AIJA (n 3) 3: 'A person may deliberately choose to be self-represented, believing that they do not need a lawyer and/or that they will obtain an advantage in being self-represented... They may also be deeply suspicious or resentful of the legal profession or wish to use the court or tribunal as a soapbox to air grievances'. Rhode cites one study in which half of the self-represented litigants surveyed thought that the case was simple enough to handle without legal representation, while only a third reported that they could not afford a lawyer. It is important to note that this survey relied on the subjective evaluation of litigants themselves, which may not necessarily reflect poverty by objective standards as opposed to an ordinary financial decision reflecting preference based on cost-benefit calculation. Rhode also reports that in some American states the typical LIP is 'at the upper level of the middle-class income and educational range': Rhode (n 12) 82.

[33] Financial need was the second most common reason: H Genn, *Paths to Justice: What People Do and Think about Going to Law* (Hart Publishing, 1999) 220. A similar finding was reported in relation to respondents who attended mediation sessions in person; see p 217.

[34] Moorhead and Sefton (n 3) 252–3.

2.3.2 The need for a principled attitude to self-representation

Irrespective of the empirical support for this view, the perception of LIPs as lacking financial means seems to have hindered a more general discussion of the desirable scope of self-representation. The right to self-representation is a general right that is conferred upon all litigants, not just those who cannot afford lawyers. The literature completely overlooks the more general question of whether an absolute entitlement to self-representation is always desirable, irrespective of financial inability. What started as an attempt to help the poor has yielded an entitlement to effective self-representation for all, regardless of means. Indeed, the literature advocating the facilitation of self-representation has not proposed conditioning it on proof of inability to pay for a lawyer.

What remains an open question is whether litigants should be allowed to represent themselves *as a matter of principle*, regardless of whether they can afford legal representation. One may wonder why a person with sufficient means to afford representation should have a right to litigate in person no matter how incapable she may be of presenting her case, or irrespective of the costs she may cause to her opponent and to the administration of justice as a result of failing to use the system properly. Likewise, one may wonder why a litigant who has the financial means to hire counsel but nevertheless decides to proceed in person should also benefit from the proposals urging judges to actively assist LIPs.

To answer these questions we must decide whether self-representation is valuable on its own, rather than accepting its merit as an article of faith. As matters currently stand, the interests of LIPs override the interests of all other litigants all the time, which is a difficult position to justify. A more balanced approach requires taking into account the legitimate interests of represented litigants who are also entitled to protection against the extra delays and costs engendered by LIPs or by actions taken to assist them.[35]

3. THE IMPACT OF SELF-REPRESENTATION ON THE ADMINISTRATION OF JUSTICE

Litigants in person strain courts resources. As often observed, '[t]he increase in pro se litigation has disrupted the efficiency of the courts, causing courtroom delays and overburdening judges, attorneys, and court staff'.[36] Because of their lack of legal knowledge, LIPs 'are likely to neglect time limits, miss court deadlines, and have problems understanding and applying the procedural and substantive law pertaining to their claim'.[37] The problems this creates go beyond the cases in which LIPs are involved; due to their large numbers, LIPs obstruct the general administration of justice and impact on other cases in which they are not involved.[38] Judges, court staff and the

[35] The represented parties' claim to more efficient proceedings could be said to be even stronger when the justice system is not funded by the taxpayer but, rather, by the fees paid by litigants. For a review of the policy change from partial public subsidy of courts towards a service which is to pay for itself, see H Genn, *Judging Civil Justice* (The Hamlyn Lectures 2008, CUP, 2010) 45–52.

[36] Swank (n 3) 1547. Moorhead (n 7) observes at 405 that '[LIPs] disturb the normal conventions of a courtroom and thus pose particular challenges to the judicial craft, impacting on the judges' ability to behave consistently; taxing their skills of communication and court management; and forcing judges to balance the competing expectations of professional and lay audience within the courtroom'. See also B Snukals and G Sturtevant, 'Pro se Litigation: Best Practices from a Judge's Perspective' (2007) 42 University of Richmond Law Review 93, 95–9.

[37] T Buxton, 'Foreign Solutions to the U.S. *Pro Se* Phenomenon' (2002) 34 Case Western Reserve Journal of International Law 103, 114. In *Tombstone Limited v Raja* (n 31), which dealt with procedural irregularities in obtaining an order to amend a writ of sequestration, it was noted at 1149–50 that: 'Mr van Hoogstraten gave notice of his intention to act in person. This was a decision that he made at various crucial stages in the civil proceedings. While accepting that he was entitled to do this for his own reasons, Lightman J commented ... that the decision "played a large part in giving rise to the difficulties, confusion and mistakes which later arose". The result was that Peter Smith J, who made the orders that have led to these claims, did not have at critical stages of the litigation the assistance of counsel on behalf of Mr van Hoogstraten'.

[38] See Snukals and Sturtevant (n 36) 93: 'The clogged dockets of general district courts are a testament to the prevalence of pro se litigation in Virginia'; Moorhead and Sefton (n 3) finding that there were high rates of LIPs in four English courts; Moorhead (n 10) arguing that in the UK there has been an apparent increase in the numbers of LIPs and that the phenomenon is an international concern (citing other studies at fns 2 and 3); Zorza (n 13) concluding that their numbers are 'hugely increased' in the United States, based on the empirical data cited at fn 1; Engler (n 10) 1987 estimating that 'unrepresented litigants are flooding [American] courts'; Swank (n 3) fns 6–18 and the accompanying text citing empirical data showing the large numbers of LIPs and recent increase in US State and Federal courts; Cameron and

opponent's lawyer are likely to expend extra resources on dealing with LIPs' non-compliance with procedures or with unnecessary applications made by them. They may not be able to take for granted matters that could have been taken for granted had all the litigants been represented.[39] As we shall see in chapter 5.2, although judges often stress that LIPs are entitled to no special allowances and should expect to be held to the same rules as lawyers, putting this principle into practice has proved too difficult for many of them. Understandably, judges tend to apply a more lenient approach to LIPs and tolerate their breaches of the rules, which in turn increases the inefficiency of the proceedings.[40]

Although these inefficiencies are fully acknowledged in the literature, commentators urge the legal system, in essence, to compound them, by requiring judges, court staff and others to go out of their way to assist LIPs. Such an approach overlooks the potential difficulties created for other users of the legal system and their equally legitimate interests. To force represented litigants to bear the extra costs and delays resulting from actions taken to assist LIPs is to force them to subsidise the self-represented, which is arbitrary.[41] There is no justification for imposing the costs of a

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Kelly (n 3) 313 estimating that the numbers of LIPs in Hong Kong as in other common law countries have increased significantly in recent years.

[39] For example, when the parties are represented an agreed judgment may be entered by a court officer without much consideration. However, this facility is not available when a LIP is involved (CPR 40.6(2)). The litigants will have to apply to the court, which will want to ensure that the LIP is fully aware of the consequences of entering the judgment; to this end, a hearing would normally be required. See also Cameron and Kelly (n 3) 335, explaining that lawyers may need to explain certain procedural requirements in more detail than they would otherwise have been required to; Snukals and Sturtevant (n 36) 95: 'The unintended consequences of the current state of pro se litigation in Virginia are often expensive and time-consuming for the court system, attorneys, and represented litigants, and can be disastrous for those who self-represent'; Buxton (n 37) 115.

[40] See in general Albrecht et al (n 14); Cerruti (n 21) 961; S Livingston-Allen, '*Faretta*: Self-Representation or Legal-Misrepresentation?' (2005) 90 Iowa Law Review 1553, 1557.

[41] For an interesting discussion of general questions concerning who should bear the costs of the implementation of social policy and the extent to which it is legitimate to impose such costs on specific members of the public rather than society at large, see M Kelman, *Strategy or Principle: The Choice between Regulation and Taxation* (The University of Michigan Press 1999); Samuel Issacharoff, 'Bearing the Costs' (2000) 53 Stanford Law Review 519 (discussing such examples as whether it is legitimate to preclude landlords from increasing rents should a tenant suffer an adverse financial event, such as illness or unemployment, or require stores to have significant alternations to their premises, at their own expense,

right to self-representation, exercised by litigants who may or may not lack financial means, on represented litigants whose ability to afford their own lawyer is likewise indeterminate. Justice for the self-represented, if achievable, must not translate into injustice for others.[42] Public confidence cannot be maintained without a balanced approach that acknowledges all the various competing interests, including that of represented litigants in protection against the cost of extra judicial activity which they are forced to incur merely because they managed, in some instances with considerable difficulty, to afford counsel. Cost and time are important dimensions of justice that are no less important than justice on the merits.[43] The concern for the general efficiency of the administration of justice manifests in the overriding objective of having courts dispose of cases expeditiously, without incurring disproportionate costs, and taking into account 'the need to allot resources to other cases' (CPR 1.1). This entails a wider view of the phenomenon of self-representation, rendering unsustainable the position taken in the literature (and sometimes in case law) that the legitimate interests of other participants in more affordable and expeditious justice should always be overridden by the needs of LIPs. When a litigant in person lacks the skills and expertise to conduct her case competently, and when her self-representation threatens to impose a disproportionate burden on court resources, the court should be entitled to require the litigant to obtain legal representation as a prerequisite for proceeding with the case.

The need to abandon the notion that self-representation can never be denied is illustrated by the phenomenon of 'vexatious litigants'. These are litigants, normally LIPs, who abuse the process and inflict disproportionate costs on courts by habitually and

to render them accessible to people with physical disabilities, or ask greengrocers to incur the costs of not charging customers who has lost their means of livelihood).

[42] The capacity of costs order to alleviate this injustice is discussed in chapter 8.4.1.

[43] This concept of three-dimensional justice is discussed in detail at A Zuckerman, 'Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments' (1994) 14 Oxford Journal of Legal Studies 353.

persistently filing nuisance claims for the purpose of harassing, intimidating and wearing down others. The main way in which such vexatious litigants are dealt with is to require them to obtain judicial permission before initiating proceedings or making applications;[44] it might be a more efficient solution to require such litigants to proceed only through counsel. While not all LIPs are vexatious litigants, this extreme form of litigation in person demonstrates the need to abandon the position that self-representation can never be denied.

Moreover, the interests of LIPs are not necessarily promoted by a right to self-representation. Chapters 4 and 5 shall show that LIPs are unlikely to benefit significantly from the legal process in complex cases and, furthermore, that except in the most straightforward and simple cases, judicial assistance to LIPs is unlikely to improve substantially their chances of prevailing. This is why many civil law countries, where judges are more active in conducting the proceedings than in common law systems, have long restricted self-representation in both civil and criminal proceedings.[45] If compulsory legal representation is appropriate in civil law jurisdictions, it should be even more appropriate in adversarial systems where the role of parties is far more demanding.

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[44] See Senior Courts Act 1981 s. 42; CPR 3.11 and CPR PD 3C. For a general discussion of this phenomenon, see *Bhamjee v Forsdick* [2003] EWCA Civ 1113 [20]; *Ebert v Venvil* [2000] Ch 484 (CA) 495; *Attorney General v Barker* [2000] 1 FLR 759 (HC) [22]. Vexatious litigants are treated in a similar way in other common law jurisdictions, see e.g. Vexatious Proceedings Act 2008 (NSW); Vexatious Proceedings Act 2002 (WA); s 21 of the Supreme Court Act (1986) (Victoria); Vexatious Proceedings Act 2007 (NT); 2005 Texas Civil Practice and Remedies Code s 11.054; 2009 California Code of Civil Procedure s 391–391.7; 2010 Florida Statutes s 68.093; Hawaii Revised Statutes s 634J; Ohio Revised Code s 2323.52.

[45] Countries in which legal representation is generally mandatory in civil proceedings include: Austria, Belgium (before the court of cassation), France, Germany, Greece, Italy, Luxembourg, the Netherlands; Poland (before the supreme court), Portugal, and Spain; this requirement would normally not apply to small claims cases and, sometimes, to other specific tribunals; see e.g. A Layton and H Mercer (eds), *European Civil Practice* (2nd edn, Thomson, Sweet & Maxwell, 2004) vol 2; P Murray and R Sturner, German Civil Justice (Carolina Academic Press 2004) ch 6; E Blankenburg, 'Civil Justice: Access, Cost, and Expedition—The Netherlands' in A Zuckerman (ed) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP, 1999). For criminal proceedings, see G Boas, 'The Right to Self-Representation in International and Domestic Criminal Law: Limitation and Qualifications on that Right' in H Abtahi and G Boas (eds), *Dynamics of International Criminal Justice* (Martinus Nijhoff Publishers, 2006) 39; see also n 47 in chapter 3.4.

3.1 The costs of self-representation versus legal representation

Concerning the claim that LIPs hinder the efficient administration of justice, a clarification is in order. This claim has not been adequately tested empirically and, presumably, empirical substantiation may be difficult to obtain. It is fully conceivable that, sometimes, it may be true that costs and delays increase most when litigants are represented. Due to their legal knowledge and experience lawyers are able to make more extensive use of the legal system than LIPs. In such cases, the sheer costs for the administration of justice may be higher with legal representation than otherwise.

Nonetheless, it is not valid to disparage lawyers generally for incurring costs by making more extensive use of the system than LIPs; insofar as costs served the disposal of the case, they may be viewed as having been incurred to enforce the legal rights of the represented party, which is entirely appropriate. Conversely, if LIPs fail to avail themselves of court resources due to their lack of competence, the underlying purpose of the legal process is defeated, and the savings thus realised are not justifiable as a matter of public policy. Thus, the correct standard for comparing the costs of cases involving lawyers to those involving LIPs must be one that looks at the nature of expenditures and not just the absolute costs incurred in each situation.

While lawyers may sometimes inflict unnecessary costs on the system, they cannot fairly be said to increase the risk of inappropriate use of the legal system. Moreover, we need to distinguish making unsuccessful applications from failing to use the system. As long as an application is sensible or arguable, it is legitimate even if ultimately unsuccessful. For example, a lawyer's application for disclosure might be dismissed on the grounds that the information sought is not relevant to the disposal of the case, but this might be a legitimate undertaking on behalf of the client. The LIP's case, by contrast, is more likely to be characterised by a fundamental and systematic failure to grasp the process and make arguable applications or present the case according to the law in a sensible and reasonable manner. For example, the LIP may fail to consult an expert at an early stage, to nominate the correct defendants, to present admissible evidence, or to serve pleadings correctly. Worse yet, the LIP may fail to grasp the substantive law pertinent to her case and therefore fail to identify the relevant facts and items of evidence.[46] This type of error is typical of LIPs and is best prevented by restricting self-representation.

CONCLUSION

This chapter has challenged the common view that litigants should be free to choose to litigate in person. It has objected to the conflation of a right to self-representation with the right of access to court and reviewed its historical, conceptual and empirical grounds. This chapter has argued that an unfettered right to self-representation is not a requirement of the right of access to court. Assessing the proper scope of self-representation requires a more balanced approach that considers not only the laudable aim of protecting the rights of LIPs but also the legitimate interests of represented litigants in avoiding unnecessary costs and delays. The next chapter examines the justifications given in case law for a right to self-representation.

[46] See e.g. Moorhead (n 7) at 409 who, based on his empirical research, notes that LIPs 'participated at a lower intensity but made more mistakes than represented parties' lawyers (who made plenty of mistakes themselves) and were more likely to make more serious errors'.

CHAPTER 2

SELF-REPRESENTATION IN ENGLISH AND AMERICAN CASE LAW: BETWEEN A DOG THAT DID NOT BARK AND ANOTHER THAT BARKED TOO LOUDLY

INTRODUCTION

English case law contains hardly any substantial discussion of self-representation in either civil or criminal proceedings. It contains only occasional statements that litigants in civil proceedings and defendants in criminal proceedings have a right to proceed in person. The only substantial discussion of the right to self-representation in all common law jurisdictions has been conducted by the United States Supreme Court (USSC) in the seminal case of *Faretta v California* (*Faretta*), in which a constitutional right to self-representation in criminal proceedings was established.[1] While this right was formally grounded in the Sixth Amendment (the American parallel of Article 6(3) of the European Convention on Human Rights (ECHR)), its theoretical rationale was derived from the value of freedom of choice; the USSC held that defendants should be free to decide whether or not to avail themselves of legal representation, and that the state must not interfere in their decision. The USSC has not yet discussed the status of the right to

[1] *Faretta v California* 422 US 806 (1975) (*Faretta*).

self-representation in civil proceedings, and lower courts seem to have contradictory views as to whether or not such a right is protected by the US Constitution.[2]

The present chapter argues that the value of autonomy was understood by the USSC in a specific way that is closely related to the unique features of the criminal process. It argues that the high importance attached by the USSC to the defendant's freedom to decide on his representation was derived from the specific nature of the criminal process as being one that poses a threat to individual liberty. The vulnerable position of the defendant, who bears the risk of imprisonment or even death, is thought to entitle him to be free to stand alone in his hour of trial. Furthermore, since the criminal process is initiated and dominated by state officials who aim to exercise the state's monopoly over the use of force, the risk of abuse of state power weighs against furnishing the state with the additional power to 'interfere', as it were, in the defendant's representation through the assignment of counsel.

Having thus characterised the reasoning in *Faretta*, this chapter goes on to argue that this reasoning is unpersuasive in civil proceedings, which pose no threat to personal liberty and in which no single party bears a special risk of error or is entitled to special protections or allowances. Furthermore, this chapter draws attention to the fact that, since its inception, the *Faretta* ruling has generated a great deal of criticism, both in case law and literature. This criticism hinges upon the detrimental impact of self-

[2] For example, in *O'Reilly v The New York Times Company* 692 F2d 863 (1982) 870 (*O'Reilly*) the United States Court of Appeal (2nd Circuit) indicated that there 'is no constitutional right in the particular circumstances of this case for Father O'Reilly to be permitted to ... represent himself ... The right while statutory rather than constitutional is nonetheless entitled to respect ...'. In *Andrews v Betchel Power Corporation* 780 F2d 124 (1985) 137 the Court of Appeal (1st Circuit) similarly indicated that 'there is no constitutional right to self-representation in civil cases'. In *Iannaccone v Law* 142 F3d 553 (1998) 557–8 the Court of Appeal (2nd Circuit) expressed a more ambivalent view. On the one hand, it distinguished the decision in *Faretta* by its focus on criminal proceedings, and further distinguished between criminal and civil proceedings, implying that the *Faretta* reasoning did not apply to civil proceedings. However, on the other hand, it highlighted the historical importance of self-representation in civil proceedings, and at times referred to it as a 'basic' or 'natural' right. In *Berrios v New York City Housing Authority* 564 F3d 130 (2009) 133 the same court referred to the right to self-representation as 'constitutional', but it did so in passing. In all these decisions, no substantial discussion has been conducted with regard to the possible rationales for a right to self-representation, except for *Iannoccone*, which reviewed the historical importance of such a right in the civil context.

representation on court resources and on the integrity of criminal proceedings. As a result, American courts have curtailed the scope of *Faretta* and undermined its underlying justification, providing clear indications that even in its stronghold, the criminal context, self-representation is unlikely to remain a fundamental right.

The structure of this chapter is as follows:

Section 1 discusses English case law, showing that although it has recognised a right to self-representation without discussing the rationales behind it, there are significant indications that English courts do not consider such a right to be fundamental. **Section 2** discusses the decision in *Faretta* and shows that its main theoretical justification is specific to criminal proceedings and is therefore unpersuasive in the civil context. **Section 3** outlines the major criticism that the ruling in *Faretta* has attracted, showing that similar criticism is applicable to a right to self-representation in civil proceedings as well. **Section 4** describes the important ways in which the scope of *Faretta* has been curtailed and its underlying philosophy undermined, which further undermines the case for a right to self-representation in civil proceedings.

1. SELF-REPRESENTATION IN ENGLISH CASE LAW: THE DOG THAT DID NOT BARK

> Gregory (Scotland Yard detective): Is there any other point to which you would wish to draw my attention?
> Holmes: To the curious incident of the dog in the night-time.
> Gregory: The dog did nothing in the night-time.
> Holmes: That was the curious incident.
> (Sir Arthur Conan Doyle, *The Memoirs of Sherlock Holmes*, the 'Silver Blaze' episode)

A thorough discussion of self-representation is absent in English case law. There are only a few cases that state the rule that a defendant has a right to represent himself, and even these offer little guidance on the scope of, and the justification for, such a right.

The fact that on those few occasions English courts have refrained from attaching a specific value to self-representation or using strong rhetoric to mark their commitment to it, coupled with a significant curtailment of its exercise, suggests that English courts do not consider self-representation in criminal proceedings to be a fundamental right. In Sir Conan Doyle's story of 'Silver Blaze', English courts would be the dog that did not bark.

1.1 The 'use it or lose it' approach

In *R v Woodward*[3] the defendant's public lawyer withdrew shortly before the beginning of the trial and a different lawyer was assigned to the defendant. The defendant objected to this last-minute change and applied for permission to defend himself in person on the grounds that he had not had an adequate opportunity to consult with the new counsel. The court refused this request, and during the trial it further rejected the defendant's attempts to make observations or pose questions to witnesses. In the end, the defendant was convicted and he therefore appealed. While acknowledging that 'there was a good deal of evidence against the appellant', the Court of Criminal Appeal quashed his conviction solely because counsel was imposed on him against his will. In doing so, the Court articulated the following general rule:

> ... no person charged with a criminal offence can have counsel forced upon him against his will. ... [the appellant] was refused what we think was his right to make his own defence to the jury instead of having it made for him by counsel.[4]

However, the Court added an important qualification; it noted that this rule is not absolute and that a defendant has to assert his right to self-representation in a timely manner. As long as he asserts his right before the beginning of the trial, he would be entitled to proceed in person. At the later stage, however, proceeding in person would

[3] *R v Woodward* [1944] KB 118 (Court of Criminal Appeal).

[4] ibid. See also 3 *Halsbury's Laws of England* (4th edn, reissued 2005) [663].

require judicial permission, and the more the trial progresses the less likely courts would be to permit self-representation.

Further guidelines on how judicial discretion was to be exercised can hardly be found in later case law. However, there is evidence for a general reluctance to permit self-representation. This manifests in the very principle that the timing of the defendant's request to proceed in person could work only against self-representation, not in favour of it. Consider the perjury case of *R v Lyons*.[5] In this case, the defendant requested to dispose of his lawyer at the end of the prosecution case, in order to present his defence in person. Not only did the trial judge refuse to discharge counsel and allow the defendant to proceed in person, but he also refused to allow the defendant to state the reasons for his request.[6] The Court of Appeal upheld this decision, noting that both decisions, whether to permit self-representation and whether to allow the defendant to express his reasons, are entirely subject to judicial discretion.[7]

The fact that the timing of this denial of self-representation was not taken into account by the Court indicates that a right to self-representation is not important. It was denied when it was the defendant's turn to present his defence, a point at which the denial of self-representation could be criticised as one that muzzled the defendant 'at the very moment at which it was his turn to tell his side of the story'.[8] More importantly,

[5] *R v Lyons* (1979) 68 Cr App R 104 (CA).

[6] The law report does not disclose the reasons for which the trial judge acted in this manner. It also seems that no reasons were given by the trial judge because the Court of Appeal had to speculate about the reason for the trial judge's decision, observing that '[m]atters might have come out which might have been extremely embarrassing for the judge': ibid 107.

[7] The Court noted, though, that '[i]t may well be that in the vast majority of cases a judge, faced with an application to dispense with counsel, *in the circumstances of this case* would allow the application. ... It may well be that in most cases the appellant would be allowed to state his reasons. But at the end of the day it is a matter for the discretion of the learned judge, and we have come to the conclusion that he was perfectly entitled to make his decision in the way he did in this case, namely, to refuse the appellant's application, and that it is quite impossible to say that the fact that he did not allow the appellant to give his reasons invalidates the exercise of his discretion' (ibid, 108). Given how the case was concluded, it seems that this general instruction was merely lip-service.

[8] Such a criticism was raised by Damaska against the decision of the Trial Chamber of the ICTY to impose legal representation on Milosevic precisely at the outset of the defence: M Damaska, 'Assignment

the Court of Appeal considered the question of self-representation as being a matter of ordinary case management which requires no special attention or consideration. In other words, self-representation weighs so lightly in the balance that a decision to deny would be affirmed even when the trial judge neither heard the defendant's reasons nor provided his own reasons for denying it.[9] This also means that a decision to deny self-representation is almost immune from appeal, being a matter of procedural discretion.

The rule that self-representation is an entitlement only if asserted at the beginning of the trial reflects a bias against self-representation. Allowing a defendant the freedom to switch from self-representation to legal representation at any stage, while restricting his freedom to make the opposite choice of switching from legal representation to self-representation to the pre-trial stage, means that the choice of self-representation is always revocable, whereas the choice of legal representation could be revoked only by permission.

The bias against self-representation is further illuminated by the different consequences resulting from the denial of self-representation as opposed to the denial of legal representation at the trial stage. While the denial of self-representation and the imposition of legal representation were tolerated and treated as discretionary case management decisions in *R v Lyons*, the denial of legal representation and the imposition of self-representation were reasons to quash a conviction in *R v Jisl (2000)*.[10] In this case, a defendant requested, at the trial stage, to discharge his defence lawyer in order to seek alternative representation, but was prohibited from doing so and 'forced' to proceed in person. This decision was faulted by the Court of Appeal for denying the defendant the benefit of legal representation, even though self-representation is a form of

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of Counsel and Perceptions of Fairness' (2005) 3 Journal of International Criminal Justice 3, 7. For further discussion of the ICTY's case law see chapter 3.

[9] See n 6 above.

[10] R *v Jisl et al,* Unreported, 14 July 2000 (CA).

representation. Presumably, the obvious reason for the Court's decision was that self-representation is not an adequate safeguard and therefore must not be allowed to serve as a 'sword' against the defendant and deny him justice. If this was the case, however, why distinguish between the trial and pre-trial stages as a criterion for whether self-representation is a matter of right or of judicial discretion?

1.2 The distinction between the trial and pre-trial stages is arbitrary

The described distinction—between a defendant who chose to proceed in person at the outset, and a defendant who had first accepted legal representation but later changed his mind—is puzzling and requires further attention. If the defendant's freedom to represent himself is valuable and justifies affording him such a right at the outset of the trial, why should such freedom be expropriated when the trial progresses? Likewise, if the defendant's wish to proceed in person is not immune from judicial intervention, why should such intervention be restricted to defendants who first chose to be legally represented and subsequently regretted their choice? If there is no principled objection to judicial supervision over self-representation, there is no valid reason why this supervision should be limited to the trial stage. In fact, the later that self-representation is asserted the less detrimental it is to the management of the case and to the defendant's interest. Moreover, if the question of representation should be supervised by the judge, there is no valid reason to consider just the timing of the decision to proceed in person, and not other considerations, such as the impact of self-representation on the administration of justice and the fairness of the proceedings, considerations already taken into account to restrict other procedural rights of the defendant, such as cross-examination, expert evidence, etc.[11]

[11] See e.g. CPR Parts 32 and 35.

1.3 A possible historical explanation

It might be helpful to look briefly into the origins of the pre-trial/trial distinction. The rule that defendants should decide at the outset whether to proceed in person can at least be traced as far back as 1865, to the case of *R v Maybury*, where the Queen's Bench stated the rule that:

> When a party appears in court by counsel and the cause is on and the counsel has been fully seised of it, his authority cannot be revoked by his client so as to give the client a right himself to address the court. But if counsel is not so seised, as where, upon a motion, the hearing has proceeded no further than the reading of the affidavits and the counsel has addressed no arguments to the court, he may at the instance of his client be permitted to withdraw and the client himself may be heard.[12]

It seems that this decision is a remnant of a long history of hostility against legal representation in criminal proceedings. For centuries, defendants in serious crimes were not allowed to retain counsel (except for the limited purpose of making legal submissions, which was a rare incidence as most disputes were factual). A full right to legal representation was first recognised in treason cases only in 1695, and in felony only as late as 1836 through the Prisoners' Counsel Act.[13] According to John Langbein, for many centuries the criminal process was structured in a way that systematically exerted pressure on defendants to speak for themselves in person, and as a result self-representation dominated criminal defences.[14] Indeed, English legal history is not short

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[12] *R v Maybury* 11 LTR (n.s.) 566 (1865) (QB) (Cockurn CJ).

[13] See Sir William Holdsworth, *A History of English Law* (Sweet & Maxwell, London 1938 (Rep 1966)) vol 11, 555.

[14] Langbein notes that the criminal trial was 'a lawyer free contest of amateurs'. The prosecution, too, was not represented by counsel even though it was not prohibited from doing so. Langbein quotes a French observer who, visiting England in 1820, was astonished to find this system still in place. 'The logic of the early modern criminal trial', writes Langbein, 'was to pressure the accused to speak, either to clear himself or to hang himself. ... Allowing counsel to meddle with the fact-adducing process would interfere with the central dynamic of the trial'. Moreover, according to Langbein the denial of legal representation was only one of many other attributes that put pressure on the defendant to speak in person; see J Langbein, *The Origins of Adversary Criminal Trial* (OUP, 2003) 36; see also 11, 26–61.

of reoccurring anti-lawyer sentiments[15] and accusations of lawyers being unnecessary and harmful to the judicial endeavour to achieve justice.[16] Moreover, legal representation was treated as a luxury, a privilege that only rich people could enjoy.[17]

That being the case, the court in *Maybury* might have sought to exert pressure on the defendant to proceed in person. The 'use it or lose it' rule makes it more difficult for defendants to repossess their right to self-representation once they gave it up. At a time when self-representation was still dear to defendants—this presumably being the product of habit, familiarity and tradition—defendants might have felt discouraged from delegating their representation to counsel if in doing so they would lose their power and control over their representation.

Today, of course, it is largely accepted that legal representation is a major safeguard for a fair trial. This realisation has gained such credence since the eighteenth and nineteenth centuries that it is now widely accepted by both jurists and the public. The longstanding struggle for legal aid provides clear evidence for that recognition. This recognition might explain why in *R v Lyons*, almost a century after *R v Maybury*, the Court of Appeal instructed judges to give effect to the defendant's wish to proceed in

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15 Antagonism to lawyers was rigorously expressed by Bentham who accused them (and judges, for that matter) of using all means to promote their 'sinister interest', i.e. the maximisation of fees exacted from citizens: J Bentham, *The Rationale of Judicial Evidence* (Bowring ed, 1842) vol 4, book 8, ch 17, 287–8. Earlier on, during the Revolutionary era, groups such as the Levellers described lawyers as 'vermin and caterpillars' whose machinations were the only reason for legal complexity: see B Shapiro, 'Law Reform in Seventeenth Century England' (1975) 19 The American Journal of Legal History 280, 290–1.

16 According to the literature, courts considered themselves better and more neutral counsel for defendants. Furthermore, counsel was thought unnecessary because the prosecutor was required to prove his case so clearly and manifestly that no defence of it was possible. Moreover, it was thought that counsel, being learnt in law, had nothing to contribute to criminal trials, the vast majority of which involved matters of fact, whereas the defendant was the best source of information as he was close enough to get himself prosecuted. Hawkins' famous observation captures another point, i.e. the advantage to the defendant of proceeding in person: '[I]t requires no manner of Skill to make a plain and honest Defense ... the Simplicity and Innocence, artless and ingenuous Behavior of one whose conscience acquits him, ha[s] something in it more moving and convincing than the highest Eloquence of Persons Speaking in a cause not their own'. It was also believed that defendants would be better off responding to the charges spontaneously, something which would enhance their credibility before the jury. See: Holdsworth (n 13) 192; Langbein (n 14) 28–36; E Cerruti, 'Self-Representation in the International Arena: Striking a False Right of Spectacle' (2009) [40] Georgetown Journal of International Law 919, 928–9.

17 A right to legal aid was first granted by law in the Poor Prisoners' Defence Act of 1903; see E Jenks, *A Short History of English Law* (3rd edn, Methuen & Co Ltd, 1924) 352.

person in ordinary circumstances: in doing so it seems to have sought to dissolve the described disincentive created in *R v Maybury* against availing oneself of legal representation. Knowing that the delegation of their defence to counsel would not completely expropriate their power to reclaim their right to self-representation, defendants would be less hesitant to accept legal representation in the first place.

If this is true, it would be a quite timid and hesitant way to encourage litigants to opt for legal representation. If courts are discontent with self-representation, they ought to subject the right to self-representation to judicial discretion at all stages, rather than adhere to the outdated and artificial pre-trial/trial distinction. To do so is to carry on with outdated precedents while losing sight of their background and of what they were meant to serve.

Having said that, one cannot avoid the feeling that this analysis of English case law may not be complete or conclusive. A feeling of groping in the dark cannot be avoided when English courts have neither confronted the rationales behind self-representation nor stated in clear terms whether a right to self-representation is or is not desirable, and under which circumstances it would be justifiable to revoke it. In search of a more informed discussion, we have to look to the other side of the Atlantic.

2. SELF-REPRESENTATION IN THE UNITED STATES: THE DOG THAT BARKED TOO LOUDLY

This section discusses the USSC's ruling that self-representation in criminal cases is a constitutional right, arguing that this decision is based on considerations that are specific to the criminal context. The USSC's position on self-representation is underlain by the image of a mighty state prosecuting an individual and seeking to restrict his freedom and inflict on him suffering and pain by means of imprisonment, and sometimes death. The gravity of these consequences and the vulnerable and inferior position of defendants create a special risk of abuse of state power that entitles defendants to special treatment and procedural allowances. A right to self-representation has been recognised as part of this special treatment and therefore its rationale does not extend to the civil context.

As a preliminary note, this chapter focuses on the principles or theoretical rationales for the right to self-representation, rather than the formal or doctrinal grounds on which it was recognised under the US Constitution.

2.1 The autonomy rationale

Mr Faretta was accused of grand theft before a court in California. Well before the trial, he asked to represent himself because he believed that the public defender office was under a heavy case load and therefore would not be able to provide him with adequate defence. The trial judge conducted a hearing at the end of which he concluded that Faretta lacked the necessary legal understanding to conduct the case in person. Consequently, the judge appointed a lawyer to represent Faretta despite the latter's objection. Insisting on proceeding in person, Faretta attempted during the proceedings to make certain motions but the court did not permit him to do so. In the end, he was convicted, and his conviction was affirmed on appeal.[18]

The USSC reversed this decision and quashed Faretta's conviction. It held that a defendant has a constitutional right to represent himself in his own trial, irrespective of his ability to defend himself, the gravity of the charges in question or the possible consequences of self-representation to the accused himself.

The legal basis for this right was to be found in the Sixth Amendment of the Constitution, which is the American equivalent of Article 6(3) of the ECHR. It provides

[18] *Faretta* (n 1) 807–11.

defendants with the regular set of procedural rights usually conferred on criminal defendants, including the rights to speedy and public trial before an impartial tribunal, to be informed of the charges, to examine the prosecution's witnesses and to summon defence witnesses. While the Sixth Amendment also confers a right 'to have the assistance of counsel', it makes no express mention of a right to self-representation. Nevertheless, the USSC held that such a right is implied by the history, 'language, structure, and spirit of the Sixth Amendment',[19] which require the USSC to respect the defendant's freedom of choice.

According to the USSC, the value of freedom of choice is reinforced by the fact that 'the right to defend is personal'.[20] That is, '[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants the accused personally the right to make his defense'.[21] On this understanding, the USSC concluded that a personal right to make one's own defence by definition includes the power to choose whether to do so in person or through counsel, in the same way that the other procedural rights in the Sixth Amendment are conferred directly upon the defendant to be at *his* personal and free disposal and to be used by *him* at *his* free discretion. 'Assistance of counsel', being 'assistance', is always subordinate and secondary to the main right, namely self-representation, and cannot replace it.[22]

As we shall see in chapter 8, this approach stands in contrast to the approach taken by European Court of Human Rights (ECtHR), according to which the right of the defendant to defend himself under Article 6(3) of the ECHR is 'impersonal' and does not include the power to choose whether to defend in person or through counsel.

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[19] *Faretta* as described in *Mckaskle v Wiggins* 465 US 168 (1984) 174.

[20] *Faretta* (n 1) 834.

[21] ibid 819.

[22] ibid 819–20.

2.2 The autonomy rationale is context specific and tailored for the criminal process

While the USSC in *Faretta* justified a right to choose between legal representation and self-representation on grounds of autonomy, it did so in reference to the specific nature of a criminal process. The USSC invoked the specific features of the criminal process, including the vulnerable and inferior position of defendants and the inherent risk of abuse of state power, to justify affording them the freedom to choose whether to avail themselves of legal assistance. The image of the mighty state using its power to prosecute a helpless individual seems to underlie the USSC's willingness to sacrifice the public interest in avoiding false convictions as well as in the efficient distribution of court resources.

The emphasis on the specific nature of criminal prosecution is evident all across the *Faretta* decision. Consider the manner in which the question was framed by the USSC: 'the question is whether a *State* may constitutionally *hale* a person into its criminal courts and there *force* a lawyer upon him'.[23] The nuances are telling. The criminal process is portrayed as one that people are 'haled' into, echoing force and coercion. It is controlled by state agents with a large arsenal of powers and monopoly over force, an apparatus that is deployed to prosecute an individual with the aim of restricting his physical liberty and imposing on him severe consequences in the form of imprisonment (or death). Against this background, the assignment of a lawyer would be perceived as another act of 'force' against the defendant. The elements of force and punishment are well illustrated in the following passage:

> The defendant, not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately

[23] ibid 807.

> to his detriment, his choice must be honoured out of 'that respect for the individual which is the lifeblood of the law'.[24]

To be clear, the USSC is not merely concerned about the fact that a criminal process affects the interest of its participants; for in civil cases, too, parties bear the 'personal consequences' of winning or losing the case. It is the particular nature of the consequences of a criminal process, whereby the state uses its monopoly over force to inflict suffering and pain on individuals, which led the USSC to respect the defendant's choice of representation. Indeed, the emphasis on the elements of condemnation and suffering is recurrent in the whole decision, as this quotation further illustrates: '[t]he right to defend is given directly to the accused; for it is he who *suffers* the consequences if the defense fails'.[25] Better still, the special nature of criminal punishment is expressed in this statement, endorsed by the USSC in a later case: 'A defendant has the moral right to stand alone in his hour of trial and to embrace the consequences of that course of action'.[26]

The distinctive feature of the criminal process as liberty-restricting is commonly associated with the liberal concern with the abuse of state power. A criminal process is dominated by state activity through the actions of the prosecution and it displays the state's monopoly over force through its restrictive nature; hence the notion of freedom as a protection against the ever suspicious power of the state.[27] This concern, too,

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[24] ibid 835.

[25] ibid 820–1. This rhetoric is also prevalent in other decisions, see e.g. *Martinez v Court of Appeal of California* 528 US 152 (2000) 160 (*Martinez*).

[26] *Mckaskle v Wiggins* (n 19) 198–9 fn 6. See also *Chapman v US* 553 F2d 886 (1977) 891.

[27] This aspect benefits from Cerruti's beautiful characterisation of the common law adversarial system (n 16, 970): 'The classical liberal individualism that supported the development of the common law adversarial system presumes a central antagonism, a clash of adverse interests, between the individual and the state, which is deemed to have an inherent governing interest in restraining the native liberties of its subjects. The state is therefore held to be inherently suspect or at least self-interested when seeking to deprive any individual of his liberty. This mistrust of the power of public prosecution has supported the libertarian notion that the accused may reasonably believe that he has only himself to trust fully when engaged in a struggle for his liberty in one of the state's own forums. The image of a self-representing citizen standing alone against the prosecutorial power of the state provides the native appeal of self-representation'.

features in the *Faretta* decision: 'To *force* a lawyer on a defendant can only lead him to believe that the *law contrives against him*',[28] which was further explained on another occasion as the 'risk that the [defendant] will be sceptical of whether a lawyer, who is employed by the same government that is prosecuting him, will serve his cause with undivided loyalty'.[29]

The close dependence of the autonomy rationale on the specific nature of the criminal process can be further illustrated by the historical portrait of self-representation in *Faretta*. The USSC was of the view that self-representation is deeply rooted in English legal history, drawing attention to the fact that legal representation in felony was prohibited until 1836; at common law self-representation was for many centuries 'the practice in prosecutions for serious crime'.[30] Moreover, to further underscore the importance of the taboo on compulsory legal representation, the USSC brought to bear the dreadful circumstances that characterised the one and only occasion in the long history of common law where legal representation was made compulsory. This occurred during the infamous Star Chamber which served as a political instrument for persecuting people through political charges of libel and treason. The secret, arbitrary and swift practices adopted by the Star Chamber to execute royal power over a period of about 200 years, ending in 1641, were described by the USSC as a symbol of 'disregard of basic individual rights' and as a diversion from the common law tradition.[31] For the USSC, the Star Chamber experience served as a reminder of the crucial role of self-representation in safeguarding individual freedom as a minimal and elementary

[28] *Faretta* (n 1) 834.

[29] *Martinez* (n 25) 160. This point is well expressed by Justice Scalia in his concurring opinion: 'I have no doubt that the Framers of our Constitution, who were suspicious enough of governmental power—including judicial power—that they insisted upon a citizen's right to be judged by an independent jury of private citizens, would not have found acceptable the compulsory assignment of counsel *by the government* to plead a criminal defendant's case'.

[30] *Faretta* (n 1) 823.

[31] ibid 821.

protection, rendering any attempt to impose legal representation a disguise for political persecution, abuse and tyranny.[32]

Thus, the centre of gravity around which the reasoning of the USSC revolves is the peculiar nature of criminal proceedings as a combat between the powerful state and the vulnerable individual. That self-representation is part of a specific philosophy of stripping the government of as much power as possible is further supported by the USSC's reference to the general atmosphere prevailing in the American colonies and throughout the foundation of the US, in which self-reliance was valued and lawyers and governments distrusted.[33]

2.3 The autonomy rationale is unpersuasive in the civil context[34]

Thus understood, the autonomy rationale is largely unpersuasive when exported to the civil context. Typical civil suits do not pose any threat to individual liberty; they are initiated and dominated by private parties. Civil proceedings are optional and they provide citizens with tools to protect their private rights. The state has no specific interest in private civil disputes, the outcomes of which primarily affect the parties themselves. It only has a general interest in having the court achieve correct outcomes in order to preserve the rule of law. The scope, content and, to a large extent, the conduct of a civil case is determined by the parties, not the state. Thus, the involvement of the

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[32] ibid 821–3. See also *People v Bloom* 48 Cal3d 1194 (1989) (Supreme Court of California) 1221: 'The only exception [in English legal history] serves only to reinforce the rule: the only English tribunal ever to adopt a practice of forcing counsel upon an unwilling defendant was the Star Chamber, whose name has "for centuries symbolized disregard of basic individual rights"'.

[33] *Faretta* (n 1) 827, 830 fn 39.

[34] It is worth noting that the general distinction between criminal and civil proceedings has been challenged; see e.g. I Rosen-Zvi and T Fisher, 'Overcoming Procedural Boundaries' (2008) 94 Virginia Law Review 79, arguing that many civil cases involve serious imbalance between litigants and high consequences, whereas many criminal cases involve minor issues with minor consequences. Such important criticism does not affect the discussion in this paper, which focuses on the paradigmatic examples of civil and criminal procedures. As has been noted, 'the existence of dusk does not render the distinction between broad daylight and pitch darkness incoherent': F Schauer, *Thinking Like a Lawyer* (Harvard University Press, 2009) 153 fn 15.

state is best understood as providing a service of adjudication to be at the disposal of citizens who wish to protect their legitimate interests and enforce their legal rights.

By contrast, in the criminal context, the state has a particular interest in the outcome of each and every case over and above its general interest in having the court achieve correct outcomes. Every specific outcome has a direct impact on the public.[35] A wrong decision means that the true perpetrator is set free and is capable of endangering the public or part of it; and a false conviction means that, in addition, an innocent person suffers grave consequences without justification. Furthermore, bar a few exceptions where private prosecution is permissible, criminal proceedings are exclusively commenced by the state, against individuals, and the content and scope of the proceedings are largely determined by it.

Moreover, state activity assumes a substantially different role in civil proceedings than in criminal proceedings. In civil cases, the court only declares private rights. Therefore, the enforcement of judgments, while involving an exercise of state power, seeks only to take from a person what is *not* his, in order to give it to its rightful owner. In criminal cases, however, the state seeks to issue a serious condemnation of the behaviour of an individual and in addition to take from the individual what is, on all accounts, his (i.e. life, liberty, or property), because of what he did (e.g. stole, raped, killed).[36] (Further discussion of the nature of civil proceedings and their relationship to autonomy is conducted in chapter 6)

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[35] A Ashworth, *Principles of Criminal Law* (6th edn, OUP, 2009): 2 'The idea of a crime is that it is something that rightly concerns the State, and not just the person(s) affected by the wrongdoing. ... the decision to make conduct into a crime implies that there is a public interest in ensuring that such conduct does not happen and that, when it does, there is the possibility of State punishment'.

[36] ibid 1: 'Criminal liability is the strongest form of condemnation that society can inflict, and it may also result in a sentence which amounts to a severe deprivation of the ordinary liberties of the offender. ... It is the censure conveyed by criminal liability which marks out its special social significance, and it is the imposition of this official censure, and the ensuing liability to state punishment ordered by the court, that requires a clear social justification'.

Another difference pertains to the inherent inequality between the parties. In criminal proceedings, the defendant is inherently inferior because only he faces the risk of a conviction and an imprisonment. In civil cases, the parties to the dispute share the same status and they compete equally for the same goods.

3. CRITICISM OF *FARETTA*

The previous section has established that the right to self-representation in criminal proceedings has been justified on the narrow basis of the criminal context and that such a justification is unpersuasive in the civil context. To cast further doubt on the desirability of a right to self-representation, this section outlines the problematic aspects and consequences of the *Faretta* decision.

3.1 The need for balance

The reasons against a near absolute right to self-representation are quite straightforward. Self-representation is a poor tool for making an effective defence, puts the fairness of the trial at significant risk and hinders the administration of justice. In doing so, self-representation undermines the integrity of the court and public confidence. These considerations are important whether in the criminal context where the public is interested in preserving order and punishing wrongdoers, or in the civil context where the rule of law requires effective enforcement of private rights.

These concerns were well articulated by the dissenting judges in *Faretta*. Chief Justice Burger observed that an unqualified right to self-representation would create a burden on the administration of justice and result in added congestion in courts and a reduction of the quality of its justice.[37] The damage to the public, caused by the enhanced risk of false convictions,

> is not mitigated by the lame explanation that the defendant simply availed himself of the 'freedom' 'to go to jail under his own banner' ... The system of criminal justice should not be available as an instrument of self-destruction.[38]

Furthermore, Chief Justice Burger criticised the Court's exaggeration of the personal nature of the procedural rights conferred upon the defendant, indicating that this 'reflects nothing more than the obvious fact that it is he who is on trial and therefore has need of a defense'.[39] Justice Blackmun, too, observed that no amount of autonomy that pro se litigation might render 'can cure the injury to society of an unjust result', whereas 'a just result should prove to be an effective balm for almost any frustrated pro se defendant'.[40] Thus, he concluded, autonomy should not outweigh the public interest in a just legal system:

> I cannot agree that there is anything in the Due Process Clause or the Sixth Amendment that requires the States to subordinate the solemn business of conducting criminal prosecution to the whimsical, albeit voluntary, caprice of every accused who wishes to use his trial as a vehicle for personal or political self-gratification.[41]

The need to balance whatever interest defendants may have in self-representation with the public interest in fair trials has since been reiterated by other courts, most famously by Judge Reinhardt of the United States Court of Appeals (9th Circuit). In his opinion:

> Nothing inherent in the implied right of self-representation justifies exalting that right over all others in the constitutional constellation, or

[37] *Faretta* (n 1) 844.

[38] ibid 839–40.

[39] ibid 837.

[40] ibid 849.

[41] ibid 849.

> requires the courts to permit Farhad and others with similar limitations or incapacities to turn criminal trials into travesties.[42]

For him, the right to self-representation should not be allowed to jeopardise the fairness of the trial, which is of independent interest to the public.[43] He went on to say that 'the state has a compelling interest, related to its own political legitimacy, in ensuring both fair procedures and reliable outcomes in criminal trials'; both objectives 'may be thwarted when a pro se defendant like Farhad seeks to offer his "more glorious kind of a defense"', as it were.[44]

The thrust of the views expressed by Burger CJ, Blackmun J and Judge Reinhardt is that the legal process is not the private business of the defendant. The criminal process is a public service that should be administered with responsibility and accountability to achieve social policy. The court is justified in not allowing actions that are likely to jeopardise its ability to fulfil its duties to the public.

This principle is not limited to the criminal context. The need to balance the litigant's interest in self-representation with the public interest in efficient proceedings is equally compelling in civil cases. The public has a strong interest in both civil and criminal proceedings to ensure that public resources are not wasted by untrained litigants and defendants who are unable to use the system for the purpose it is supposed to fulfil, and that trials, whether civil or criminal, are reliable and able to produce accurate and timely results. Otherwise, the rule of law will be compromised. Furthermore, in civil cases the self-represented litigant faces an individual as his opponent, who has an equal entitlement to obtain expeditious justice at a reasonable cost. The state's monopoly over the use of force is justified only when citizens are given a reasonable service of peaceful dispute resolution.

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[42] *US v Farhad* 190 F3d 1097 (1999) (United States Court of Appeal, 9th Circuit) 1108.

[43] ibid 1106.

[44] ibid 1107–8.

The fact that civil proceedings, unlike criminal proceedings, do not pose an immediate threat to the physical liberty of litigants does not mean that the subject matter of civil proceedings is not important or that the public interest in the quality of their outcomes is less compelling or otherwise insufficient to override whatever interest a litigant might have in proceeding in person. On the contrary, it is the absence of such a threat that makes it more compelling to prefer the public interest over whatever interest a litigant might have in self-representation, because in the absence of such a threat there would be no need to provide litigants with any special protection.[45]

3.1.1 Anecdotal evidence of the ongoing agony

The absurd situations created by self-represented defendants leave no doubt that the USSC's rhetoric of freedom was detached from reality. Chief Justice Burger's concern that there was 'nothing desirable or useful in permitting every accused person, even the most uneducated and inexperienced, to insist upon conducting his own defense to criminal charges'[46] has since been substantiated by many examples of self-represented defendants who led irrational, incompetent and detrimental defences that undermined elementary senses of justice and fairness.

What has intensified the negative effect of *Faretta* is the low competence threshold for waiving the right to counsel, which was set as low as the mere competence to stand trial.[47] Coupled with the rule that self-represented defendants cannot challenge

[45] One possible objection to this argument might be that in criminal proceedings the court has no powers to order costs or strike out a statement of case, and that therefore self-representation could be more inefficient in such proceedings than in civil proceedings where the court has such powers. This point is discussed in chapter 8.4.1.

[46] *Faretta* (n 1) 836.

[47] *Godinez v Moran* 509 US 389 (1993). Cf *Johnson v State* 17 P3d 1008 (2001) (Supreme Court of Nevada) 1017: 'the trial courts may properly deny the *Faretta* right to defendants whose mental impairments do not render them incapable of standing trial, but do affect their abilities and perceptions to such an extent that they are ultimately disruptive to the trial process and unable to adhere to rules of procedure or protocol'.

their conviction on appeal on grounds of incompetent defence,[48] self-representation has become a 'sword' used against defendants rather than a 'shield' that supposedly protects them from state tyranny. Courts found no basis for preventing defendants from making clearly flawed decisions, even in capital cases, such as to plead guilty and request the jury to impose a death penalty, or to refuse to adduce mitigating evidence or raise the insanity defence.[49]

Commentators report many incidences in which 'mentally compromised and egocentric grandee[s]'[50] used their right to self-representation in ways that rendered the proceedings irrational and self-defeating. These incidences exemplify the frequent and yet irresolvable tension between self-representation and the public interest in fair and just proceedings. One well-known example is the case of Collin Ferguson, who was accused of opening fire randomly and killing six people and injuring many others.[51] He was examined by two psychiatrists who testified that he suffered from a mental illness that 'rendered him delusional and paranoid and caused him to react violently to his imagined persecutors'.[52] Nevertheless, he was found competent to stand trial and accordingly also competent to proceed in person. During the trial, Ferguson raised bizarre allegations, failed to raise the insanity defence and was ultimately given six consecutive life sentences. Whether or not such a result satisfied some people's anger

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[48] *Martinez* (n 25) 157.

[49] See e.g. *People v Bloom* (n 32) 1222-3; *Johnson v State* (n 47) 1015. Further state and federal cases are reviewed and discussed at Cerruti (n 16) 950–2; R Toone, 'The Incoherence of Defendant Autonomy' (2005) 83 North Carolina Law Review 621, 630–5. In *People v Gordon* 688 NYS2d 380 (1999) 383–4 the Supreme Court of New York lamented that: 'It is unfortunate that in recognizing the right to self-representation, a distinction has not been made between minor infractions and cases … in which the penalty is death'. One commentators argued that appellate courts, reluctant to uphold unjust convictions, tended to fault them for other procedural grounds, a tendency that resulted in confusing and inconsistent case law: S Livingston-Allen, '*Faretta*: Self-Representation or Legal-Misrepresentation?' (2005) 90 Iowa Law Review 1553.

[50] Cerruti (n 16) 956.

[51] *People v Ferguson* 670 NYS2d 327 (1998).

[52] ibid 953; see also Livingston-Allen (n 49) 1556.

and sentiments towards what Ferguson had allegedly done, it remains normatively questionable.

Another often-cited example is the case of *US v Farhad*. Charged on 19 counts of fraud and other forms of deceit, Mr Farhad insisted upon exercising his right to self-representation, thinking that he could defend himself more effectively than the public defender. As the decision reports, 'Farhad's performance at trial was ... a complete disaster';[53] for example, he communicated to the jury his own criminal record, misstated the law, and appeared to admit guilt due to poor command of English.[54] It was clear that Farhad 'evinced an utter lack of comprehension of the proceedings. He failed to object at critical points. He had only the sketchiest understanding of the roles played by various people in the courtroom'.[55] He argued with the witnesses instead of cross-examining them, his questions 'were entirely unintelligible, irrelevant, or prejudicial to his own case', often using narrative rather than posing questions. His own direct testimony 'was an even worse spectacle'.[56] His closing argument, much like the opening speech, was a complete 'debacle'.[57] While he had stated that he wished to present a 'more glorious kind of a defence', he ended up asking the jury to return 'a true verdict, a just verdict, that the prosecution has proved its allegations'.[58] He was convicted and sentenced to 27 months in jail and required to pay a sum of about $20,000 in compensation to the victims.

The United States Court of Appeal (9th Circuit) was bound by *Faretta* and therefore had no choice but to affirm the verdict. Judge Reinhardt protested, however, that the *Faretta* decision *de facto* allowed 'even one who is severely mentally impaired' and

53 *US v Farhad* (n 42) 1102.

54 ibid 1102.

55 ibid 1104.

56 ibid 1103.

57 ibid 1104.

58 ibid 1105.

'mentally retarded or disturbed defendants' to represent themselves merely because they were not mad enough to be incompetent to stand trial.[59] He summarised the problem with *Faretta* in three powerful lines: 'it is quite plain that Farhad, like many criminal defendants who choose to be tried without a lawyer, was convicted in a proceeding so fundamentally flawed that, were it not for *Faretta*, it would undoubtedly offend minimal constitutional standards of fairness'.[60]

Commentators have also presented anecdotal examples of defendants who, free from the ethical and professional constraints imposed on lawyers, used their right to self-representation to cross-examine witnesses in a most humiliating and intimidating manner. The classical examples involve defendants in sexual assault cases who tended to expose humiliating and intimate details of the victims' personal or family history during the proceedings.[61]

To be clear, the potential for such regretful complications was not completely overlooked by the USSC in *Farreta v California*. The Court was aware that self-representation is likely to be detrimental to the defendant, but nevertheless thought that the risk of a false conviction and unjust sentence should be trumped by the intrinsic value of autonomy and freedom. One is left to wonder, however, whether the USSC properly estimated the extent of the adverse consequences that its ruling would create to the administration of justice, or the kind of defendants who would avail themselves of it. Despite the anecdotal nature of the evidence reviewed in the literature to illustrate the consequences of self-representation, the mere fact that self-representation was allowed to produce such questionable situations is sufficient to cast doubt on the Court's exclusive reliance on the autonomy rationale, and underscore the need for a more

[59] ibid 1106.

[60] ibid 1101. Judge Reinhardt's invitation for the USSC to seize on the opportunity and reconsider its ruling was denied. Another attempt to obtain certiorari failed in 2004: *Egwaoje v US* 541 US 958 (2004).

[61] See e.g. Cerruti (n 16) 956–9.

balanced view that takes into account the interests of the other participants in the process as well as public considerations.

3.2 The USSC's historical description of self-representation is inaccurate

Not only did the Court in *Faretta* fail to give sufficient regard to the potential adverse effects of self-representation on the fairness and administration of courts, but it also exaggerated the importance and weight of the defendant's possible interest in self-representation. The USSC painted too 'romantic' a portrait, so to speak, of self-representation as a longstanding right that is deeply rooted in Anglo-American legal history, and which represents the commitment to liberty, individualism, self-reliance, and most of all the protection of the individual from the state. Justice Blackmun rightly pointed out in his dissenting opinion that the historical reasons for a right to self-representation are no longer valid.[62] Until the mid-nineteenth century, defendants in the United States were disqualified from testifying as witnesses in their own trials, and self-representation therefore provided the only means for them to have a voice.[63] Indeed, this was also the case in England where defendants were not allowed to testify on oath until 1898.[64] Today, however, defendants in both countries are able to testify, and therefore self-representation is no longer the only way in which a defendant could speak to the courts in a direct and personal manner. In fact, commentators have outlined the inherent tension between self-representation and the ability of the defendant to exercise

[62] *Faretta* (n 1) 850–1. For further criticism of the Court's historical account, see H Schwab, 'How Far Faretta: Creating Implied Constitutional Rights' (1977) 6 San Fernando Valley Law Review 1, 8–11; M Mayers, 'A Fool for a Client: The Supreme Court Rules on Pro Se Right' (1975) 37 University of Pittsburgh Law Review 403, 407–9; Cerruti (n 16) 927–35.

[63] *Faretta* (n 1) 850–1.

[64] Section 1 of the Criminal Evidence Act 1898. See also the discussion in Langbein (n 14) 52.

his right to remain silent, and highlighted the risk of him compromising his own credibility by excessive involvement in conducting his defence.[65]

Moreover, it is possible to question the USSC's use of the 'notorious procedures of the Star Chamber'[66] as a scarecrow to preserve the outdated practice of self-representation. This use is questionable because it relies on a radical example that was not motivated by a genuine desire to improve the fairness and efficiency of court proceedings. Furthermore, the infamy of the Star Chamber sprang from a series of several notorious practices of which compulsory counsel was only one component. Such practices included the power to dispense with procedural and evidentiary safeguards, the use of torture to elicit confessions and reveal accomplices, and the interrogation of defendants and witnesses in private *without* the help of defence counsel.[67] Thus, the significance of the compulsory requirement of legal representation to the overall infamy of the Star Chamber, if at all, remains an open question.[68]

Quite apart from the lack of historical support for the importance of self-representation in criminal proceedings (as opposed to its existence as a historical fact), in civil proceedings the historical story has been totally different. Legal representation in civil cases has been commonplace since the thirteenth century.[69] Thus, in civil cases self-representation does not even have the historical appeal that was attributed, albeit questionably, to self-representation in the criminal context.

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[65] See e.g. ibid 278–9; M Damaska, *The Faces of Justice and State Authority* (Yale University Press, 1986) 217–8.

[66] *Faretta* (n 1) 848.

[67] Holdsworth (n 13) 178–88; Cerruti (n 16) 930–1.

[68] In Holdsworth's historical account of the proceedings of the Star Chamber, the compulsory requirement of counsel was barely dwelt on; interestingly, Holdsworth seems to imply that the Star Chamber's practices seemed to have precipitated the enactment of a right to counsel in treason cases in 1695; see Holdsworth (n 13) 179, 192.

[69] See Jenks (n 17) 203–4; T Plucknett, *A Concise History of the Common Law* (5th edn, Butterworth & Co Ltd, 1956) 215; F Pollock and W Maitland, *The History of English Law* (2nd edn, CUP, 1898) vol 1, 211.

3.3 The struggle for a constitutional right to legal aid

Another problematic aspect in the USSC's historical account is that in the past lawyers were not readily available and therefore self-representation was an indispensable minimum. Today, legal aid *is* available in criminal cases and therefore self-representation is no longer indispensable.

Furthermore, the anti-lawyer sentiments that might have been prevailing in the United States in the colonial era are now outdated. Clearly, the element of distrust does not fairly characterise the mainstream perception of the role of defence lawyers in criminal cases. Generally speaking, there is no longer a valid reason for doubting the loyalty of lawyers to their client. In fact, contemporary debate focuses on the excessive loyalty of lawyers to their clients.[70] Paradoxically, the risk of abuse of state power against vulnerable and inferior defendants is exacerbated rather than reduced by allowing self-representation; defendants are better protected against the power of the state through legal representation, not self-representation.

In a series of cases prior to *Faretta* the USSC had used unequivocal rhetoric to convey a clear message that without legal representation criminal trials cannot be fair. The struggle for a constitutional guarantee of legal aid in serious crimes has, from start to end, premised that legal representation is essential to ensure a fair trial. As the USSC noted in *Powel v Alabama*:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

[70] See e.g. D Luban, *Lawyers and Justice* (Princeton University Press, 1988) 81–5.

> Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[71]

The Court in *Faretta* attempted to reconcile the conflicting approaches to legal representation by expressing the concern that imposing legal representation on an unwilling defendant does not allow a full realisation of the advantage of legal representation.[72] This answer fails to confront the core point that without legal representation a fair criminal trial is difficult to sustain. The concern for the defendant's cooperation is discussed in detail in chapter 8.3, but a few remarks are necessary to complete this analysis.

It is true that a cooperating defendant would benefit from legal representation more than a defendant who does not cooperate with his counsel. However, even in the latter circumstances legal-representation may still benefit the defence in some ways.[73] More importantly, any harm caused as a result of lack of cooperation would be the responsibility of the defendant who chose not to cooperate without good reason. Furthermore, it might be said that had the choice between self-representation and legal representation not been made available in the first place, defendants would have adjusted to the practice of legal representation and choose to cooperate with their lawyers. Be that as it may, the creation of a clearly irrational choice puts at risk those who are prone to making clearly irrational choices and, accordingly, who would be in utmost need of protection against their own irrationality.[74] Note that the very fact that a

[71] *Powel v Alabama* 287 US 45 (1932) 69. See also *Gideon v Wainwright* 372 US 335 (1962). This point was also raised by the dissenting judges at *Faretta* (n 1) 851, 838–9, 843–4.

[72] *Faretta* (n 1) 834.

[73] As the USSC itself acknowledged in a later case: 'In both trials and appeals there are, without question, cases in which counsel's performance is ineffective. Even in those cases, however, it is reasonable to assume that counsel's performance is more effective than what the unskilled appellant could have provided for himself': *Martinez* (n 25) 161.

[74] In other words, this could be defended as justified paternalism. It must be noted, however, that this thesis does not rely on paternalism as its main justification for defending mandatory representation. See discussion in chapter 6.3.2.

legal system allows self-representation might lend to it some facade of credence and possibly induce those who are either ignorant of the intricacy of litigation or in possession of questionable notions about what litigation entails to think that it is a reasonable choice. This creates an unnecessary dilemma for those who are the least able to discern its fallacy. As we have seen in the previous section, experience has substantiated this concern and shown that as a matter of fact the defendants who insisted on self-representation were typically mentally compromised.

Another point made by the USSC was that 'it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense'.[75] However, it is unclear neither when these 'rare instances' occur, nor why legal representation must never be imposed in those more frequent incidences when defendants are unable to present an effective defence.[76]

It is therefore unsurprising that in the later case of *Martinez v Court of Appeal of California* (*Martinez*) the USSC seems to have backed off from its romantic portrait of self-representation as representing the commitment to individualism and freedom. Given the experience American courts had had with self-represented defendants since *Faretta*, the USSC in *Martinez* changed the tone and stated in clear and forceful terms that:

> The historical evidence relied upon by *Faretta* as identifying a right of self-representation is not always useful because it pertained to times when lawyers were scarce, often mistrusted, and not readily available to the average person accused of crime. For one who could not obtain a lawyer, self-representation was the only feasible alternative to asserting no defense at all. Thus, a government's recognition of an indigent defendant's right to represent himself was comparable to bestowing upon the homeless beggar a 'right' to take shelter in the sewers of Paris. Not surprisingly, early precedent demonstrates that this 'right' was not

[75] *Faretta* (n 1) 834.

[76] See discussion at Cerruti (n 16) 945.

> always used to the defendant's advantage as a shield, but rather was often employed by the prosecution as a sword.[77]

The central role of lawyers in obtaining justice on the merits is not unique to criminal proceedings. Lawyers are needed in civil cases as much as in criminal cases.[78] In fact, the need for legal representation might be even more compelling in civil cases. There are reasons to believe that the cases that reach the court and fail to be resolved earlier are particularly complex (see chapter 4.2.2). It may not be an exaggeration to say that many civil cases would attract more complicated factual and legal questions than many criminal cases. The decision to grant more generous legal aid to criminal defendants, but only partial legal aid to civil litigants, has never been based on a proposition that criminal cases are on average more complex and difficult for the legally untrained than civil cases, or that self-representation is more detrimental to the administration of criminal than civil justice. It is primarily the higher gravity of the consequences of criminal trials that may justify, in a world of limited resources, a more generous legal aid scheme in criminal proceedings. Consequently, there is no reason to think that the integrity and fairness of the process will be less compromised with self-representation in civil proceedings than in criminal ones.

It might be thought that while defendants in criminal proceedings do not need self-representation given their right to legal aid (in cases involving the potential of imprisonment), in civil cases self-representation is an important minimum because eligibility for legal aid is more limited.[79] Accordingly, it might be thought, a denial of

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[77] *Martinez* (n 25) 156–7; see also p 161: 'Under the practices that prevail in the Nation today ... we are entirely unpersuaded that the risk of either disloyalty or suspicion of disloyalty is a sufficient concern to conclude that a constitutional right of self-representation is a necessary component of a fair appellate proceeding. We have no doubt that instances of disloyal representation are rare'.

[78] See e.g. Luban (n 70) 243–8, relying on the necessity of lawyers to argue that the principle of government legitimacy and the commitment to equality of rights under the American political and legal background necessarily place upon the State an obligation to provide the poor with legal service as a matter of right in criminal and civil proceedings alike.

[79] A point along these lines was made by the United States Court of Appeals (2nd Circuit) in *Iannaccone v Law* (n 2) 556–7.

self-representation in criminal cases would have a lesser effect than in civil cases; it would only mean that the court would appoint free counsel. In civil cases, however, a court may not always have the resources to appoint a free lawyer, and in such cases it may have to strike the litigant's statement of case altogether. This point is discussed in chapter 8.4, which argues that in complex cases self-representation may amount to no representation and therefore fall short of even a 'bare minimum' of representation.

4. THE CURTAILMENTS OF THE *FARETTA* RIGHT

So far, this chapter has shown that while the available justification for self-representation is specific to criminal proceedings, the reasons against it are persuasive also in civil proceedings. This section further shows that even in the criminal context there have been second thoughts as regards the desirability of an unfettered right to self-representation, which makes the case for a similar right in civil proceedings even weaker.

In light of the serious problems that the *Faretta* ruling has created since its inception, one should not be surprised that its scope has been circumscribed in major ways. A number of decisions have expressed a general reluctance to carry on with the *Faretta* legacy, imposing certain restrictions on, and conditions for, the exercise of self-representation. To begin with, courts have been required to ensure that the defendant has waived the right to counsel 'knowingly, voluntarily and intelligibly', after being warned of the dangers and disadvantages of a waiver; furthermore, as in English case law, defendants have been required to assert the right in a timely manner, before the trial.[80] Similar conditions have also been required in civil proceedings.[81] The following sub-sections discuss two major curtailments of the *Faretta* right.

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[80] See a summary in *Martinez* (n 25) 161.

[81] In *O'Reilly* (n 2) 867 the United States Court of Appeal (2nd Circuit) imported to civil proceedings the requirement that the right to self-representation be asserted in a timely manner, preferably prior to the

4.1 No *Faretta* right on the appellate level

Martinez was a self-represented defendant who was convicted of embezzlement and sentenced to 25 years in jail. On appeal, he once again sought to represent himself. This time, however, he was refused. Affirming the decision of the lower courts, the USSC decided that the ruling in *Faretta* was limited to the trial level, and that a person does not have a constitutional right to represent himself before the appellate court.[82]

This decision is important for the change of attitude it reflects as well as for its reasoning. Indeed, some have found in *Martinez* a landmark decision heralding the end of *Faretta*.[83] While still affirming the *Faretta* right, the USSC in *Martinez* was no longer as passionate about the liberal aspects of self-representation as it was in *Faretta*. Bluntly put:

> No one, including Martinez and the *Faretta* Court, attempts to argue that as a rule pro se representation is wise, desirable, or efficient. Although we found in *Faretta* that the right to defend oneself at trial is 'fundamental' in nature ... it is clear that it is representation by counsel that is the standard, not the exception. ... Our experience has taught us that 'a pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney'.[84]

This change in rhetoric appears to express a shift in ideology prompted by the negative experience with self-representation.

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trial. In *Brasier v Jeary* 256 F2d 474 (1958) the United States Court of Appeal (8th Circuit) held that a litigant is not entitled to hybrid representation in civil proceedings, and that it is a matter to be left to judicial discretion.

[82] *Martinez* (n 25).

[83] See e.g. Toone (n 49) 622: 'the right to self-representation is surely the most likely to be eliminated by the Supreme Court in the foreseeable future ... The Supreme Court itself has undermined *Faretta*'s doctrinal foundation in [*Martinez*]'.

[84] *Martinez* (n 25) 161; cf Justice Scalia's opinion, refusing to 'share the apparent skepticism of today's opinion concerning [the *Faretta* decision]' (165), Justice Kennedy describing *Faretta* as 'quite sound' (164), and Justice Breyer leaving the soundness of *Faretta* open to challenge depending on the availability of empirical evidence on the extent to which the exercise of self-representation furthers or rather inhibits 'the Constitutional basic guarantee of fairness' (164).

In the circumstances of the case, the USSC reasoned that there are fundamental differences between the trial and the appeal stages that require a different treatment of self-representation at the appellate level. From a formal standpoint, the USSC indicated that the right of appeal is not guaranteed by the constitution, and, accordingly, that self-representation on that level would not be constitutionally guaranteed either. Moreover, the Sixth Amendment, which was the legal basis on which the *Faretta* right was established, is concerned with the specific rights given to defendants in relation to the preparation for and the conduct of the *trial*, none of which means much on appeal (such as the right to be informed of the charges, to cross-examine and summon witnesses).

On a more substantive level, the USSC indicated that, unlike a criminal trial which is initiated by the State and imposed on the accused, the appeal is commenced by the defendant himself as a voluntary decision, 'seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt ... in the words of [*Faretta*], appellate proceedings are simply not a case of "haling a person into its criminal courts"'.[85] Furthermore, the USSC noted that at the appellate level 'the autonomy interests that survive a felony conviction are less compelling than those motivating the decision in *Faretta*'.[86] This is because on the appellate level '[t]he status of the accused defendant, who retains a presumption of innocence throughout the trial process, changes dramatically when a jury returns a guilty verdict'.[87]

This reasoning confirms this chapter's argument that the *Faretta* decision was motivated by considerations which were tailored specifically for the accused in a criminal process and which were derived from the inherent suspicion that the state may abuse its monopoly over force and persecute free people illegitimately. On appeal, this

85 ibid 162–3.

86 ibid 163.

87 ibid 162.

suspicion is weak, since the proceedings are initiated by and not imposed upon the appellant. Furthermore, on appeal the use of power by the state at the trial stage would already be vindicated by the conviction of the defendant by his impartial peers, the jury, beyond reasonable doubt. Thus, the *Martinez* decision could be understood more as stating a limitation of the *Faretta* rationale rather than creating an exception to it (in the Benthamite sense[88]): on appeal, the rationale is no longer applicable and therefore the *Martinez* decision does not really restrict the *Faretta* right as much as it confirms the narrowness of its underlying rationale.

At any rate, whether we view *Martinez* as creating a restriction on the *Faretta* right or merely stating a limitation of its rationale, the reasons provided in *Martinez* for dismissing a right to self-representation on appeal weigh even more heavily against such a right in civil cases. Like criminal appeals, civil proceedings are commenced by individuals. Better still, the dispute is between private parties who have exclusive control over the scope and content of their cases, without state involvement. Moreover, unlike criminal appeals that revolve around the appellant's criminal condemnation and punishment, the subject matter of typical civil cases does not pose any threat to the litigants' physical freedom, which is not at all in question.

4.2 Standby counsel and hybrid representation

In *Faretta* the USSC indicated in a footnote that courts are entitled to appoint standby counsel who would be available to assist the defendant if and when he requests help, or to take over the defence if the defendant's self-representation was terminated due to deliberate disruption or abuse of the process.[89] In *McKaskle v Wiggins*, the USSC took this

[88] On Bentham's distinction between 'exceptions' and 'limitations', see HLA Hart, 'Bentham on Legal Powers' (1972) 81 Yale Law Journal 799; G Postema, 'The Principle of Utility and the Law of Procedure: Bentham's Theory of Adjudication' (1977) 11 Georgia Law Journal 1393.

[89] *Faretta* (n 1) fn 46.

footnote one step farther and decided to afford standby lawyers additional latitude and allow them to act on their own initiative to facilitate the presentation of the case, even over the defendant's objection.[90] The USSC held that standby lawyers are allowed to act independently and in substantial ways, as long as they do not participate excessively and intrusively in ways that destroy 'the jury's perception that the defendant is representing himself', or otherwise 'substantially interfere with ... significant tactical decisions, ... control the questioning of witnesses, or ... speak instead of the defendant of any matter of importance'.[91]

The power to appoint a standby lawyer gave rise to the question of whether defendants were actually *entitled* to a standby lawyer as a matter of constitutional right. The USSC answered in the negative, noting that '*Faretta* does not require a trial judge to permit "hybrid representation"' and that a 'defendant does not have a constitutional right to choreograph special appearances by counsel'.[92]

Federal and state courts reiterated this view and held in a number of cases that where state laws do not explicitly provide defendants with a right to hybrid representation, there was not such a right under the federal constitution: the Sixth Amendment guarantees either full legal representation or full self-representation, not both at the same time.[93] In fact, hybrid representation has been strongly resisted even in a state like New York whose own constitution guarantees that 'the party accused shall be allowed to appear and defend themselves in person *and* with counsel'.[94] Accordingly,

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[90] *Mckaskle v Wiggins* (n 19).

[91] ibid 178.

[92] ibid 183.

[93] See e.g. *People v Bloom* (n 32) 1218–9, where the Supreme Court of California ruled that: 'the powers and responsibilities which attend the representation of a criminally accused person should never be conferred jointly and equally on the accused and the attorney. Rather, in all cases of shared or divided representation, either the accused or the attorney must be in charge... the accused cannot be both at once'.

[94] New York State Constitution s 6 art I. The Supreme Court of New York came up with the less straightforward interpretation that this provision only secures the right of a represented defendant to be present at court; see *People v Mirenda* 57 NY2d 261 (1981) (New York Supreme Court) 265.

hybrid representation is not an entitlement and remains 'a matter of trial management … subject to the discretion of the Trial Judge, whose decision will not be disturbed by [higher courts] unless the Judge abused that discretion'.[95]

The USSC in *McKaskle v Wiggins* presented its decision as merely making explicit what was implicit in *Faretta*:

> ... we make explicit today what is already implicit in *Faretta:* A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel—even over the defendant's objection—to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals.[96]

However, it is difficult to gloss over the tension between *McKaskle v Wiggins* and *Faretta*. Standby counsel with permission to act independently and over the objection of the defendant trespasses the defendant's freedom to 'stand alone in his hour of trial', as the USSC in *Faretta* had it, and to conduct the defence in his own and distinctive way.

More importantly, the refusal to recognise a *right* to hybrid representation runs counter to the spirit of the *Faretta* decision. As we recall, the USSC in *Faretta* inferred a right to self-representation from the Sixth Amendment because the Amendment 'speaks of the "assistance" of counsel, and an assistance, however expert, is still an assistance'. Similarly, in its historical review of the right to self-representation, the USSC indicated that '[t]he right to counsel was clearly thought to supplement the primary right of the accused to represent himself, utilizing his personal rights to notice, confrontation, and compulsory process'.[97] In the same vein, the USSC in *Faretta* said that the lawyer is merely a defence tool 'like the other defense tools guaranteed by the Amendment' and

[95] ibid 266. See also *People v Gordon* (n 49) 383.

[96] *Mckaskle v Wiggins* (n 19) 184; cf the dissenting opinion.

[97] *Faretta* (n 1) 830–1.

as such 'shall be an aid to the willing defendant'.[98] These observations compel the conclusion that if the Sixth Amendment guarantees a right to legal 'assistance' that 'supplements' the 'primary' right of self-representation, there is no reason why this should only include full and not partial legal assistance. Furthermore, if legal assistance is indeed just another tool for the defendant 'to be used at his option'[99] to 'supplement the primary right of the accused to represent himself', the decision to use this tool cannot expropriate the defendant's power to use the other procedural tool of self-representation. In other words, seeking legal assistance should not prevent the defendant from representing himself in person in the same way that using his right to cross-examine a witness does not expropriate his other right, say, to summon his own witnesses. This is particularly true because hybrid representation potentially facilitates, enhances and optimises the exercise of self-representation.

Thus, it is clear that the decision in *McKaskle v Wiggins* marks a change in the philosophy of the USSC because it shifts the focus from the defendant to the court. The device of standby counsel was developed to assist the court, not the defendant. The primary goal of appointing a standby lawyer is not to maximise the defendant's ability to represent himself as much as to minimise the costs of self-representation for the administration of justice. Hybrid representation is therefore a measure of economy and as such the court, rather than the defendant, should be entrusted with the task of deciding when the appointment of standby counsel should be made. Having the required knowledge and expertise, the judge is in a position to optimise the use of this tool as a case management device to safeguard the interest of the court. Thus, rejecting a constitutional right to hybrid representation while affording the court the case management tool of imposing standby counsel marks an ideological shift in priorities,

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98 *Faretta* (n 1) 820.

99 ibid 832.

from the defendant's interest in self-representation to the court's and the public's interest in the administration of justice. In that sense, this is a curtailment of both the *Faretta* commitment to self-representation and the *Faretta* right itself.

But this is only half the story. There is more to the matter, for it remains unclear why a court would refuse to appoint standby counsel when the defendant himself expresses a need for assistance. Presumably, in most cases the defendant's interest in obtaining assistance would overlap with the court's interest in efficient and just proceedings. A principle that allows the court, on the one hand, to impose standby counsel over the objection of the defendant and, on the other, to withhold it at the defendant's request, might be faulted for incoherence. If the purpose behind appointing standby counsel is to assist the court by enabling the self-represented defendant to make a more effective and less wasteful use of his right to self-representation, why would the court refuse to appoint standby counsel when the defendant himself admits that he needs a professional adviser to enable him to properly represent himself? In fact, it is when the defendant agrees to and requests a standby lawyer that the latter would more effectively minimise the degree of obstruction and waste that would otherwise result when the defendant is not assisted at all. One would think that appointing standby counsel over the objection of the accused, as occurred in *McKaskle v Wiggins*, would be less beneficial to the court than in situations where the defendant invites the services of standby counsel.

The denial of a right to hybrid representation can be interpreted as a disincentive to defendants who might prefer self-representation. The denial of standby counsel discourages a defendant from his intention to proceed in person. Without standby counsel the gap in efficacy between self-representation and legal representation would be substantial, providing an incentive for a defendant who already demonstrates a need for assistance to opt for full legal representation altogether.

However, the possible disincentive created by the denial of an entitlement to hybrid representation is diluted by the fact that a defendant might still receive hybrid representation if the court is convinced that this is the right thing to do. After all, hybrid representation itself was not prohibited, rather the entitlement to it was rejected. The USSC could have created a more effective disincentive by prohibiting the practice of standby counsel altogether, which it did not. Worse still, it would appear that the more obstructive the defendant, the more likely he would have 'gained' standby counsel.

Another way to explain why a court may impose standby counsel on an unwilling defendant and yet deny hybrid representation for a defendant who requests it, is to invoke the core justification of self-representation as suggested in this chapter. It is possible to say that since self-representation has been recognised against the background of an inherent suspicion of state activity, it would be contrary to this idea to provide the defendant with both a right to represent himself and to be assisted by a court-appointed lawyer.[100] If self-representation reflects a distrust of lawyers and of the state that appoints them, then a defendant that seeks to represent himself cannot at the same time seek to be assisted by those same forces. Seeking such assistance undermines the very justification of self-representation because it signifies the defendant's acceptance of state authority and integrity. It is this that makes both *rights* mutually exclusive.

CONCLUSION

This chapter has reviewed the status of the right to self-representation in English and American case law. It has shown that English courts have not been sympathetic to self-representation and have restricted its exercise. In the United States, while the Supreme Court has recognised a constitutional right to self-representation in criminal

[100] It would be interesting to see how courts would approach this question when the accused offers private standby counsel. To my knowledge, there has been no such case.

proceedings, it has done so on the narrow basis of the criminal context, as a response to the threat posed by the criminal process to personal liberty. These considerations are unpersuasive in the civil context and therefore a fundamental right to self-representation cannot be justified based on them. This chapter has also pointed out the unsound theoretical basis of *Faretta* and its detrimental practical implications. Furthermore, it has drawn attention to the fact that, despite the special considerations that come to play in the criminal context, the right to self-representation has been curtailed in significant ways, which further support the case against a fundamental right to self-representation in the civil context.

The next chapter continues this discussion against the background of the case law of the ICTY, which has also recognised a fundamental right to self-representation. A more general discussion of whether the freedom to choose between self-representation and legal representation involves a genuine question of autonomy in the civil context is conducted in chapter 6.

CHAPTER 3

THE ICTY'S CASE LAW

INTRODUCTION

The International Criminal Tribunal for the former Yugoslavia (ICTY) has recognised a fundamental right to self-representation for defendants before it. This chapter discusses the relevant case law and argues that the basis for the ICTY's position is even narrower than the basis for the USSC's position in *Faretta*. Not only did the proceedings before the ICTY involve accusations of utmost gravity, namely war crimes,[1] but its political background created an additional concern for legitimacy. These proceedings were vulnerable to the criticism that they reflected the 'victor's justice'. Against this background, self-representation assumed particular importance to former political leaders who refused to acknowledge the authority and legitimacy of the Tribunal. In these circumstances, the ICTY found itself compelled to recognise a right to self-representation in order to avoid any impression that it was trying to muzzle defendants and prevent them from speaking in court. These considerations were so intense that the ICTY went farther than the USSC and granted a right to self-representation not only at trial but also at the appellate level; it also set a higher threshold for appointing standby counsel.

[1] This thesis uses the term 'war crimes' in a generic way; for the specific definitions of violations of war laws or customs, genocide and crimes against humanity, see Articles 3–5 of the Statute of the International Criminal Tribunal for the former Yugoslavia 1999 (ICTY Statute). The specific accusations against each of the defendants discussed in this chapter do not concern us.

To further support the argument that the ICTY's considerations are irrelevant in ordinary civil proceedings, this chapter shows that by recognising a fundamental right to self-representation the ICTY sought to avoid the likely consequence of the imposition of counsel, namely that the unwilling defendant would react in ways that would further undermine the integrity of the proceedings. This chapter also discusses, albeit briefly, the status of a right to self-representation under the International Covenant on Civil and Political Rights 1966 (ICCPR), which was discussed by the ICTY.

Section 1 reviews the main decisions in which the ICTY recognised a fundamental right to self-representation. **Section 2** argues that this recognition was based on considerations closely related to the specific circumstances of the proceedings before the ICTY. **Section 3** further substantiates this account and discusses the ICTY's decision to recognise a fundamental right to self-representation at the appellate level. **Section 4** assesses the status of a right to self-representation under the ICCPR.

1. REVIEW OF THE ICTY'S ATTITUDE TO SELF-REPRESENTATION

Article 21(4)(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia 1999 (ICTY Statute) grants defendants before the ICTY a right to defend themselves 'in person or through legal assistance of [their] own choosing'. In a series of decisions the ICTY interpreted this provision as affording defendants before it a fundamental right to self-representation, which could be restricted only in exceptional circumstances, such as to prevent abuse of court or of certain vulnerable witnesses, or when a defendant's self-representation 'is substantially and persistently obstructing the expeditious conduct of his trial'.[2]

[2] *Prosecutor v Milosevic* Case No IT-02-54-AR73.7 (1.11.2004) (Appeals Chamber) [13] (hereafter: '*Prosecutor v Milosevic* (AC)'); see also *Prosecutor v Milosevic* Case No IT-02-54 (4.4.2003) (Trial Chamber) [40] (hereafter: '*Prosecutor v Milosevic No 1* (TC)'). It is worth noting that not all the special international tribunals

The first decision on self-representation was given by the Trial Chamber in *Prosecutor v Milosevic*. At the beginning of the trial, the Trial Chamber dismissed the prosecution's motion to impose legal representation on Milosevic and upheld Milosevic's right to self-representation.[3] As the proceedings went along Milosevic's health deteriorated, making it too difficult for him to keep up with the pace and stress of the trial. To prevent the proceedings from becoming dysfunctional the Trial Chamber decided to appoint a defence lawyer despite Milosevic's strenuous objection. This decision shifted the lead of the defence from Milosevic to the imposed lawyer, rendering Milosevic's participation secondary to that of the lawyer and conditional upon obtaining judicial permission.[4]

This decision was appealed. The Appeals Chamber endorsed the principle that a lawyer can be imposed on an unwilling defendant before the ICTY but ruled that in doing so more weight should have been given to the right to self-representation. Accordingly, it reversed the specific terms of the appointment of counsel with the aim of enabling Milosevic to lead the presentation of his case and exercise his right to self-

recognised a right to self-representation in the same way as the ICTY did. For example, Rule 45*quater* of the Rules of the International Criminal Tribunal for Rwanda provides: 'The Trial Chamber may, if it decides that it is in the interest of justice, instruct the Registrar to assign counsel to represent the interests of the accused'. Rule 59(F) of the Rules of Procedure and Evidence of the Special Tribunal for Lebanon contain clearer terms that explicitly recognise the power to '*impose* counsel to represent or otherwise assist the accused in accordance with international criminal law and international human rights where this is deemed necessary in the interests of justice and to ensure a fair and expeditious trial'. For further discussion of less committed approaches to self-representation taken by other tribunals, including the special tribunals for Sierra Leone and Iraq, see: M Scharf and C Rassi, 'Do Former Leaders Have an International Right to Self-Representation in War Crimes Trials?' (2005) 20 Ohio State Journal on Dispute Resolution 333–7; E Cerruti, 'Self-Representation in the International Arena: Striking a False Right of Spectacle' (2009) [40] Georgetown Journal of International Law 919fn 268–9; *Prosecutor v Krajisnik* Case No IT-00-39-A (11.5.2007) (Appeals Chamber) the dissenting opinion of Judge Schomburg [56]–[62]; G Boas, 'Self-Representation before the ICTY' (2011) 9 Journal of International Criminal Justice 53, 70–1; G Boas, 'The Right to Self-Representation in International and Domestic Criminal Law: Limitations and Qualifications on That Right' in H Abtahi and G Boas (eds), *The Dynamics of International Criminal Justice* (Martinus Nijhoff, 2006) 57–62.

3 *Prosecutor v Milosevic No 1* (n 2).

4 *Prosecutor v Milosevic* Case No. IT-02-54-T (22.9.2004) (Trial Chamber) (hereafter: '*Prosecutor v Milosevic No 2* (TC)'). For a criticism of this decision, see M Damaska, 'Assignment of Counsel and Perceptions of Fairness' (2005) 3 Journal of International Criminal Justice 3.

representation when he was physically able to do so.[5] This decision, in effect, transformed the appointed lawyer into a sort of standby counsel and left Milosevic with a great deal of control over the manner in which the case would progress.

The fallout of the *Milosevic* case would manifest in the later case of *Prosecutor v Seselj*.[6] Seseli was considered 'a radical Serb nationalist who assumed major credit for developing the ideology of ethnic cleansing'.[7] Unlike in *Milosevic* where the appointment of counsel was triggered by Milosevic's ill health, in *Seselj* it was triggered by Seselj's express intention to obstruct the proceedings and use them as a forum for voicing his political views in order to produce 'a publicly broadcast campaign for political martyrdom'.[8] Having established at the outset that Seselj was 'increasingly demonstrating a tendency to act in an obstructionist fashion while at the same time revealing a need for legal assistance',[9] the Trial Chamber II decided on 9 May 2003 to appoint standby counsel for him to ensure that the defendant's interests were fully represented.[10] In doing so the Trial Chamber II stressed that Seselj's right to self-representation remained intact,[11] and that this appointment was also in the Tribunal's interest in order to safeguard its fairness as well as the expeditious progress of its proceedings.

This decision was not appealed at the time. More than three years later, on 21 August 2006, as the obstructionist conduct of Seselj persisted, the Trial Chamber decided to impose full legal representation. It held that Seselj's behaviour satisfied

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[5] *Prosecutor v Milosevic* (AC) (n 2) [19]. In the end, Milosevic died in March 2006 and the trial was terminated thereafter.

[6] *Prosecutor v Seselj* Case No IT-03-67-PT (9.5.2003) (Trial Chamber) (hereafter: '*Prosecutor v Seselj* (TC) (9.5.2003)').

[7] Cerruti (n 2) 979.

[8] ibid, 979.

[9] *Prosecutor v Seselj* (TC) (9.5.2003) (n 6) [23].

[10] In making this decision, the Trial Chamber II drew on the American jurisprudence on the subject, mainly the decision of *Mckaskle v Wiggins* 465 US 168 (1984) (see chapter 2.4.2).

[11] *Prosecutor v Seselj* (TC) (9.5.2003) (n 6) [21], [29].

Milosevic's test for appointing defence counsel because his self-representation 'may substantially and persistently obstruct the proper and expeditious conduct of a fair trial'.[12] Intimidating witnesses and making offensive comments to them, raising frivolous demands and showing deliberate disrespect for the rules,[13] Seselj's behaviour 'compromises the dignity of the Tribunal and jeopardizes the very foundations upon which its proper functioning is based'.[14]

This decision was appealed. On 20 October 2006 the Appeals Chamber delivered a puzzling decision. On the one hand, it endorsed all the points of principle made by the Trial Chamber II, and accepted that based on the obstructionist behaviour demonstrated by Seselj the Trial Chamber II had been entitled to impose legal representation.[15] On the other hand, however, it overturned the decision of the Trial Chamber II on the technical grounds that the Trial Chamber II had not issued a specific and explicit warning to Seselj to the effect that his right to self-representation would be restricted should he persist in his behaviour.[16]

Relying on this technical ground for restoring self-representation is hardly persuasive given that the Trial Chamber II noted in its first decision on 9 May 2003 that Seselj's behaviour was obstructionist and that standby counsel would take over the defence should Seselj persist in his behaviour. It is unclear why this warning was insufficient when according to the Appeals Chamber all that was required was to issue 'a warning', and not necessarily an immediate warning, prior to revoking the right to self-representation.[17]

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[12] *Prosecutor v Seselj* Case No IT-03-67-PT (21.8.2006) (Trial Chamber I) [79], [81].

[13] ibid [34]–[71].

[14] ibid [77].

[15] *Prosecutor v Seselj* Case No IT-03-67-AR73.3 (20.10.2006) (Appeals Chamber) [45] (hereafter: '*Prosecutor v Seselj* (AC) (20.10.2006)').

[16] ibid [22]–[26].

[17] ibid [24].

The saga did not end here. From this point forward events would unravel in an even more incomprehensible manner. Following the Appeals Chamber's decision the Trial Chamber revoked the appointment of the defence lawyer and reinstated the standby counsel, who had served prior to the decision on 21 August 2006 which was overruled by the Appeals Chamber. Seselj's reaction was to challenge the restoration of the former status quo claiming that the Appeals Chamber had restored his full right to self-representation and a proper warning was due also prior to the appointment of standby counsel. On top of this claim, he went on a hunger strike to exert pressure on the Trial Chamber. The Trial Chamber dismissed Seselj's allegation, reinstated the former status quo, and appointed standby counsel. Seselj refused to content himself with this decision and upon further obstruction the Trial Chamber issued a warning. When this did not restrain Seselj, the Trial Chamber reappointed defence counsel.

While the Trial Chamber seems to have complied with the decision of the Appeals Chamber (from 20 October 2006) by issuing a proper warning prior to the revocation of Seselj's right to self-representation, on 8 December 2006 the Appeals Chamber overturned the Trial Chamber's decision once again. This time it explained that by revoking the Trial Chamber's first decision to impose legal representation the Appeals Chamber had restored the full right to self-representation, not the former status quo whereby a standby lawyer was in operation.[18] The Appeals Chamber further indicated that the Trial Chamber should have refrained from appointing standby counsel immediately after the Appeals Chamber's decision in order to give Seselj the opportunity to change his obstructive course of action in the light of the ruling. Only upon establishing further obstruction in spite of the decision of the Appeals Chamber would it have been possible for the Trial Chamber to appoint a standby lawyer with the

[18] *Prosecutor v Seselj* Case No IT-03-67-AR73.4 (8.12.2006) (Appeals Chamber) [26].

power to take over the defence should the obstruction persist.[19] The result was that the Appeals Chamber set aside the proceedings which had taken place since the Trial Chamber's decision to appoint standby counsel.[20]

This ruling is unsustainable because in its first decision on 20 October 2006 the Appeals Chamber expressed no objection to the presence of standby counsel, who had already been working on the case for three years. Nor did it make clear that the standby counsel infringed upon Seselj's freedom to defend himself in person. The attempt to justify its failure to make this matter clear by noting that these questions were not raised before it on the previous occasion—which only involved the imposition of defence counsel, and not standby counsel—is too technical.[21] If the Appeals Chamber did not approve of the presence of standby counsel who had been in action for three years it should have already indicated so in its first decision. However, it did not. Furthermore, it is unclear to what extent the appointment of standby counsel represented a curtailment of the right to self-representation when the terms of the appointment were such that they hardly interfered in Seselj's freedom to represent himself; the standby counsel was not allowed to initiate any action or act on his own motion.[22]

Thus, it is unsurprising that the Appeals Chamber's decision has been heavily criticised by commentators as being legally unfounded. The ICTY has been said to have capitulated to the pressure created by Seselj's hunger strike—which had severe consequences on Seselj's health—in order to prevent further damage to its reputation after the termination of Milosevic's case due to his death.[23] Indeed, the political background against which the ICTY operated could explain why the Appeals Chamber,

[19] ibid [27].

[20] ibid [30].

[21] ibid [26].

[22] *Prosecutor v Seselj* (TC) (9.5.2003) (n 6) [30].

[23] See e.g. G Sluiter, 'Compromising the Authority of International Criminal Justice' (2007) 5 Journal of International Criminal Justice 529.

while repeatedly affirming the principle that self-representation was not absolute, went out of its way to avoid applying this principle in practice even at the price of resorting to technical and largely unfounded grounds.[24] This point is developed in the following section.

2. THE UNIQUE FEATURES OF THE ICTY

2.1 A preliminary distinguishing factor

One possible factor that could explain the ICTY's readiness to permit self-representation might be that the defendants before it were distinguishable from ordinary litigants or defendants. Being former leaders or otherwise high officials, they would normally be particularly competent, intelligent and capable. Furthermore, these defendants enjoyed extensive legal assistance and the amount of resources invested by the ICTY in facilitating the self-representation of defendants before it was exceptionally high.[25] For example, Milosevic was himself a lawyer and he was assisted by a number of lawyers and legal associates, as well as by three amicus curie appointed by the ICTY with an expanded role to undertake substantial work.[26] Likewise, Seselj, himself a law professor, was assisted by a legal team of 25 members, most of whom were lawyers.[27] All other things being equal (leaving aside the defendant's political calculation of

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[24] Note that even within the Appeals Chamber different views have been expressed. In the case of the *Prosecutor v Krajisnik* (n 2), which is discussed in detail below, the dissenting judge challenged the right to self-representation and its potential to override the public interest in fair and expeditious proceedings. Describing the previous decisions of the Appeals Chamber in *Milosevic* and *Seselj* as 'a long line of unfortunate decisions' (Judge Schumburg, [4]), and drawing on the civil law practice of mandatory representation and on the American case law that criticised the decision in *Faretta v California*, the dissenting judge took the view that when self-representation 'conflicts with the overarching right to a fair, public and expeditious trial, the right to self-representation must yield' ([83]).

[25] Boas, 'Self-Representation before the ICTY' (n 2) 73–4.

[26] *Prosecutor v Milosevic No 1* (TC) (n 2) [3], [5]. See also Cerruti (n 2) 974; Boas, 'Self-Representation before the ICTY' (n 2) 67 noted that in the case of another defendant, Karadzics, a large international team of pro bono lawyers working with an experienced legal associate was engaged, and the Registry and the Trial Chamber formally recognised these lawyers as rendering legal assistance to the accused.

[27] *Prosecutor v Seselj* (AC) (20.10.2006) (n 15) [42].

whether or not to abuse the process), self-representation under such circumstances would be far more effective than in ordinary civil cases where LIPs normally proceed with minimal legal advice, if any. This difference weakens the force of the ICTY's position to support the case for self-representation in the civil context.

2.2 An increased dose of the *Faretta* rationale and the ICTY's political vulnerability

In *Milosevic* the Trial Chamber pointed to the two opposite attitudes to self-representation, namely the common law treatment of self-representation as a fundamental right and the civil law treatment of it as an ordinary procedural matter of no normative significance. The Trial Chamber chose to side with the former, being of the view that its proceedings bore more resemblance to adversarial rather than civil law procedures:

> Adversarial proceedings are a feature of the common law and find little echo in systems based on civil law. ... the imposition of a defence counsel upon an accused who does not want one is a feature of the inquisitorial systems, but not of adversarial systems.[28]

Having classified its procedure as adversarial, the Trial Chamber turned to the decision in *Faretta* as a source of inspiration, considering it the 'classical statement of the right to self-representation'[29] in adversarial proceedings. It went on to say that:

> While it may be the case that in civil law systems it is appropriate to appoint defence counsel for an accused who wishes to represent himself, in such systems the court is fulfilling a more investigative role in an attempt to establish the truth. In the adversarial systems, it is the responsibility of the parties to put forward the case and not for the court, whose function it is to judge. Therefore, in an adversarial system, the imposition of defence counsel on an unwilling accused would

[28] *Prosecutor v Milosevic No 1* (TC) (n 2) [21].

[29] *Prosecutor v Milosevic No 2* (TC) (n 4) [45]. The *Faretta* ruling was also relied on in *Prosecutor v Milosevic* (AC) (n 2) [11]; *Prosecutor v Seselj* (TC) (9.5.2003) (n 6) [12], [15].

> effectively deprive that accused of the possibility of putting forward a defence.[30]

This reasoning has been criticised by many scholars, who argue that ICTY's proceedings were rather a mixture of civil law and common law procedures, and that consequently the civil law tradition of mandatory representation should not have been discarded completely.[31] There is more to the matter, however. The Trial Chamber was not justified in holding that the imposition of counsel is more detrimental to the accused in adversarial proceedings than in civil law proceedings. The opposite position seems more plausible: since judges undertake a much more active role in civil law systems, self-representation in these systems may be more effective or at least less harmful. Furthermore, the proposition that the imposition of counsel on a defendant in adversarial proceedings would effectively deprive her 'of the possibility of putting forward a defence' would be correct only if the defendant decided not to cooperate with the imposed counsel.[32] This implies that the ICTY's decision to follow *Faretta* was not related to the adversarial nature of its procedure as much as it was related to the risk of lack of cooperation between the defendant and the imposed counsel, a risk that was substantial in the specific circumstances. Former political leaders considered the

[30] *Prosecutor v Milosevic No 1* (TC) (n 2) [24]. Damaska raised a quite different point, arguing that mandatory representation results in a greater loss of the defendant's *freedom* within adversarial procedure, rather than in his ability to defend himself and influence the outcome; see Damaska (n 4) 5. The extent to which self-representation promotes personal autonomy is discussed in chapter 6.

[31] See the review at B Brown, 'The Internation Criminal Tribunal for the Former Yoguslavia' in C Bassiouni (ed) *International Criminal Law* (3rd edn, Martinus Nijhoff Publishers, 2008) 91.

[32] The focus on the risk of lack of cooperation led the Trial Chamber to consider further practical difficulties that weighed against the restriction of self-representation. As it noted (*Prosecutor v Milosevic No 1* (n 2) [38]): 'There are also practical reasons in the instant case for not appointing defence counsel to the Accused. If such counsel were appointed, the Trial Chamber would have to take one of two courses: should the Accused (as, judging by his submissions, is likely to be the case) refuse to instruct him or her, the Trial Chamber could either: (a) not allow the Accused to make submissions and question witnesses, thereby effectively preventing the Accused from putting forward any defence; or, (b) it could allow him to make submissions and question witnesses, in which case, the defence counsel could do no more than the Amici Curiae'. This concern has been reiterated by the Appeals Chamber in *Prosecutor v Seselj* (AC) (20.10.2006) (n 15) [44]–[45]: 'Thus, the Trial Chamber had a choice between allowing Seselj to present himself at trial, resulting in the near certain disruption to the trial ... or assigning counsel to represent Seselj, resulting in the possibility that problems could arise in that representation due to Seselj's refusal to cooperate with assigned counsel'. These considerations are discussed in detail in chapter 8.3; it should be noted, briefly, that they are largely irrelevant in civil proceedings in the light of the court's power to strike out cases for procedural non-compliance.

proceedings against them as illegitimate, and therefore if they expressed a preference to proceed in person they would be unlikely to cooperate with an imposed counsel. While such defendants might refuse to accept the tribunal's legitimacy whether left to represent themselves or not, the ICTY seems to have preferred at least to give them a chance to participate in the proceedings and avoid any impression that it was trying to deny them the opportunity to speak up and defend themselves.

The *Farreta* justification for self-representation could be viewed as even more persuasive in war crimes proceedings, given their gravity as well as their political dimension. Defendants before special international tribunals are usually former leaders or otherwise highly ranked state officials, and their defence often seeks to deny the legitimacy of such trials by accusing them of being politically driven.[33] The experiences with the international tribunals of Yugoslavia, Iraq, Sierra Leone and Rwanda have demonstrated that the defendants before these tribunals 'openly question the legitimacy of the court, act disrespectfully to the judges'[34] and 'are most likely to view a criminal trial, like diplomacy, as merely a continuation of hostilities by other means'.[35] As Gideon Boas put it:

> The desire to speak on their own behalf, a mistrust of others to represent their understanding of events, the wish to utilize the forensic trial process as a political podium from which to attack the judicial process and the political powers and forces which reduced them from positions of power and leadership to detention and trial all appear to be factors motivating this phenomenon [of self-representation]. ... They all concern manipulative accused of relative or significant seniority who do not respect the authority and legality of the court trying them and who use the forensic trial process as a political platform and/or as a means to exploit their personal interests, even if that is only to obstruct and derail the trial against them.[36]

[33] The ICTY's position was vulnerable also because it was the first special tribunal to assume the task of trying former political leaders, and its creation and operation were accompanied by ambivalent political support. For a brief review of the inception of the ICTY see Brown (n 31) vol 2, 69–72, 96–9.

[34] Scharf and Rassi (n 2) 21.

[35] Cerruti (n 2) 970.

[36] Boas, 'Self-Representation before the ICTY' (n 2) 54.

Indeed, in justifying its position to afford a fundamental right to self-representation the ICTY raised the same concerns about the political persecution of individuals and cited the same symbolic example relied on by the USSC, namely the Star Chamber.[37]

To be clear, whether the concern for political legitimacy should lead to a right to self-representation in war crime proceedings, and outweigh the international interest in a reliable and expeditious process, is beside the scope of this chapter. The only relevant point is that it is these kinds of considerations that underlie a right to self-representation in this context, considerations which are largely irrelevant in ordinary civil proceedings.[38]

3. Self-representation at the appellate level

3.1 The ICTY's love/hate relationship with American jurisprudence

While the ICTY used the adversarial nature of its proceedings as a reason to follow the American decision of *Faretta* and recognise a right to self-representation at the trial stage, it refused to follow the American decision of *Martinez* which, as we recall, refused to extend the *Faretta* right to the appellate level (chapter 2.4.1). In the case of *Prosecutor v*

[37] *Prosecutor v Milosevic No 1* (n 2) [22].

[38] It is worth noting that the ICTY's recognition of self-representation has attracted fierce criticism pertaining to aspects that have no direct bearing on our enquiry. Typically, this criticism would recount the deliberate damage caused by some of these self-represented defendants to international legal proceedings, given that they were usually politically driven to obstruct a judicial process which they considered illegitimate. Furthermore, critics would highlight the extra complexity of war crimes trials and the important role of international tribunals in establishing a historical record of the events and allowing victims to recount the atrocities they experienced. In the light of these factors, it is often argued, international tribunals cannot afford the 'luxury' of self-representation. See generally Cerruti (n 2), Boas, 'Self-Representation before the ICTY' (n 2); Scharf and Rassi (n 2). It would be incorrect to say that the fact that these heavy considerations were outweighed by self-representation underscores the universal importance of the latter. It was precisely the high profile nature of the allegations and the fragile legitimacy of such tribunals that gave self-representation its primary appeal. Likewise, the fact that critics rely on these heavy considerations to outweigh self-representation does not mean that self-representation can only be outweighed by such heavy considerations. Clearly, the extra complexity and importance of war crime trials do not mean that ordinary civil cases are not complex and important enough to require legal representation.

Krajisnik[39] the Appeals Chamber decided that a defendant who was convicted of war crimes by the Trial Chamber continued to enjoy a fundamental right to self-representation before the Appeals Chamber. In its brief decision the Appeals Chamber refused to distinguish between the trial and appeal stages, observing that:

> There is no textual basis for concluding that the guarantee to self-representation [as expressed in Article 21(4)(d)] ... evaporates with the issuances of the trial judgment. Moreover, there is no obvious reason why self-representation at trial is so different in character from self-representation on appeal as to require an *a priori* distinction between the two. Self-representation on appeal ... is no more difficult (and perhaps less difficult) than self-representation at trial.[40]

This reasoning is questionable. The legal basis for a right to self-representation before the ICTY, i.e. Article 21(4)(d) of the ICTY Statute, is concerned only with the rights of the accused at the trial stage: Article 21 grants 'minimal guarantees' to the 'accused' in 'the determination of any charge' against her, which include the rights to be tried without delay, to be informed promptly of the charges against her, to cross-examine witnesses, and to have adequate time to prepare her 'defence'. These rights are irrelevant on appeal and therefore it is clear that Article 21(d)(4) cannot serve as a basis for a right to self-representation at the appellate level. In this respect, the ICTY was in the same position as the USSC in *Martinez*, where it ruled that the Sixth Amendment, which was the legal basis for the right to self-representation at the trial stage, dealt with rights at trial and was therefore inapplicable to appellate proceedings.

The Appeals Chamber advanced another ground for distinguishing *Martinez*. It said that the USSC in *Martinez* relied on the fact that the US Constitution did not provide a right to appeal and therefore that self-representation could not have been recognised as a constitutional right at the appellate level. Conversely, since a right to appeal existed under the ICTY Statute, the Appeals Chamber concluded that *Martinez*

[39] *Prosecutor v Krajisnik* (n 2).

[40] *Prosecutor v Krajisnik* (n 2) [11] (emphasis in original).

could not provide any guidance.[41] However, the Appeals Chamber overlooked the fact that the USSC in *Martinez* advanced additional reasons for rejecting the right at the appellate level. As we have seen in the previous chapter, the USSC relied also on the fact that an appellant no longer enjoyed the presumption of innocence and was accordingly no longer entitled to special treatment or allowances. Once convicted, the defendant's autonomy-based interest could no longer override the public interest in fair and expeditious proceedings. This consideration is equally forceful in the proceedings before the ICTY.

In his concurring opinion at the Appeals Chamber, Judge Shahabuddeen attempted to address this deficiency in the Chamber's reasoning by arguing that it is only in common law systems that appellants do not enjoy the presumption of innocence, whereas 'the general position in civil law countries is that the presumption of innocence continues and comes to an end only when the conviction at trial is upheld on appeal'.[42] However, Shahabuddeen's response runs counter to the foundational justification given for self-representation in *Milosevic,* where the ICTY based its rejection of mandatory representation on the grounds that its proceedings were adversarial rather than civil-law-like. For if the ICTY were to follow the civil law tradition the right to self-representation would have lost much of its force by the trial stage.[43]

On another front Judge Shahabuddeen suggested a connection between the right to attend a hearing and the right to proceed in person:

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41 *Prosecutor v Krajisnik* (n 2) [12].

42 ibid, Judge Shahabuddeen's concurring opinion [7].

43 An additional reason put forward by Judge Shahabuddeen was that neither self-representation nor legal representation is part of customary international law as different states adopt different methods of participation. Accordingly, he concluded, it was open to the ICTY to choose whatever method it saw fit ([2]–[4]). However, if we were to take this point at face value, it would follow that imposing legal representation was also a legitimate option, meaning that there is no principled objection to one course of action or another. To avoid arbitrariness, the adoption of one form of representation and not another should be based on principles, not on the mere fact that opposing practices were adopted by different countries and therefore that either course of action would be acceptable.

> The fact that the appellant has a right to be present during the hearing of his appeal favours a right to self-representation. It at any rate provokes this question: why does an appellant have a right to be present during the hearing of his appeal if he must sit there condemned to silence while he watches an assigned lawyer speak on his behalf—a lawyer whom he may not want and with whose statements he may disagree? There is difficulty in locating a convincing answer which would justify the Appeals Chamber in taking the radical step of what, despite the sanitised reference to 'restricting' the right to self-representation, has the effect of altogether removing the right.[44]

This is a non-sequitur. The right to be present in court and the right to self-representation have different justifications and serve different values. First, not only could the right to be present in court be derived from the principle of public and open court, but it is also necessary to promote the acceptability of verdicts. Proceedings that are conducted in absentia would not be legitimate and acceptable (bar exceptional circumstances in which a defendant has to be removed *temporarily* for special reasons, such as to facilitate the testimony of a sex crime victim or to prevent disruption and abuse).[45]

More importantly, a right to be present in court is vital for a legally represented defendant because it allows her to oversee the conduct of her defence by her counsel. For representation to be effective and meaningful defendants should be entitled to be present in order to advise and instruct their attorneys; after all, it is the defendant who best knows the facts. Furthermore, we must bear in mind that the defendant has a major role in deciding what defence their counsel should make and she retains the power to fire counsel whose service is unsatisfactory. To exercise these supervisory powers effectively a defendant must be able to see what her counsel is doing. Finally, it might be worth noting that the right to be present does not hinder the flow of the proceedings.

[44] *Prosecutor v Krajisnik* (n 2) Judge Shahabuddeen's concurring opinion [28].

[45] Disruptive behaviour in the courtroom could be seen as an abuse and therefore as a waiver of the right to be present.

In conclusion, the right to self-representation cannot be inferred from the right to be present in court.

3.2 Back to the ***Faretta*** rationale

The inconsistent treatment of American case law by the ICTY, by following *Faretta* at the trial stage but rejecting *Martinez* at the appellate level, could be explained by recalling the nature of the justification of self-representation given in *Faretta*, namely its relation to the risk of persecution and abuse of power, the gravity of the subject matter and the potential consequences of the proceedings. These considerations weigh heavier in war crime proceedings than in ordinary criminal proceedings. The sense of persecution in war crimes cases is more substantial than in ordinary criminal trials. Proceedings against political figures on account of what they did in their political capacities could be perceived as political. Furthermore, if in ordinary criminal proceedings the defendant's entitlement to special treatment results from the imbalance of power between the state and the individual, in international proceedings it is the whole international community against an individual involving allegations of utmost gravity: war crimes. Indeed, ordinary criminal proceedings differ from international proceedings in the intensity of the threat to the defendant and the gravity of the accusations against her. In the context of war crimes proceedings, these considerations are so important that they might be used to justify self-representation not only at trial but also at the appellate level.

This could explain why the ICTY was reluctant to follow *Martinez* even though it drew heavily on American jurisprudence to establish a right to self-representation at the trial level. This could also explain why the Appeals Chamber went as far as to describe the right to self-representation, whether at trial or at the appellate level, as 'an indispensible cornerstone of justice'.[46] Judge Shahabuddeen, for example, found it imperative to borrow from *Faretta's* rhetoric that the risk of persecution lies at the heart of the justification for the right to self-representation, even though this rhetoric was used in *Faretta* in relation to the trial, not the appeal:

> *Faretta* concerned self-representation at trial, not at appeal, but it is still appropriate to recall the principle enunciated by the Supreme Court of the United States in that case that to 'force a lawyer on a defendant can only lead him to believe that the law contrives against him. … The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage'. *The pertinence of these observations does not evaporate with the conclusion of a trial at first instance; their rationale extends to the entire judicial process ending in a final declaration of guilt or innocence.*[47]

This suggests that the recognition of self-representation as a fundamental right before the ICTY has been based on considerations that bear no relevance to ordinary civil proceedings.

4. REVISITING THE RIGHT 'TO DEFEND ONESELF IN PERSON OR THROUGH COUNSEL'

This section examines a different aspect of the reasoning that led the ICTY to recognise a fundamental right to self-representation. The purpose of this examination is to cast doubt not only on the soundness of the ICTY's position but also on the value that might be attached to a right to self-representation in criminal proceedings.

The formal basis for the right to self-representation was Article 21(4)(d) of the ICTY Statute, which is virtually an identical copy of Article 14(3)(d) of the ICCPR. The ICCPR was the first international convention to recognise a right to 'defend in person or through legal assistance' as part of the package of rights afforded to defendants under

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[46] *Prosecutor v Milosevic* (AC) (n 2) [11]; *Prosecutor v Krajisnik* (n 2) [11].

[47] *Prosecutor v Krajisnik* (n 2) Judge Shahabuddeen's concurring opinion [33].

the fair trial protection, along with other procedural safeguards including the rights to be informed of the charges, to have adequate time and facilities for the preparation of defence, to examine the prosecution's evidence and to be able to present evidence. Interestingly, these rights are explicitly guaranteed only for defendants in criminal proceedings. Article 14(3)(d) of the ICCPR provides that every defendant is entitled to

> be tried in his presence, *and to defend himself in person or through legal assistance of his own choosing*; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

This provision has been replicated, at times with slight modification, in other conventions such as Article 67(1)(d) of the Rome Statute of the International Criminal Court 1988 which pertains to defendants before the International Criminal Court, Article 8(2)(d) and (e) of the American Convention on Human Rights 1969 (ACHR) which pertains to defendants mainly in Latin America and Article 6(3)(c) of the ECHR which pertains to defendants before European criminal courts.

Even though all these provisions guarantee a right to 'defend in person or through legal assistance', several countries with civil law traditions in Europe and elsewhere have laws which require mandatory legal representation in cases involving serious crimes or that are otherwise factually or legally complex.[48] This gives rise to the question of whether these laws are compatible with the applicable convention, be it Article 6(3)(c) of the ECHR, Article 14(1) of the ICCPR or Article 8(2)(d) of the ACHR.

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[48] For example, this is the case in Argentina, Austria, Belgium, Bulgaria, Cameroon, Columbia, Costa Rica, Croatia, Denmark, France, Germany, Italy, the Republic of Korea, Montenegro, Norway, Paraguay, Portugal, Spain, Slovenia, Sweden, Zurich (Switzerland); for references see: *Prosecutor v Milosevic No 1* (n 2) fn 40; *Prosecutor v Krajisnik* (n 2) [40]–[55] of Judge Schomburg's dissenting opinion; *Prosecutor v Seselj* (TC) (9.5.2003) (n 6) [16]–[17]; Scharf and Rassi (n 2) 13–4; Boas, 'Self-Representation before the ICTY' (n 2) at fn 20.

4.1 Two different interpretations of the right 'to defend oneself in person or through legal assistance'

The key question is what to make of the conjunction 'or' in 'to defend oneself in person *or* through legal assistance'. The ICTY understood this clause in its Statute as affording two rights: self-representation and legal representation. Both the Trial Chamber and the Appeal Chamber observed that 'a plain reading of this provision indicates that there is a right to defend oneself in person',[49] and that it is a 'straightforward proposition' that 'given the text's binary opposition between representation "through legal assistance" and representation "in person"' there is 'no reasonable way to interpret Article 21 [of the ICTY Statute] except as a guarantee of the right to self-representation'.[50]

However, this interpretation can be contested. For the ICTY's interpretation to be really straightforward, Article 21 of the ICTY Statute or the other similar provisions should have provided, for example, that 'every defendant has the right to *choose* whether to represent herself in person or through counsel'. As such provisions are presently phrased, it is more plausible to argue that the right that is being conferred is a right to representation, not a right to choose the *form* of representation. The obligation under such provisions would be discharged by permitting *either* self-representation *or* legal representation, not necessarily both. If the right is to 'either or', another right to choose between the two alternatives does not necessarily follow. To use Hohfeldian terms, a right to either X or Y translates into a duty to provide either X or Y, not both.[51]

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[49] *Prosecutor v Milosevic No 1* (n 2) [18].

[50] *Prosecutor v Milosevic* (AC) (n 2) [11]. Cf *Prosecutor v Milosevic No 2* (TC) (n 4) [32].

[51] It should be noted, however, that according to Nowak, the French and Spanish versions of Article 14 of the ICCPR support the interpretation that it affords a right to choose whether to proceed in person or through counsel: see M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised, Engel 1993) 338.

On this interpretation, the prescription of two specific ways in which the right to representation could be satisfied—i.e. 'in person' or 'through counsel'—does not imply an additional right to choose between the two possible alternatives. Rather, these two specific forms of representation are mentioned in order to eliminate other forms of representation. For example, if a defendant was allowed to appear only through a lay representative, her right to defend herself 'in person or through legal assistance' would be violated; by the same token, if the defendant insists on being represented by a layperson,[52] she may not rely on the right to 'defend herself in person or through counsel' to support this request.[53]

It is possible to develop this interpretation and argue that the prescription of the two alternatives implies that the choice between them should not be arbitrary. In other words, the right to 'defend in person or through counsel' would not be satisfied whenever one of the two prescribed forms of representation was granted, irrespective of the circumstances. When self-representation is inadequate, the right to representation is

[52] As occurred in *Mayzit v Russia* (2006) 43 EHRR 38 (ECtHR) (discussed in chapter 8.2).

[53] Another way to interpret a right to 'defend oneself in person or through legal assistance' is as a prohibition against 'hybrid representation'; that is, the conjunction 'or' would indicate that the defendant cannot both hire a lawyer and seek to operate in person at the same time. As we remember from chapter 2.4.2, this was the interpretation adopted by some American states' supreme courts of similar provisions in their constitutions. Replacing 'or' with 'and' would give rise to the opposite interpretation, that there *is* a right to hybrid representation. Judge Schomburg of the ICTY's the Appeals Chamber offered such an interpretation, observing that 'the disjunction of "self-representation or counsel"' in Articles 14(3)(d) of the ICCPR and 21(4)(d) of the ICTY was never meant to be understood as a dichotomy making the right to self-representation and legal representation mutually exclusive. In his opinion, the word 'or' in these articles should be read as 'and' to reflect a more proper approach to the right to make a defence. According to Judge Schomburg, this interpretation would afford the accused some latitude for personal participation and active involvement in the proceedings even whilst being represented. He defended this approach on the grounds that it prevents the accused from becoming an object of the proceedings and accordingly from being excluded from his own defence when counsel is engaged. Thus, according to Judge Schumburg, 'joint efforts of accused and counsel are feasible and finally serve best the interests of justice and the accused'; see *Prosecutor v Krajisnik* (n 2) (his dissenting opinion) [2]–[3], *Prosecutor v Seselj* (TC) (9.5.2003) (n 6) [29] and W Schomburg, 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights' (2009) (8) Northwestern Journal of International Human Rights 1, text attached to fns 106–110, 143. This approach is interesting, and limited personal participation could indeed be considered as a possible compromise in a mandatory-representation regime. However, it should be indicated that Schumburg's proposition, that if a defendant is required to act only through counsel the defendant would become an object of the proceedings and a mere observer, is inaccurate. As argued in chapter 8, the defendant always retains a certain level of control over her counsel's activity and over her defence.

violated if a defendant is not allowed to proceed through counsel or is not provided with legal aid. The focus on effective representation is consistent with the rest of the provision in question, which deals solely with legal representation, not self-representation: 'to be informed, if he does not have legal assistance, of this *right* [not 'rights']; and to have legal assistance assigned to him in any case where the interests of justice so require ...'. As we shall see in chapter 8, this interpretation is consistent with the approach taken by the ECtHR to Article 6 of the ECHR, according to which Article 6 secures a right to effective representation rather than an entitlement to insist on one form of representation over another.[54]

4.2 The history of self-representation in the international domain

To further support the proposed interpretation, it might be useful to briefly examine the drafting history of the relevant conventions. A number of scholars who have investigated this history found that the incorporation of a right to 'defend oneself in person or through legal assistance' was not motivated by respect for a right to self-representation as a fundamental right. Eugene Cerruti describes the process in which such a right found its way to the international arena as follows:

> Self-representation slipped unnoticed through the international door at Nuremberg ... The right received no notice and was of no consequence since none of the Nazi war criminals elected to represent themselves. The right was thereafter incorporated, again without review or consequence, in the seminal document that inaugurated the 'rights of accused' in international criminal proceedings: [the ICCPR]. The ICCPR rights of the accused then became a standard package of rights that were

[54] The European Commission on Human Rights, too, expressed such a view; see *Ensslin, Baader and Raspe v Germany* Apps No 7572/76, 7586/76, 7587/76 (8.7.1978) (EComHR) [21]: 'the Convention clearly defines the right guaranteed by [Article 6(3)(c)] as an alternative between two arrangements designed to ensure that both sides of the case are heard'. A similar approach might be also attributed to the Inter-American Court of Human Rights observed in an Advisory Opinion with regard to the ACHR: see Judge Schomburg's note in *Prosecutor v Krajisnik* (n 2) [27].

> incorporated wholesale in a broad number of newly established national constitutions and international conventions.[55]

Michael Scharf and Christopher Rassi have reached a similar finding in their examination of the drafting history of the ICCPR:

> According to official records, no discussion ensued concerning an absolute right to defend oneself; rather the delegates were solely concerned about the right to access to counsel, the choice of counsel, and who pays for counsel if the defendant is indigent.[56]

Until it was first asserted by defendants before the ICTY, the right to self-representation had also been ignored in the literature. The central issues discussed in relation to these conventions were the entitlements to legal representation and to legal aid. Indeed, the right to self-representation was usually perceived as a limited right to participate in the trial insofar as such participation did not compromise the integrity of the process. As Cherif Bassiouni notes, international human rights conventions never intended to prevent courts from imposing legal representation whenever it was 'in the best interests of justice and in the interest of adequate and effective representation of the accused'.[57]

To conclude, the general picture seems to indicate that the inclusion of a right to 'defend oneself in person or through counsel' in several international and regional conventions cannot be taken at face value as a guarantee of an unfettered right to self-

[55] Cerruti (n 2) 965. Cf the ICTY's Appeals Chamber in *Prosecutor v Milosevic* (AC) (n 2) [11]: '[t]he drafters of the [ICTY] Statute clearly viewed the right to self-representation as in indispensable cornerstone of justice, placing it on a structural par with [the] defendants' right to remain silent, to confront the witnesses against them, to a speedy trial, and even to demand a court-appointed attorney if they cannot afford one themselves'. This inference is doubtful because self-representation does not seem to have been discussed while drafting Article 21 of the ICTY Statute, which is merely a copy of Article 14 of the ICCPR; see C Bassiouni, *The Law of the ICTY* (Transnational Publishers, 1996) [12.11.2]–[12.11.3].

[56] Scharf and Rassi (n 2) 12.

[57] C Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 Duke Journal of Comparative and International Law 235, 283–4 (further noting that '[t]he right to self-representation complements the right to counsel and is not meant as a substitute thereof'). See also Scharf and Rassi (n 2) 12–13; Cerruti (n 2) 966; cf Nowak (n 51) 338–9, who proposes to interpret the history of Article 14 in a way that favours a right to self-representation.

representation. A deeper and more nuanced investigation reveals that self-representation has not been intended to be a fundamental right even in the criminal context.

4.3 The *Hill v Spain* case before the Human Rights Committee

The Human Rights Committee established by the ICCPR (HRC) dealt with mandatory legal representation in *Hill v Spain*.[58] In this case, a Spanish court convicted two English brothers of firebombing a bar during their holiday in Spain, and therefore sentenced them to six years in prison, in addition to heavy compensation for the bar owner. Dissatisfied with the incompetence of the lawyers and the poor quality of the interpreters provided for them, one of the brothers requested to represent himself at some point during the trial in order to examine the prosecution's witness and to call as a witness a person who was present in the courtroom. Under Spanish law, however, counsel was mandatory under the circumstances and the judge therefore dismissed these requests.

The HRC found that the complainers did not receive a fair trial before the Spanish courts due to several violations of the ICCPR, including violations in relation to their detention conditions (they were not provided with food for five days), their right to be tried without undue delay (it took 16 months for the trial to start although the case was not particularly complex), and their right not to be detained in custody merely because they were foreigners.[59] As for self-representation, the HRC held that the decision to prevent one of the brothers from proceeding in person was in violation of his right to proceed in person under Article 14 of the ICCPR.[60] The HRC further

[58] *Hill v Spain* Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (2.4.1997) (Human Rights Committee).

[59] ibid [12.3], [12.4], [13].

[60] ibid [14.2].

decided that the refusal to entertain the brothers' appeal on the grounds that it was not filed by counsel denied them their right to appeal under the ICCPR.[61]

Whether this decision supports a general right to self-representation under the ICCPR has been subject to some debate given that the HRC did not provide a detailed analysis of its findings. The ICTY Trial Chamber in *Prosecutor v Melosivic* used the HRC's decision to support its position that a right to self-representation is fundamental in international criminal law and should therefore weigh heavily in the balance with other considerations.[62] Although the Trial Chamber conceded that 'the Human Rights Committee did not discuss its findings in detail', it nevertheless considered the *Hill* decision 'highly relevant to the correct interpretation' of Article 21(4)(d) of the ICTY Statute merely because, as it happened, it was the only case available on Article 14(3)(d) of the ICCPR.[63] However, this is an illegitimate use of a source because it is difficult to assess the full effect and the scope of a decision that contains no detailed analysis. This is particularly so when the *Hill* case did not deal only with the question of self-representation; there were so many other violations of procedural safeguards that it is not possible to isolate the question of mandatory representation and assess it on its own merit.

Indeed, many writers have picked up on this issue. Scharf and Rassi faulted the reliance of the ICTY's Trial Chamber on *Hill* on the grounds that the case was 'factually unique' to an extent that discounted 'the general applicability of the [its] finding'.[64] Scharf and Rassi indicated that 'nowhere in the Hill decision did the [HRC] say that the procedural codes of civil law systems, where it is common practice to assign mandatory

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[61] ibid [14.3].

[62] *Prosecutor v Milosevic No 1* (TC) (n 2) [36]–[37].

[63] ibid [37].

[64] Scharf and Rassi (n 2) 16.

counsel, are inconsistent with the ICCPR'.[65] They also added that 'the defendant was unable to effectively participate in his defense because of the incompetence of the assigned counsel. ... the only chance for Michael Hill to receive a fair trial under those circumstances would be to allow him to represent himself'.[66]

In later decisions the Trial Chamber in both *Milosevic*[67] and *Seselj* took a more careful view towards the decision in *Hill v Spain* and conceded that the *Hill* decision was 'distinguishable on its facts which reveal that assigned counsel [was] incompetent and the accused received an unfair trial in numerous aspects'.[68] Critical views emerged also within the ICTY's Appeals Chamber. In the case of *Prosecutor v Krajisnik* the dissenting judge Wolfgang Schomburg pointed out that 'the holding of the [HCR] merely relates to a specific case where the defendant was not allowed to cross-examine or call witnesses, or in fact to participate in the proceedings at all'.[69]

To be accurate, however, it must be noted that the HRC did *not* grant the right to self-representation because of the incompetence of the lawyers and the interpreters. The HRC expressly noted that it refrained from determining the defendants' allegations on this score.[70] Nevertheless, the essence of the criticism described above remains true, namely that the facts in *Hill v Spain* were exceptional and that the reasoning of the HRC

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[65] ibid 17.

[66] ibid 17. See also Cerruti (n 2) 972 fn 230: 'The single case before the HRC which did uphold a right of self-representation, Hill v Spain, was decided on the limited basis of an exceptional set of facts'.

[67] See e.g. *Prosecutor v Milosevic No 2* (TC) (n 4) [44]. This decision was overturned on appeal; see section 1 above.

[68] *Prosecutor v Seselj* (TC) (9.5.2003) (n 6) [18]: '... this decision did not address the question of mandatory defence counsel in detail, and it is doubtful if it can be understood to imply that any rule requiring the assignment of defence counsel in the procedural codes of civil law systems is incompatible with the ICCPR. In other words, the Human Rights Committee does not go so far as to recognise an absolute right to self-representation'.

[69] *Prosecutor v Krajisnik* (n 2) [27] of Judge Schomburg's opinion. In this case Judge Schomburg dissented on the question of whether a right to self-representation should be recognised before the Appeals Chamber; see discussion in section 3 above.

[70] *Hill v Spain* (n 58) [14.4]: 'Given the Committee's conclusion that the authors' right to a fair trial under article 14 was violated, it need not deal with their specific allegations relating to the adequacy of their representation by a legal aid lawyer [and] the competence of the interpreters'.

was not detailed. Thus, this decision does not provide useful guidelines on the status of self-representation under the ICCPR, and on the extent to which defendants could insist on proceeding in person irrespective of the potential consequences that this insistence could have on the integrity and efficiency of the proceedings.[71]

CONCLUSION

This and the previous chapter have shown that the available justifications for a fundamental right to self-representation in criminal proceedings are context specific and cannot be used to justify a similar right in the civil context. Both the USSC and the ICTY recognised a right to self-representation in the light of the specific nature of the criminal process as one that poses a threat to individual liberty. This chapter has shown that the proceedings before the ICTY involved further considerations that had to do with the risk of political persecution and of the 'victor's justice', leading the ICTY to go farther than the USSC: it recognised a fundamental right to self-representation at the appellate level and raised the threshold for appointing standby counsel over the objection of defendants.

This chapter has also briefly examined the status of a right to self-representation under the ICCPR. It has shown that a right to self-representation may not necessarily be derived from it, and that its drafting history supports the view that self-representation was not taken to express an important value. Furthermore, the only case available by the HRC does not provide any rationale for such a right.

Having established that the available justifications for a right to self-representation in criminal proceedings are unpersuasive in civil proceedings, the

[71] For these reasons, Damaska's laconic one line comment, tucked into a footnote, that this decision 'underscores' the importance of the right to self-representation under Article 14 of the ICCPR, is clearly an exaggeration (n 4, fn 5).

following chapters shall examine whether such a right can be justified against the background of civil proceedings.

CHAPTER 4

CAN THE LAW SPEAK DIRECTLY TO ITS SUBJECTS? THE LIMITATION OF PLAIN LANGUAGE*

INTRODUCTION

This chapter examines the question of whether self-representation can be made effective and efficient by simplifying the language of the law. We have seen in chapter 1 that several commentators identify the complexity of legal procedures as the main stumbling block for LIPs, consequently suggesting that the laws of procedure should be simplified and that the court should provide LIPs with explanatory material. Since to conduct litigation effectively the litigant needs to develop an adequate understanding of both procedural and substantive law, it is necessary to ask whether it is possible to simplify the whole body of laws through simplifying its language, to such an extent as to make it readily accessible to LIPs. A negative answer to this question is necessary to justify mandatory representation.

Complaints about the excessive complexity of the law are as old as the law itself.[1] The high expense, long delay and complexity of legal proceedings are chronic defects of many legal systems. When the law is too complex for the public to

* A modified version of this chapter has been published as: 'Can the Law Speak to its Subjects? The Limitation of Plain Language' (2011) 38 Journal of Law and Society 376.

1 Although it is customary to focus on the last four centuries, such complaints were chronicled long before the 17th century. See in general B Shapiro, 'Law Reform in Seventeenth Century England' (1975) 19 The American Journal of Legal History 280, 281; B Shapiro 'Codification of the Laws in Seventeenth Century England' [1974] Wisconsin Law Review 428, 431–8.

understand, access to justice becomes largely dependent on access to lawyers. However, many believe that much of the law's inscrutability is avoidable. A growing body of literature suggests that legal complexity can be addressed by simplifying the language and style of the law. Indeed, the language employed by legislators, judges, and lawyers has been criticised for centuries. 'Sham science', 'spun of cobwebs', 'a mass of rubbish', 'a language of nonsense and solemn hocus focus', 'a dark jungle, full of surprises and mysteries', are but a few examples of the pejorative vocabulary that has been used to describe law language.[2] Thinkers as divergent as Jeremy Bentham and Karl Marx have nonetheless concurred that the language of the law is deliberately obfuscated so as to mystify its content and its institutions and conceal their deficiencies.[3]

During the second half of the twentieth century, criticism of the law language was seized on by flourishing consumer movements and produced the Plain English Movement (PEM).[4] The PEM concentrated initially on the intelligibility of governmental forms and consumer documents, but its agenda soon extended to the intelligibility of legislation. The fundamental idea promoted by the PEM is that since the law is addressed primarily to ordinary citizens, rather than lawyers and judges, it should be drafted so as to be fully intelligible to those affected by it. This is to be achieved, the PEM suggests, by drafting the law in plain language, stripping it of its dense, technical and convoluted style.

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[2] J Bentham, *The Rationale of Judicial Evidence* (Bowring ed, 1842) vol 4, Book 8, Ch 17, 290, 294–5; E Tanner, 'The Comprehensibility of Legal Language: Is Plain English the Solution?' (2000) 9 Griffith Law Review 52, 52–3; D Mellinkoff, *The Language of the Law* (Little, Brown, 1963) 4, 265.

[3] See on this point HLA Hart, *Essays on Bentham: Study in Jurisprudence and Political Theory* (Clarendon Press, 1982) 21.

[4] A review of the emergence of the PEM can be found at P Butt and R Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (CUP, 2007) ch 3. It is fair to say that it was David Mellinkoff who fired the first shot in 1963 when he published *The Language of the Law* (n 2 above), an incisive study that has inspired a large amount of literature which, along with the growing popularity of consumer movements, would translate into the PEM. See J Kimble, 'Plain English: A Charter for Clear Writing' (1992) 9 Thomas M Cooley Law Review 1, 8: 'Although the critics of legal writing are legion ... Mellinkoff can fairly be called the intellectual founder of the Plain English Movement'. See also LM Friedman, 'Law and Its Language' (1964) 33 The George Washington Law Review 563.

The idea of making the law speak directly to its subjects has proved so seductive that little critical thought has been devoted to what plain language can or cannot achieve.[5] Due largely to extensive campaigns promoting plain language in the law in such countries as the United Kingdom, the United States, Australia and Canada, most English-speaking countries and some others have adopted plain language policies and prepared manuals for drafting legislation and governmental forms in plain language. Not only governments but also private corporations have been convinced by plain English campaigns to expend significant resources on drafting their legal documents, such as insurance policies and the various documents that banks may require customers to sign, in plain language.[6] This has been due to the growing recognition that people's entitlement to intelligible laws is entailed by ideas of the rule of law, of personal autonomy and of democratic values, as well as by considerations of efficiency.[7]

This chapter argues that the PEM has idealised and exaggerated the potential benefits plain language could yield and has propagated a false belief that the law could speak directly to its subjects merely by simplifying its language. It sets out to debunk the main arguments made by leading plain English advocates and show that plain language cannot make the law significantly intelligible to laypeople. Litigation is the paradigmatic example of a setting where using the law effectively requires skills and expertise that go far beyond understanding the meaning of the words used to communicate it. Simplifying the language used to convey procedural and substantive laws has not made and cannot make the law sufficiently intelligible for laypeople to litigate their cases

[5] As we will see, the most serious criticism of the PEM can be found in an article by Robyn Penman and implicitly in some of Peter Tiersma's work. Critical albeit brief views have also been expressed by Francis Bennion in short commentaries in newspapers and elsewhere.

[6] For a detailed account of the intensive activity of the PEM and its influence see P Tiersma, *Legal Language* (University of Chicago Press, 1999) ch 13; Butt and Castle (n 4) ch 3; R Penman, 'Unspeakable Acts and Other Deeds: A Critique of Plain Legal Language' (1993) 7 Information Design Journal 121.

[7] For a more elaborate review of these rationales see Law Reform Commission of Victoria, *Plain English and the Law* (Melbourne, 1987) [93]–[107] (Victoria Commission); R Sullivan, 'The Promise of Plain Language Drafting' (2001) 47 McGill Law Journal 99, 99–101.

effectively because there is a good deal of complexity inherent in the law which cannot be reduced to matters of language and style. Analysing the difficulties that litigation poses for laypeople will uncover those complex aspects of the law that are not eliminated by mere simplification of language and demonstrate that coming to grips with these aspects requires other specialised skills over and above the ability to penetrate technical language. Such skills include the ability to identify the pertinent legal rules, principles and doctrines, to recognise the relevant facts and classify them into the pertinent legal categories, and to engage in a particular type of interpretation and reasoning.

When one understands these complexities, it becomes clear that they cannot be reduced to matters of language and style, and that the aspiration to make the law directly intelligible to laypeople is far too ambitious. Abandoning archaic phraseology and convoluted style in favour of modern vocabulary and user-friendly structure, as urged by the PEM, will not obviate the need for legal services. Instead, these are at best desirable changes in the culture of legal writing that might improve the quality of the service provided by lawyers. The realisation that without lawyers the benefits of plain language cannot be fully realised is the starting point for the quest for more promising ways to enhance access to law and courts.[8]

Section 1 briefly defines the scope of this chapter. **Section 2** discusses in detail the literature developed in support of the PEM and shows how it has propagated the belief that the law can be drafted clearly enough to be intelligible to laypeople without any loss of precision. It then criticises this belief and demonstrates that the PEM has failed the empirical test. **Section 3** argues that lawyers are indispensable, and substantiates this argument by examining the interplay among details, legal precision and

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[8] The realisation that lawyers are necessary to obtain justice underlies calls for additional legal aid in civil and criminal cases. See: D Luban, *Lawyers and Justice* (Princeton University Press, 1988) 243–8.

linguistic clarity. It underscores the importance of details to the precise allocation of legal rights and obligations in modern society, and explores the complications created by a detailed body of law, and the kind of expertise that is needed for handling them effectively. **Section 4** shows that to a certain extent the language of the law is bound to deviate from common speech in favour of what might be described as technical or professional language.

1. THE SCOPE OF THIS CHAPTER

It should be recalled that the focus of this thesis is on civil litigation dealing with private law matters (such as contracts, wills, and torts); consequently, the criticism of the PEM in this chapter is restricted to the argument that the use of plain language cannot provide laypeople with sufficient understanding of the law to enable them to conduct effective and efficient litigation. The question of whether simplifying the law language may be valuable for other purposes will therefore be discussed only briefly (in section 2.2).[9]

Furthermore, this chapter does not argue that there are no areas of law that are simple enough to be dealt with by people without legal representation. The argument advanced here is that there are reasons to believe that a great proportion of the cases that end up in court are particularly complex and cannot therefore be litigated without lawyers. While 'simple' and 'complex' are vague terms which evade precise definition, this chapter explores certain aspects of the law that enhance complexity over and above the technicality of language.

[9] Furthermore, given that the PEM has concentrated on private law matters, the implications of the PEM for the criminal context, vis-à-vis the question of ignorance of law, are not discussed.

In making the argument that the use of plain language cannot eliminate the litigant's need for a lawyer as a necessary condition for obtaining justice in court, legal representation is considered 'necessary' if a litigant is unable to present her case effectively and receive a judgment on the merits, or when the litigant is unable to do so without inflicting disproportionate costs on her represented opponent and on the general administration of the legal system. In such circumstances, legal representation is more effective and more efficient than self-representation, and it is in this sense that lawyers are regarded as indispensable.

Moreover, the discussion in this chapter is restricted to illuminating the marginal difference between lawyers and non-lawyers, and the basic qualitative advantage enjoyed by those who possess legal education over those who do not. Consequently, it does not address other variables that may bear upon the capacity for effective litigation, such as personal characteristics, articulation and rhetorical abilities, cross-examination skills, strategic and tactical abilities, etc. These are 'advanced' skills that vary amongst both lawyers and non-lawyers, and which are not usually acquired or developed throughout formal legal education.

A final note is on terminology. This chapter uses interchangeably the terms 'lay', 'ordinary', and 'uninitiated' referring to a person who has no professional legal training or experience. It therefore does not deal with paralegals or those people who may have some experience or knowledge of the law, whether formal or otherwise. Likewise, the word 'lawyer' is used to signify a person who obtained the systematic legal knowledge usually attributed to lawyers, whether formally or otherwise. Undoubtedly, the terms 'lawyer' or 'layperson' are inherently vague and the inevitable variations in intelligence and education among members of both groups, lawyers and non-lawyers, add imprecision to the distinction between the groups. Despite these limitations, the paradigmatic classification of 'lawyers' as opposed to 'non-lawyers' is necessary in order to conduct any meaningful general discussion.

2. THE PLAIN ENGLISH MOVEMENT: A STORY OF A FALSE PROPHET

2.1 What does the Plain English Movement seek to achieve? The notions of 'immediately intelligible' laws and 'people affected' by them

Simply put, the PEM calls for drafting legislation and other legal documents in 'ordinary' or 'plain' language. Typically, this means avoiding archaic and foreign expressions, using common and familiar vocabulary, simpler grammatical structures, shorter and simpler sentences, substituting active for passive voice, favouring verbs over nouns, and providing a better organised outlook—the latter entailing such features as wider spaces and margins, division into sections and subtitles, definition of technical terms, use of examples, provision of tables of contents, highlighting techniques, and the like.[10]

In what has been described as 'the most comprehensive scholarly treatment of the topic ever published',[11] the *Law Reform Commission of Victoria on Plain English and the Law* (The Victoria Commission) states that legislation should be drafted not for lawyers or judges but for its real audience, namely 'the group of people who are affected by it and the officials who must administer it'.[12] As it explains:

> When Parliament passes a law applying to citizens or to a selected group of citizens, its primary concern is ... with the conduct of the citizens whom it regulates or on whom it imposes burdens or confers benefits. ... the prime aim should be to ensure that those to whom the law is addressed act in accordance with it. *The law should be drafted in such a way to*

[10] See e.g. Kimble (n 4) 11–14; Butt and Castle (n 4) chs 5–7; P Knight, 'Clearly Better Drafting' (Report to the Plain English Campaign, 1996) Appendix 4.

[11] Butt and Castle (n 4) 95.

[12] Victoria Commission (n 7) [69].

> *be intelligible, above all, to those directly affected by it*. If it is intelligible to them, lawyers and judges should have no difficulty in understanding it and applying it.[13]

Consequently, the Commission concludes, the language and structure of legal documents

> should be improved, not in the hope of making the document intelligible to the average citizen, but in order to make it intelligible—*and immediately intelligible*—to as many of those as possible who are concerned with the relevant activities.[14]

By 'immediately intelligible' the Commission actually suggests that the use of plain language should aim at making the law intelligible to its subjects to such an extent that they need no legal assistance. By suggesting this, it presumes that persons who are not legally trained are capable of fully understanding the law and availing themselves of its protections without a lawyer, if only the language is stripped of its unnecessary complexity. However, if the Commission concedes that the law cannot be made immediately intelligible to the *average person*, shifting the focus to the 'person affected by a given law' does little to enhance the feasibility of its project. The Commission's distinction—largely followed by other plain English advocates[15]—between drafting for the *average* person and drafting for *those who are affected* by the law in question is meaningless because both notions fail to embrace the huge diversity of people's backgrounds, expectations, education, orientations, perspectives, skills and intelligence. It is unrealistic to accommodate at once all the different and competing needs and interests of the law's users.[16] Only if the 'affected group' were largely homogenous in their reading skills, interests, backgrounds, etc, would it then be meaningful to distinguish them from the general public. In fact, this is rarely the case. The large bulk

[13] ibid.

[14] ibid [71].

[15] See e.g. Sullivan (n 7) 118; and Knight (n 10).

[16] This point has been conceded at Sullivan (n 7) 110–11.

of legislation targets either the general public (as is true of the laws of contracts, torts, taxes, or real property) or indefinite smaller groups whose members are classified together based solely on their common interest in that law. Having such a common interest does not necessarily mean that the members of the 'affected group' are homogenous in their skills. Take the laws on landlords and tenants, family, elderly people, or corporations. These laws target specific segments of the general public, while nothing about this group membership has any bearing on the comprehension skills of the individual member. In other words, members of an 'affected' group are likely to approximate the same diversity of backgrounds and skills as is found in society at large.[17] Therefore, drafting legislation for the 'affected group' in these examples would be as meaningless as drafting for the 'average person'.

The Commission's insistence that the law *can* be understood and effectively used unaided conveys a view widely shared among plain English proponents. One commentator has described the agenda of '[m]ost supporters of plain English' as one that aims at making legislation 'speak directly, *without the need for intermediaries*, to the very people whose lives it affects'.[18] Yet others were even inspired to make a far-reaching claim that legislation is to be drafted for the 'least experienced readers' or 'most frequent unofficial readers' among the group of people affected by that legislation, with the aim of making legislation 'simple', 'understandable' and 'easily understood by laypeople'.[19] Clearly, drafting for the 'least experienced' would amount to drafting for everyone, which is impossible. Nonetheless, the idea that the law can be understood and used

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[17] Furthermore, litigation strongly depends on knowledge of the laws of procedure and evidence, which are general laws that do not target homogenous audiences.

[18] Sullivan (n 7) 101. See also F Bennion, 'Confusion over Plain Language Law' Com L 08/2007 <http://www.francisbennion.com> 4 (last visited 12.9.2011).

[19] See Knight (n 10) 12; this objective was formulated as reflecting 'a need for the type of transformation which will *enable people to participate in the justice system* ...'. This study was requested by the South African Ministry of Justice to prepare a plain English draft of South Africa's Human Rights Commission Act 1994. Sullivan endorsed the study's objective (n 7, 114).

unaided has gained such credence as to cast doubt on what may have otherwise been the intuitive notion that lawyers are necessary.[20] For that reason, Justice Nazareth (HK) for example found it necessary to comment on such ideas:

> It is often observed that legislation should be readily intelligible not only to the lawyer, but also to the layman. That may be the ideal. Regrettably it is also a pipe-dream for all but the most simple matters. Complicated matters are neither easily understood nor explained. ... The sooner such fanciful notions are abandoned the quicker we should be able to get on with the business of achieving such a measure of simplicity and intelligibility as is attainable.[21]

Unfortunately, the debate over the question of the intelligibility of laws is often carried out without carefully defining the *degree* of intelligibility that is sought by using plain language, or the *purpose* for which it is sought. This point is developed in the following sub-section.

2.2 Intelligibility for what purpose?

It is crucial to specify what degree of intelligibility the use of plain English can or cannot achieve, or to what end such intelligibility is sought. For example, the degree of legal understanding that is required for enhanced legal awareness or legal empowerment may not be the same as the degree of legal understanding required for a person to draft a contract or a will, and the latter may also not be the same as the degree of understanding required to conduct litigation.

The failure of plain English advocates to discuss and define clearly the limitation of their project, coupled with the strong rhetoric they bring to bear in arguing that the

[20] Another example of the far-reaching impact of the PEM's discourse can be found in Sullivan's proposal that the law should no longer reside in the defined text: judges must interpret it according to how laypeople understand it, and to that end judges have to 'receive and assess evidence about the audience' which could come from 'experts in sociolinguistics or related field' or from the audience itself, such as in the form of polls. See n 7 above, 120–1, 124–5. Cf Bennion (n 18 above) who, drawing on Bentham, argues that such suggestions pervert the nature of the law from a command or imperative to a commentary or description.

[21] CBE Nazareth, 'Legislative Drafting: Could Our Statutes Be Simpler?' (1987) 8 Statute Law Review 81, 90.

law could and should speak directly to citizens, has hindered a more fruitful discussion of the potential benefits of that project, making it necessary to explore the limitations of the plain English project and reconceptualise its goals accordingly.

Generally speaking, certain areas of law might be simple enough to be approached without legal advice. In the following sections, however, this chapter argues that as a matter of general principle the use of plain English cannot make the law intelligible enough to enable laypeople to litigate their cases effectively and efficiently without legal assistance. The extent to which the use of plain language may be able to improve the intelligibility of laws to laypeople for non-litigation purposes is an open question; it might be said, for example, that plain language may help people understand their rights and obligations sufficiently for 'ordinary' circumstances, even if not in the precise detail needed for litigation—examples of which include traffic signs or instructions concerning how to return a product and get a refund.[22]

While the plain English project cannot eliminate the need for lawyers for litigation purposes, this project might still be valuable for two reasons. It can improve the engagement of *represented* people in their legal affairs and it can make the law more precise and more intelligible to *lawyers*. This means that for the non-lawyer to realise the full value of plain English she must be legally represented. These two benefits could be best understood in consumer-based terms, as an attempt to improve the service provided to *clients* and to reduce its costs. By improving the clients' understanding of the law language, whether of the laws pertinent to a given legal matter they are involved in or of private legal documents prepared for them by their lawyers (e.g. contracts, wills), they are made better informed of the legal activity they have undertaken and more involved in the process of decision-making, whether in relation to litigation or

[22] It must be noted, however, that the interpretation of rules as simple as 'no vehicles in the Park' or 'no parking' could be debated. See n 71 and accompanying text.

otherwise. Enhanced understanding of the law is also important for the empowerment of clients and for protecting them against abuse by providing them with better tools to assess or direct the service provided to them by their lawyers or by the legal system. In other words, the true value of plain English lies in its potential to enable clients to maximise the benefits of legal service, as opposed to dispensing with it altogether. Laypeople benefit from the use of plain English through its capacity to make the law more intelligible to *their lawyers*, as service-providers or 'suppliers' of 'goods' the quality of which is potentially improved. Redefining the goal of plain English as making the law more intelligible to lawyers does not undermine its value; on the contrary, it makes the project more realistic and more important.[23]

There might be a third benefit, namely that plain English may serve to reduce the incidence of litigation by enhancing conformity to the law or adherence to legal documents. This proposition might be particularly appealing in relation to certain private legal documents such as wills, consumer contracts, insurance policies, leases, and so on. To the extent that plain English truly enhances conformity with the law or with private legal documents, the cases that still reach the court are precisely those that are particularly difficult and complicated, and therefore cannot be litigated effectively and efficiently without legal representation.[24] However, for reasons brought below, it is doubtful whether plain English could *significantly* enhance the intelligibility of legal texts, especially legislation, without legal assistance. In order for the law to be violated or

[23] In Bennion's opinion, for example, the challenge of making the law intelligible to lawyers is far more rewarding and therefore should be the primary aim of plain English: F Bennion, 'Don't Put the Law into Public Hands' Times 24 January 1995 <http://www.francisbennion.com> 4 (last visited 12.9.2011) and Bennion (n 18).

[24] Some commentators describe this phenomenon as the 'selection effect'. They suggest that the litigated cases are predominantly and disproportionately hard and represent a biased sample of all legal events. See F Schauer, *Thinking Like a Lawyer* (Harvard University Press, 2009) 13, 22–3 (and the literature cited).

litigation to become imminent, it suffices that just one party does not adequately understand the law or chooses deliberately to violate it.[25]

To sum up, the adoption of plain English does not make an untrained person into her own lawyer any more than increasing health awareness obviates the need for medical care or makes medical science more readily accessible to ordinary people. Plain English should only be advocated with the aim of doing away with as many as possible of the linguistic and stylistic defects in legal documents so as to make legal service more valuable for the money.

2.3 Does plain English pass the empirical test?

2.3.1 Inadequacy of supporting data

The CPR offer a good anecdotal example. The CPR have been hailed as a milestone in the drafting of legislation in plain English. They have been described as 'user-friendly and direct' and their new forms as 'clear and well designed'.[26] Furthermore, they were drafted by Lord Woolf with an express vision of making the system work for the self-represented and rendering procedure 'simple and easily comprehensible to the layman and lawyer alike'.[27] However, the fact that the CPR now use 'claim' instead of 'writ', 'claimant' instead of 'plaintiff', 'without notice' instead of 'ex parte', 'witness summons' instead of 'subpoena' and the like, does not necessarily mean that the procedure is now more transparent or easier to use by the unaided. In fact, the new Rules have not rendered LIPs better able to use the English civil justice system effectively and

[25] Another possible reason why understanding the *law* does not necessarily prevent litigation is that in many cases the dispute is over the *facts*.

[26] Butt and Castle (n 4) 92.

[27] Lord Woolf, 'Access to Justice—Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales' (1995) 5, 119. See also N Andrews, *English Civil Procedure* (OUP, 2003) 117.

efficiently.[28] This example casts doubt on the assertion that plain language makes the legal system directly accessible to laypeople without lawyers.[29] Even from a broader perspective, despite the large increase in the use of plain English in Commonwealth jurisdictions over the last two decades, there is no indication that this has enabled self-represented litigants to present their cases more effectively or efficiently.[30]

On the empirical level, the findings are equivocal. Some studies have shown that texts written in plain English are easier to comprehend whereas others have found no significant difference. Take for example the empirical study conducted for the Victoria Commission, which, as mentioned earlier, issued a leading report in the area. This study tested two excerpts from two Australian statutes against their plain English versions and found that the latter made 'no significant difference in the level of accuracy of the answers given by participants', who were law students and lawyers. What did improve was the speed at which participants attained a particular level of accuracy: the time needed by law students to read the text was reduced by a third, and the time needed by lawyers was reduced by almost half.[31] A striking fact in this study, as in many similar studies, is that it was lawyers and law students who comprised the target audience, and not 'the group of people affected by the legislation' as enthusiastically advocated by the Commission. As will be explained in section 3.2, it is hard to tell how the laypeople

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[28] See for example R Moorhead, 'Access or Aggravation? Litigants in Person, Mckenzie Friends and Lay Representation' (2003) 22 Civil Justice Quarterly 133; R Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' (2007) 16 Social and Legal Studies 405. The CPR are not the only example. Butt and Castle report considerable efforts in Australia to simplify certain statutes but conclude that 'research has shown that more work needs to be done on improving the readability of Australian legislation' (n 4, 98–9).

[29] Nor have the CPR made the legal system much cheaper to use. See in general A Zuckerman, *Civil Procedure: Principles of Practice* (2nd edn, Sweet & Maxwell, 2006) ch 26.

[30] See in general C Cameron and E Kelly, 'Litigants in Person in Civil Proceedings: Part I' (2002) 32 Hong Kong Law Journal 313; R Engler, 'And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks' (1999) 67 Fordham Law Review 1987. One might think that the problems of the legal system or those faced by LIPs could have been even worse without the use of plain English. This is doubtful. As Justice Nazareth (HK) observes (n 21, 92), many of the specific suggestions for simplifying the law language 'have long been effected in some jurisdictions [and yet] have neither stilled the complaints nor simplified the statute book significantly'.

[31] Victoria Commission (n 7) [106].

'who are mostly affected' by the examined legislation might have benefited from the plain English versions, but it is a telling fact that the Commission did not follow its own recommendation that the relevant audience should be laypeople not lawyers.

Moreover, even those studies which yielded data that supposedly attested to the benefits of plain English do not provide a solid basis for the claim that it makes the law directly intelligible to its subjects. This can be illustrated by Tanner's study, in which he considered a passage from a bank guarantee that had been criticised by a court as 'incomprehensible legal gobbledygook', along with two versions of the same passage rendered in plain English, one prepared by the Bank and another by the researcher for the purpose of the study. Again, the vast majority of participants were law students (undergraduates and graduates). Their reading comprehension was tested with multiple-choice questions, with straightforward answers that followed the sequence of information in the passage.[32] The average rates of comprehension were as follows: (1) 52.6 percent of the original draft was found intelligible; (2) 62.4 percent of the Bank's plain English draft; and (3) 68.6 percent of the researcher's draft. Despite an improvement of 16 percent in the level of intelligibility, the best plain-English result left almost a third of the text unintelligible, even when the questions were relatively easy and the subjects were individuals with some legal education. This led Tanner to conclude that for the particular type of document used in his study (bank guarantee), plain English did not necessarily guarantee successful communication and that it is only a partial solution for making it more comprehensible.[33]

However, there is more to be said about Tanner's study. The study does not address the more important question of whether the use of plain English brings the level of understanding among legally untrained people closer to that of the legally

[32] Tanner (n 2) 59.

[33] ibid 72.

trained. The fact that the level of understanding of law students registered a 16-percent increase does not tell us much about the effect of plain English on those with no legal education *compared with* its effect on those who have such training. Because what matters is not only whether participants could answer more questions correctly when plain English was used than otherwise, but also and more importantly whether they could answer *a similar number of* questions *of a similar kind* to those that lawyers would need to answer in the real world. In other words, the crucial question is whether it is possible, by the use of plain English, to reduce the gap between the legally trained and the untrained. What we are left with in such a study is only a speculation that if law students benefited from plain English (albeit not immensely), laypeople might benefit even more. Such speculation is not necessarily well-founded; as will be argued in section 3.2, what makes a text more comprehensible to people who are legally trained may not necessarily make it more comprehensible to those who are not.

A common response to the criticism that the empirical data does not clearly substantiate the utility of plain language is to refer to Joe Kimble's list[34] of supposedly more encouraging findings on the impact of plain English on comprehensibility.[35] However, much like Tanner's and the Victoria Commission's studies, Kimble's data does not weigh in overwhelmingly in favour of plain English. Kimble himself admits that 'in some of these studies the level of comprehension remained lower than the revisers might have hoped'.[36] Furthermore, none of these studies showed that the uninitiated could understand legal texts as lawyers would or, at least, displayed a level of understanding that could confidently be tested in court. In fact, some of these studies

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[34] J Kimble, 'Answering the Critics of Plain English' (1994–95) 5 The Scribes Journal of Legal Writing 51, 62–71; J Kimble, 'You Be the Judge (Again)' (January 2005) Michigan Bar Journal 56.

[35] See e.g. Knight (n 10) 4–5, and the studies reviewed at Sullivan (n 7) 105–8.

[36] Kimble, 'Answering the Critics of Plain English' (n 34) 65.

were conducted on law students, lawyers, even judges, rather than on those unversed in the law.

But there are more fundamental reasons to dismiss the findings presented in Kimble's array of studies, as well as the findings of Tanner and the Victoria Commission. The following two sub-sections argue that the findings of these studies are insufficient because they do not inform us how people in real world situations would perform in a legal setting, especially with regard to litigation. This failure results from two fallacies: statistical and methodological.

2.3.2 The statistical fallacy

The fact that some studies found that the use of plain English improved the comprehension of participants cannot be of general validity unless it is demonstrated that the sort of legal texts most commonly confronted in everyday life are written in as opaque a style as the texts chosen for these studies (which were apparently extremely impenetrable texts). This has not been empirically shown. There is no clear evidence to substantiate the claim that the 'gobbledygook' anecdotally described is the sort of language *typically* used by lawyers in drafting private legal documents or by legislators in drafting legislation. For if it turns out that the language of the average legal text is more intelligible than what is offered in these studies, then we need to search for other explanations of the complexity of such texts than language alone can offer. Peter Tiersma, for example, published a paper in which he sought to rebut some of what he describes as 'myths' about the language of the law. He concludes, among other things, that it would be a 'gross mischaracterisation' to suggest that the law language is a peculiar or different language unto itself. He maintains that, while it may indeed be a unique genre of formal written language, it is 'much closer to ordinary English than many people seem to think'.[37]

More importantly, no one has sufficiently demonstrated that the language used in the typical legal text (as opposed to what is anecdotally selected) gives rise to litigation, or to violations of the law, that could have been avoided had plain English been used. In other words, no one has shown a significant relationship between actual levels of litigation and the failure to use sufficiently plain language.[38] With no such relationship demonstrated, we can only speculate about the role of this or that linguistic feature of legal texts in making the law difficult to understand and, in turn, about the impact of any such difficulty on the incidence of litigation.[39]

In sum, the statistical fallacy lies in the leap from anecdotal accounts of the inscrutability of the law language, which is typically 'proved' by reference to some exceptionally convoluted texts, to the generalisation that legal texts are typically written in such a way. The result of this leap has been that the focus of recent research has been restricted to the sort of language selected for those anecdotal examples, reducing the question of intelligibility to a mere matter of language, structure or style.

2.3.3 The methodological fallacy

There is another fundamental point that largely undermines the capacity of the available empirical studies to substantiate the claim that drafting legal texts in plain English

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[37] P Tiersma, 'Some Myths About Legal Language' (2006) 2 Law, Culture and the Humanities 29, 48.

[38] Tiersma (n 6) 85, arguing that a large number of legal documents does not give rise to disputes over its language, while attributing many disputes over language to strategic choices of imprecise language rather than a failure to be precise.

[39] Different reasons could account for the general obedience to and understanding of the law other than the intelligibility of its language. For example, it may result from acceptance of general moral notions such as not to lie or to be honest. Furthermore, Lon Fuller argues that in many activities people observe the law not by knowing it directly but rather by following the pattern set by others whom they know to be better informed than themselves. Accordingly, 'knowledge of the law by a few often influences directly the actions of many': L Fuller, *The Morality of Law* (Yale University Press, 1964) 51. Sullivan (n 7, 116–7) refers to a similar phenomenon of 'peer interpreter' in localities.

improves the ability of ordinary people to conform their conduct to the law or, more ambitiously, to litigate their cases effectively and efficiently. Put simply, the methodology adopted in these studies was fundamentally misguided.

As described above, empirical studies that have attempted to measure the effectiveness of plain English typically adopted the following methodology: participants were required to answer a number of questions, usually in the form of multiple-choice or 'cloze' tests, the answers to which were *supposed to be found* in *certain* texts *provided* to them. Some of these texts would be written in the so-called 'traditional' legal style and others in plain English. The researchers would then compare the results and see which of these texts enabled the participants to answer more questions correctly.

The main critic of this methodology has been Robyn Penman who faulted it for not testing the comprehension of *actual* users. She argues that legislation should be tested by using more sophisticated testing methods, such as open-ended interviews, rather than multiple-choice or 'cloze' tests. In her view, the problem of the PEM is that it approaches the question of intelligibility mainly from a text-based point of view, and not from the standpoint of actual users.[40] Kimble responded by conceding that comprehensibility should indeed be tested on actual users when possible; however, according to him, absent such research we should still infer from the available empirical findings that plain English is *more likely* to make legal texts more intelligible to actual users as well.[41] However, such a response is beside the point. As Penman rightly insisted, the *only* valid way to test comprehensibility is to turn to *actual* users, rather than 'pseudo-users'. In her example, to test the comprehensibility of a given childcare statute, we would need to ask people who are affected by it to undertake the process for

[40] Penman (n 6) 124–6.

[41] Kimble, 'Answering the Critics of Plain English' (n 34) 68–75.

registering as a childcare provider as described in that law. Only in this way would we test how real users understand a given text.

I would take this a step further. The fact that the law is by and large text-based does not mean that the ability to use the law depends only on the intelligibility of its text. A study that defines the relevant questions for the participants in advance, provides them with the texts from which the answers should be found, and marks their answers as 'correct' or 'wrong', does not test the ability of actual readers to use the law. Actual users of the law, whether in the context of litigation or in relation to private documents (e.g. insurance policies or consumer contracts), are not provided with all the relevant legal texts, nor with the relevant questions that must be answered and surely they are not offered a menu of multiple-choice answers from which to choose. In reality, legal questions and their answers may not be definite or assessed simplistically as 'correct' or 'wrong'. Often, their determination may depend on a variety of texts that are not always available to the layperson, including statutes and case law, and on background knowledge of the rules of interpretation and legal reasoning. That is to say, the meaning of legal texts may depend on a context with which the non-lawyer will not be familiar and background knowledge which she does not possess. Without such familiarity and knowledge, someone else will be needed to define what is relevant and what is not, and when this function is performed for the participants by the researchers, they will no longer resemble the actual users of legal texts. In the studies that purported to lend credence to PEM, test-subjects were *given* the relevant legal text and the material facts were *defined* for them, and therefore what these subjects were tested on was their ability to select a correct answer from a specific list. Thus, the subjects were not tested on their ability to identify the relevant issues and form the appropriate legal questions and, on that basis, to distil the material facts from the 'bewildering and infinitely complex continuum of facts and events';[42] rather, these tasks were *performed* for them by the researchers.[43]

Litigation gives rise to additional difficulties. The transformation of legal knowledge into effective and efficient litigation in any particular case must deal with an array of important procedural matters, such as choices of jurisdiction, identity of parties (defendants, claimants, third parties), causes of action, etc. Having the skills to address such matters constitutes a necessary condition for effective and efficient litigation—a condition that can be met only by having a general and comprehensive knowledge of the law; only with such knowledge can one know which questions to raise and where to seek their answers.

It follows that to test comprehension levels among actual users of, say, the law of contracts or wills, we would have to take a random sample of laypeople and ask them to make a contract or draft a will, without any further information, that is, without advising them as to what statutes and cases should be examined, where these materials can be found, which provisions are relevant, what questions must be answered, etc. Likewise, to test the ability of laypeople to litigate, we would have to give participants a body of facts, only some of which are material to the question at issue, and then ask them to figure out how they should proceed. This is the only way to test actual users.

Having established that plain English has so far failed the empirical test, I will proceed to offer a qualitative analysis of why simplifying the language alone cannot suffice to eliminate the need for legal representation to obtain justice in court.

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[42] N MacCormick, *Legal Reasoning and Legal Theory* (OUP, 1978) 46.

[43] For example, in Knight's empirical research (n 10 above, 15–6) potential users of a human rights act were required to identify the sections relevant to a given issue and apply them to a given problem. The legal problems as well as the text from which the answer was to be extracted were *already defined* for the subjects, and the questions posed to them were yes/no questions (with an opportunity to explain their choice). As Knight himself admits at p 34, this does not reflect how real users perform in real life. While the use of plain English in this study resulted in some improvements in the performance of non-professionals and professionals, the overall results were still disappointing and far from achieving the goal formulated in the study, namely, to make the law 'easily understood by laypeople'.

3. PRECISION, REDUNDANCY, AND DETAILS: 'THE GOOD, THE BAD, AND THE UGLY'

The need to simplify the language of the law can be approached in two different ways. One way would be to argue that such language is not well served by retention of certain linguistic and structural patterns that enhance incomprehensibility without contributing to its precision. This argument does not require altering the function of the law or compromising its pursuit of the precise allocation of rights and obligations. Whether stripping the language of the law of its defective linguistic and structural patterns would make the law clear enough for laypeople to use it effectively and efficiently, remains an open question. Another, more radical way to simplify the law would be by de-legalisation; that is, by sacrificing precision on the altar of clarity. This section argues that as a matter of general principle neither suggestion can eliminate the layperson's need for a lawyer as a necessary condition for obtaining justice in court.

3.1 The need for details

The starting point is that the state must offer its citizens a reasonable means of peaceful dispute resolution; otherwise it cannot legitimately prevent them from taking it upon themselves to protect their own interests and solve their own conflicts.[44] Conflicts tend to arise out of the collision of interests, so the more sophisticated society becomes, the more conflicts of interest the law needs to cater for. Thus, to prevent conflicts modern societies have to ensure that their laws allocate people's rights and obligations precisely. This allocation is usually resolved in legislation that is enforceable through a judicial system. It follows that any attempt to reduce the law systematically in hopes of reducing

[44] See K Scott, 'Two Models of the Civil Process' (1975) 27 Stanford Law Review 937. Luban argues that absent equal access to the legal system the state loses the legitimacy of its monopoly over the use of force: see n 8 at 244, 255.

the need for lawyers would be self-defeating: it will not reduce the likelihood of conflicts or litigation; rather, it will only increase uncertainty as to the correct allocation of legal rights and obligations. De-legalisation cannot therefore be a *general solution* for the unintelligibility of law.[45] Nor could generality be. If the law only stated general principles, it might indeed be easier to read because it would be brief and general but, because it would leave out relevant details that cannot be determined merely by appealing to the general principles, it would provide only limited guidance. As H.L.A. Hart has it, '[i]n all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide'.[46] One senior legislative draftsman also observes:

> The circumstances, conditions and contingencies in which a particular legislative provision is to operate need to be specified with precision and certainty. Likewise the exceptions and qualifications to which such a provision is subject need to be clearly designated ... I would urge that the legal consequences of non-compliance or contravention should always be specified.[47]

In short, the devil that lies in the details cannot be eliminated by eliminating the details; it will still be recreated in litigation. If the details are not found by referring to statutes, the courts will be called upon to determine whether or not a given contingency is captured by the law in question.[48] Frequent recourse to courts would produce an increased volume of case law, which is usually even less accessible than statutes to the

[45] See e.g. Luban (n 8) 244 fn 20, doubting the extent to which de-legalisation or simplification of the law is possible as a general solution on the long-run.

[46] HLA Hart, *The Concept of Law* (2nd ed, OUP, 1994) 126. See also J Raz, 'The Rule of Law and its Virtue' (1977) 93 Law Quarterly Review 195, 197: 'It is humanly inconceivable that law can consist only of general rules and it is very undesirable that it should'.

[47] D Berry, 'Legislative Drafting: Could Our Statutes Be Simpler?' (1987) 8 Statute Law Review 92, 93.

[48] Nazareth (n 21) 86.

layperson leading to a higher degree of dependence of the law (and of citizens) on courts.[49]

3.2 Legal and linguistic clarity

When one speaks of the 'clarity of the law', one needs to be precise about what is meant—linguistic clarity or legal clarity. Even though these two senses are related, they do not necessarily overlap. For one thing, a text may be clear but so general or so incomprehensive as to make its application to concrete cases open to dispute and argument. A person may comprehend what is written, but not be able to find in the text the answer to his concern because of vagueness, open texture, and borderline factors. Therefore, there seems to be a point up to which the more detailed the law is, the clearer it is likely to be in the *legal* sense, that is, the better equipped it is to resolve legal conflicts in advance or provide guidelines for resolving them. It is this sense of clarity that is referred to as 'precision'. From this perspective, the inclusion of details is detrimental only when they fail to contribute to legal clarity (precision, that is) or if they undermine it.[50]

Moreover, the relationship between details and clarity calls upon another distinction between being difficult to read and being unclear. A document may be *legally* clear even if it is linguistically complicated and requires time and effort to read. To say

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[49] Meir Dan-Cohen describes this paradox as resulting from an inverse relation between the determinacy of rules and their accessibility: M Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1984) 97 Harvard Law Review 625, 659–60.

[50] Thus, it remains an open question in each individual case whether or not specific complexities are required for the text to be precise. Furthermore, while it is true that inserting more details may sometimes give rise to more disputes over their meaning, the fact that a particular contingency has been extensively litigated does not mean that it should have not been included. It only means that this contingency was not defined precisely enough to prevent misunderstanding. Omitting the contingency altogether would most likely have created a loophole in that text, and so would have resulted in litigation in any case. Of course it remains an open question in each individual case whether or not specific complexities are required for the text to be precise. It is not necessary for this chapter to discuss in depth the other, general question of how much regulation would be too much or too little, and under which circumstances or regarding which kind of activities de-legalisation might be useful. For specific examples of over-regulation in the area of cyberspace law, see C Reed, 'How to Make Bad Law: Lessons from Cyberspace' (2010) 73 Modern Law Review 903.

that a text is difficult is not to say that it is ambiguous or contradictory. Shakespeare and Milton may require concentration, but their works are rich in meaning. Thus, 'clarity' may not reflect the same value for lawyers and non-lawyers. For the lawyer, clarity is not merely linguistic—in fact, linguistic clarity (simplicity) is subordinate and instrumental to legal clarity (precision) and must not undermine it. Furthermore, linguistic clarity is valuable for the lawyer only to the extent that it contributes to legal clarity. But how does clarity work for the uninitiated? The Victoria Commission considers the relation between clarity of law and clarity of language in the following passage:

> In fact, *precision and clarity are not competing goals*. Precision is desirable in order to minimise the risk of uncertainty and of consequent disputes. But a document which is precise without being clear is as dangerous in that respect as one which is clear without being precise. In its true sense, precision is incompatible with a *lack* of clarity.[51]

But are clarity and precision really always compatible with each other, as the Commission proclaims? That precision and linguistic clarity are both 'desirable' does not necessarily mean that they 'are not competing goals'. Nor does the proposition that clear-but-imprecise texts are 'as dangerous' as precise-but-unclear texts in causing uncertainty and disputes, mean that linguistic clarity overlaps or is compatible with precision all or most of the time.[52] The insistence of plain English proponents that clarity and precision are not mutually exclusive must rely on an implicit premise that the law can be made clear to the non-lawyer without compromising precision.[53] It is precisely this premise that has attracted the criticism that the PEM is simple-minded.[54] Driven by the conviction that for the layperson precision and clarity *are* competing values, critics of the PEM tend to view the proposition that the law should be made

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[51] Victoria Commission (n 7) [65]; see also [61]–[66].

[52] As Kimble thought: 'Most of the time, clarity and precision are complementary goals'; Kimble, 'Answering the Critics of Plain English' (n 34) 53.

[53] ibid 53–61.

[54] See the review of critics at Victoria Commission (n 7) [57]–[92]; Kimble (n 4) 19–27. See also P Mayhew, 'Can Legislation Ever be Simple, Clear, and Certain' (1990) 11 Statute Law Review 1, 7–8.

intelligible to laypeople as one that necessarily leads to simplistic laws and compromises precision ('Dick-and-Jane' fashion, as it has been ridiculed).[55] For these critics, clarity of law inevitably compromises clarity of language, and vice versa.[56] Plain English advocates have largely failed to respond adequately to this criticism. They have mainly resorted to counter-attack, giving examples of obfuscatory linguistic tendencies, to which they claim lawyers are prone, which do not contribute significantly to precision and may detract from it.[57] On its face, this is a forceful argument, because unnecessarily complicated language and mere verbosity or repetition are likely to make the law more costly, difficult, and frustrating to use for legal professionals and non-professionals alike. But whether the PEM is correct in suggesting that using plain language could make the law significantly more intelligible to laypeople without any loss of precision is a question that remains to be answered.

3.3 Why is legal clarity in tension with linguistic clarity?

This sub-section argues that the commitment to precision prevents the law from speaking directly to its subjects in any meaningful way. If the law is to coordinate the wide range of social and economical activities in which people in modern society may engage, simplicity is bound to be compromised. To set forth precise arrangements for such matters as how to create a legal entity such as a corporation, what taxes to pay, how to enter into a contract, how to transfer ownership of property, and the like, legal texts have to be detailed and lengthy.[58] Under such circumstances, law-users, particularly litigants, should be able to use legal rules in a *contextual* way because the law as a whole

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[55] Kimble (n 4) 19.

[56] See e.g. Bennion (n 18); Berry (n 47) 97; Luban (n 8) 244–245 fn 20.

[57] Knight (n 10) 7; Victoria Commission (n 7) [66]; Kimble (n 4) 19; Butt and Castle (n 4) 89.

[58] To avoid length on the one hand and over-generality on the other, one ends up using compressed language that, given the density of information, is unlikely to be any plainer to the layperson, and not even to the jurist. See Nazareth n 21 above, 89. For empirical data on the harmful effects of lexical density see Tanner (n 2) 58, 62–3.

creates the context in which rules could have a meaning.[59] To ascertain what a given legal rule means and fully understand its effect and how it operates, it is often necessary to know what other related rules provide and how these rules impact on each other. Some rules may conflict and need to be balanced against each other, a task which has to follow certain principles and rules. Clearly, the more detailed the law, the more intricate the structure with which one must become familiar as a precondition for using it properly.

Moreover, litigants should become familiar with rules of interpretation and be prepared to deal with cases that are not directly captured by existing legal rules as well as instances of ambiguity, open texture and borderline cases. Furthermore, the volume of detail and the complexity of the subject matter create inevitable complications that make the task of understanding the law more than just reading and understanding the words of a particular legal text. For a litigant to develop a legal theory applicable to her case, she must be able to *identify* which specific legal texts are relevant to her case and which particular parts of these texts capture those case. To do that, she needs to be aware of the different sources of law, primarily statutes and case law, and how they intersect.[60] The litigant also needs to know how to treat precedents, how to distinguish between a dictum and a ratio, and how to analogise or distinguish between cases as needed. These are important issues that have been so immensely cultivated in legal literature that they cannot be made straightforward or bypassed simply by breaking the law into short and elegant clauses, free of technical terms, or presented in a user-friendly style, as the PEM proposes.[61]

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[59] On the importance of context to the understanding of the law, vis-à-vis the works of Wittgenstein and Hart, see T Endicott, 'Law and Language' in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP, 2002) 946–50.

[60] For a description of further logistic and application difficulties see Sullivan (n 7) 100–103.

[61] For a brief review of different views on adjudication, interpretation and legal reasoning, see J Penner, 'Legal Reasoning' in J Penner, D Schiff and R Nobles (eds), *Introduction to Jurisprudence and Legal Theory*

Further difficulties arise in the light of the intertwined nature of procedural and substantive laws. The process of litigation is governed by a set of rules of procedure that facilitate the process of investigating and determining a case, including rules on jurisdiction, joinder of parties, standing, pleadings, service, disclosure, expert evidence, cross-examination, appeal, and so on. Furthermore, the trial is governed by a set of evidence rules having to do with the kind of evidence that is admissible and for what purposes, types of evidence (documents, physical objects, oral testimony), the distinction between direct and opinion evidence, questions of weight, and so on. To be able to use this procedural and evidentiary apparatus, one needs to know which substantive legal rules are pertinent. Comprehensive knowledge of substantive law is necessary to determine the criterion for legal relevance, i.e. which specific substantive rules govern the situation, which, in turn, will determine the criteria for factual relevance, i.e., out of 'the totality of acts and events in the world those which it is worth averring and offering to prove.[62] Of course, the extent of the difficulties the litigant may encounter will vary from one case to another, depending on the factual and legal complexity of the case in question.

It is important to note that the observance of procedural and evidentiary rules should not be downplayed due to the fact that they are instrumental and subordinate to the final disposal of the case. In other words, they should not be treated as mere technicalities that have no merit on their own. Many of these rules aim at protecting important rights and interests. For example, the law on disclosure involves a balance between the right to obtain knowledge and equal footing on the one hand, and the interest in reducing costs, the right of privacy, or some other privileges, on the other. Likewise, the law on service involves important considerations such as the right of

(Butterworths, 2002) 649. A more elaborate discussion of the distinctive features of legal reasoning can be found at Schauer (n 24).

[62] MacCormick (n 42) 47.

claimants to obtain a remedy as opposed to the right of defendants to be duly notified of actions against them.[63]

To conclude, the argument often made by plain English advocates that 'complexity in subject matter does not call for complicated, convoluted language'[64] should be taken only to discourage unnecessary complexity and obfuscation. It should not play down the complications created by detailed and sophisticated laws.

3.4 Can the law be detailed without being complex?

One might argue that a law can be merely detailed without being complex. For example, the law of contracts could include lists of all that has been or could be considered as 'acceptance', 'offer', 'frustration', etc, so that the litigant need only navigate one text that contains all the details she needs. Jeremy Bentham, for example, criticised the common law as an illegitimate usurpation of the legislative power and as 'giving uncertainty in volume'.[65] A fan of codification, Bentham believed that the law could be broken down into clear, discrete parts that could be comprehended and remembered by ordinary citizens.[66] With regard to procedure, he thought that a court should resemble a 'domestic tribunal' and its proceedings should follow a model of 'natural procedure'. That is, courts should adjudicate matters in a manner similar to the way a father, or a householder, settles disputes among children or servants: as envisioned by Bentham,

[63] It is worth noting that the English rules of evidence and procedure used to have a bad reputation. Bentham famously presented them as irrational, excessively complex and mainly used by lawyers and judges to exact fees from litigants: see Bentham (n 2). However, such criticism is no longer prevailing in contemporary literature. See R Park and M Saks, 'Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn' (2006) 47 Boston College Law Review 949.

[64] R Eagleson, *Sydney Morning Herald*, 20 January 1985, 8, endorsed by Victoria Commission (n 7) [72].

[65] Bentham (n 2) 291

[66] ibid Ch 27, 422; Mellinkoff (n 2) 262.

courts would be informal and flexible settings in which judges enjoy a wide discretion that is not confined by rules of evidence and procedure.[67]

However attractive such ideas might be, they are impractical. For one thing, if in every document each legal concept or definition is to be deconstructed into all the possible variations or contingencies that fall within its scope, we will end up with a huge mass of information that runs counter to the simplicity promised by the PEM.[68] For another, the idea of a completely self-contained code is theoretically infeasible. As H.L.A. Hart observes, it is impossible for any rule to foresee and therefore capture all the possible circumstances in which the rule may be invoked. There will always be situations that cannot be settled by simply appealing 'to linguistic rules or conventions or to canons of statutory interpretation, or even by reference to the manifest or assumed purposes of the legislation'.[69] Furthermore, according to Hart, the scope of legal rules is dynamic; they evolve by being adapted, adjusted, restricted or qualified to meet the needs of future cases.[70] It follows that their scope is neither fixed nor confined to the linguistic meaning of the words that convey them. Whether rules even have a clear 'core', and whether the problems described above are typical only of the 'fringes' of rules, is a controversial matter.[71]

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[67] For a good account of Bentham's theory of adjudication see G Postema, *Jeremy Bentham and the Common Law Tradition* (Clarendon Press, 1986) ch 10.

[68] See e.g. Tiersma (n 37) 50; Schauer (n 24) 28. Sullivan presses this point, arguing that the risk of being blinded by the mass of details may be alleviated by access to Internet and electronic publications. She thinks that more use should be made of examples, tables and indexes, overviews, flow charts, Q&A forums, preambles, purpose statements, and explanatory notes. Furthermore, definitions and references should be entered as hyperlinks so that locating and navigating the statute book would require no more than the ordinary web surfing skills 'developed by citizens in searching for good vacation spots or downloading music': see n 7 above, 102–3, 112. Such solutions are far from satisfactory because they are likely to yield only a partial knowledge of this or that provision of the law, taken out of context.

[69] HLA Hart, *Essays in Jurisprudence and Philosophy* (OUP, 1983) 103.

[70] Hart (n 46) 120-132. See also Schauer (n 24) 28–9.

[71] See discussion at Schauer (n 24) 151–8, vis-à-vis the famous Hart-Fuller debate. This is further complicated given the unclear boundaries between matters of law and fact. For an incisive discussion see A Zuckerman, 'Law, Fact or Justice' (1986) 66 Boston University Law Review 487.

This point can be further illuminated by G.E.M. Anscombe, who challenges the very existence of what she calls 'brute facts'. She argues that it is impossible to articulate an exhaustive description of all the circumstances that, theoretically, could impair the normal description of a certain action as such. In her example, if somebody asks the grocer for a quarter of potatoes and the grocer in turn delivers the potatoes to that person with a bill, it may not be correct to infer that that person 'owes' the grocer the amount of the bill until we have excluded other possible scenarios, for example that the described exchange was being simulated by actors rehearsing a scene. Likewise, that the grocer 'supplied' the potatoes may not be inferred from the fact that the grocer left them at that person's door unless we specify that this happened in the absence of other circumstances, such as the grocer's subsequently having sent someone else to collect the potatoes. Accordingly, Anscombe concludes that 'every description presupposes a context of normal procedure, but that context is not even implicitly described by the description', and that there is always 'a further special context for each special context, which puts it in a new light'.[72]

Thus, we are led to conclude that it is impossible to create a self-contained code and that legal knowledge cannot be exhausted by the language of legal rules. This is why, as the European experience shows, codification has not made the law directly intelligible to its subjects, nor litigation cheaper, more expeditious or more straightforward for self-represented litigants.[73] This is also why other scholars did not take Bentham's ideas on this subject seriously. For example, H.L.A. Hart, while lamenting that there is still a significant amount of unnecessary complexity in the law, suggests that it is quite unreasonable to adopt Bentham's ideas:

[72] GEM Anscombe, 'On Brute Facts' (1958) 18 Analysis 69, 70–1.

[73] In many European countries self-representation is even formally prohibited; see n 45 in chapter 1, n 47 in chapter 3, and chapter 8.

> it may be quite plausibly urged that our society has grown so much more complex since Bentham's day that it is absurd now to call for radical simplification of our law and legal proceedings, or to hold out even as an ideal the natural simplicities of the cottage and family life.[74]

For similar reasons, Lon Fuller asserts that the expectation that 'the dutiful citizens will sit down and read [all the laws]' or that every citizen should be educated 'into the full meaning of every law that might conceivably be applied to him' is 'foolish' and 'absurd'.[75] He substantiates his claim by reporting an observation of communist Poland in 1961 which attempted to make the law directly clear to the worker and the peasant and instead inflicted severe harms on the system as a whole, rendering the application of laws by the court more capricious and less predictable.[76]

In summary, for the law to be precise it needs to be detailed and it cannot be reduced to general principles or concise texts that could be easily understood by the uninitiated. The task of dealing with the law becomes more difficult in the context of litigation because, as explained in this section, litigants need to take into account a whole system of detailed legislation, case law, rules of interpretation and legal reasoning, and this requires expertise, where the litigant must, at various junctures in the process, make important decisions that call for a nuanced knowledge of both procedure and substance.

4. IS IT POSSIBLE TO AVOID 'TECHNICAL LANGUAGE'?

To better understand why laypeople find it difficult to understand the law language it is of vital importance to look into the relationship between technical language and

[74] Hart (n 3) 32. Hart also remarks that even when Bentham 'flirted' with the idea of 'everyman his own lawyer', he did not really believe that lawyers can be disposed of. According to Hart, what Bentham did believe, however, was that the need for lawyers' service and its cost could be largely reduced if 'the artificial encrustations of the law and its procedure were cut away' (30).

[75] Fuller (n 39) 49.

[76] ibid 44–6. When Lon Fuller prescribed clarity as one of eight fundamental prerequisites for the validity of law, he had in mind clarity as precision, not clarity for the layperson. This is why in his opinion matters of clarity invoke questions of the delegation of the task of clarifying the law from the legislature to the judiciary. Furthermore, this understanding is implied in his treatment of open-ended standards such as 'good faith' and 'due care' as 'honest vagueness', preferable to 'specious clarity' (63–5).

common speech. Undoubtedly, the deviation of the law language from ordinary speech enhances its unintelligibility. Yet it would be a mistake to condemn that deviation without carefully examining its nature. This section argues that the technical nature of the law language has been misconceived by plain English advocates.

4.1 In what ways is the law language considered technical?

The technical character of the law language is said to deviate from ordinary speech in two ways.[77] The first involves the taxonomy of what are usually referred to as 'common' versus 'uncommon' expressions. Arguably, Anglo-American law language makes use of 'common' expressions while ascribing to them meanings in the law different from their ordinary ones, such as: *action* (as law suit), *cause of action*, *piercing the corporate veil*, *cross-examination*. Furthermore, the law language uses 'uncommon expressions'—formal and archaic English, Latin, and Old French terms—either to convey a specific meaning in the law for which the expression serves as shorthand (such as *habeas corpus*, *alibi*, *amicus curiae, mens rea*, *in rem*, *in personam, res judicata*, *res gestae*, *bona fide, affidavit, estoppel*, *without prejudice*) or merely to convey the ordinary meaning of that expression without imparting any additional legal implication (such as *prima facie*, *versus*, *inter alia, in re, aforesaid*, *forthwith*, and the *here- there-* and *where-* words).[78] While uncommon expressions are merely unintelligible, common expressions may be confused with their common meanings without signalling to the uninitiated the need to enquire into their specialised meanings.

The second taxonomy relates to the degree of precision of legal expressions. This is the distinction between 'terms of art' and 'argots' as suggested by David Mellinkoff, who defines a 'term of art' as a technical expression that has a well-defined specific meaning in the law that the uninitiated may not understand even while

[77] This description is mainly based on Mellinkoff (n 2) ch 2.
[78] Cf Hart as cited by Bennion (n 23) 5.

recognising it as the mark of a speciality. Examples include *felony*, *alibi*, *agency*, *landlord and tenant*, *dry trust*, *fee simple*, *dictum*, *ex parte*, *inter parte*, *contributory negligence*, *injunction*, *res judicata*, *stare decisis*, *tort*, *voir dire*. Yet not every legal expression is specific enough to qualify as a term of art. Hence the 'argots', which Mellinkoff takes mainly to include expressions that are not technical or specific enough to qualify as terms of art, or that are merely professional slang—such as *cause of action*, *due care*, *inferior court*, *issue of fact or of law*, *raise an issue*, *alleged*, or *pierce the corporate veil*.[79]

Based on these distinctions, the typical argument proffered by plain English advocates is as follows.[80] It starts by reciting Mellinkoff's famous sentence that the law language should agree with ordinary speech unless there are reasons to deviate from it.[81] It then submits that, while the use of technical expressions can sometimes be useful, such utility cannot legitimise the excessive departure of traditional law language from ordinary language because 'terms of art' are 'but a tiny part of any legal paper', the rest of which can be written in Plain English.[82] In other words, the deviation of the law language from ordinary speech can be justified only in those very few instances in which a term of art is more apt, and potentially more useful, than what ordinary speech has to offer. In all other cases, law language should conform to ordinary English capable of being understood by laypeople.

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[79] Mellinkoff (n 2) 16–9.

[80] See e.g. Kimble (n 4) 10, 18, 20–1; Victoria Commission (n 7) [80].

[81] Mellinkoff (n 2) preface and ch 13.

[82] Kimble, 'Answering the Critics of Plain English' (n 34) 55. Kimble mentions some estimates of the number of terms of art: fewer than 50 according to one view, 100 according to another and, according to a third, 3 percent of the words of real-estate sales contracts. According to Mellinkoff (n 2, at 388) there is only a 'distinctive nubbin of precision' achieved by the use of terms of arts and some of the law's argot, and that 'small part ... is almost lost in any given square foot of the law language'. Melinkoff mentions 52 terms of art (17).

4.2 Technical language redefined

The described perception of technical language is too narrow. It views the technicality of the law language only through the lens of 'terms of art'. While the distinction between terms of art and argots might have some linguistic value, when it comes to evaluating the effect of language on the level of comprehension of the uninitiated it is of little use. A broader definition of technical language is needed to explain the unintelligibility of the law language. Such a definition is offered by Peter Tiersma who includes under technical language any expression that has a meaning peculiar to the law and unlikely to be known to the layperson, regardless of whether it is a term of art, argot, or otherwise.[83] The advantage of this definition is that it ties 'technicality' to the expression in question being used by the profession because, in the specific context, it conveys more information than the mere words constituting that expression, even when, as Mellinkoff would have complained, it is not completely precise. Thus understood, technical expressions are typically incomprehensible to laypeople because their legal meaning is not contained or exhausted in their linguistic meaning; accordingly, the use of ordinary words would not dispel their unintelligibility. Their legal meaning can be grasped only by possessing specialised knowledge of the legal context in which these expressions operate. This may include legal doctrines, rules, case law, conventions, practices, and some other information to which these expressions allude. When commentators defend the law language as being precise, they do not have perfect or theoretical precision in mind, but rather a higher degree of precision achieved by the law language. This broad definition of technical language better explains why the following phrases are less likely to be properly understood by the uninitiated, even

[83] Tiersma (n 6) 106–110.

though they may not be considered as terms of art:[84] *judge/forum-shopping*, *piercing the corporate veil, cause of action*, *due care*, *inferior/superior court*, an *issue of fact or of law*. The translation of these expressions—as with foreign expressions such as *habeas corpus* or *res judicata*—into ordinary English would be insufficient to make them fully intelligible, because their incomprehensibility lies in the fact that they refer to a legal rule, practice, concept, or doctrine that lies outside their linguistic meaning, even if this expanded meaning is not sufficiently precise to produce a term of art. As explained earlier, the CPR serve as a good example of an instance where the translation of Latin and archaic words into contemporary language did not make English civil procedure much easier or cheaper to use.

The question is now this: can the content of technical expressions (as defined here) and what they represent be made more accessible to the uninitiated who wish to discover their meaning? It is perhaps possible to make them *more* intelligible, but not intelligible enough so as to enable laypeople to fully understand the law and, when necessary, litigate their cases. As argued in section 3.4, it is not reasonable to bring into every legal document all the relevant premises, definitions, statutory rules, or case law that are required to fully understand it, at least not without running the risk of generating a massive amount of information that is too unwieldy to be intelligible. But it is not only that. The following sub-section explains why there will always remain a gap between the language of the law and ordinary language.

4.3 Legal concepts versus words: the inevitability of specialised meanings

The common distinction between the law language and 'ordinary' language should be taken with care. Arguably, there is nothing out of the ordinary in the law language. Just as in the so-called 'ordinary' language words may take on different meanings in different

[84] As classified at Mellinkoff (n 2) 16–7 and Tiersma (n 6) 107.

contexts,[85] the law language may be simply one example of a context in which certain expressions take on different or unique meanings. Thus, distinguishing such meanings from so-called 'ordinary' meanings may be biased. For example, the expression 'contract' and its components 'offer' and 'acceptance' may mean different things to different people: for some, verbal agreements would qualify as a 'contract' whereas for others only written ones would deserve that name. Likewise, individuals may disagree as to the degree of particularity and specificity required to render their agreement a binding contract, or whether agreements can be inferred from certain actions or omissions. Similarly, people may disagree on what counts as 'consent' for the purpose of sexual intercourse, or whether 'possession' includes situations in which the object is not physically possessed. Thus, if the law is to provide a unified meaning of what constitutes a 'contract', 'consent' or 'possession', it must inevitably deviate from one 'ordinary' definition in favour of another.[86] Therefore, there will always be a gap between the meaning of certain concepts in the law and their meaning in other contexts and, in turn, contrasting the law language to 'ordinary' or 'common' speech must only be understood as noting that expressions may have certain meanings in the law that are different from other meanings they may have in other contexts.

Moreover, when speaking of the law language, regard must be had for what might be described as 'conceptual thinking'.[87] This means not only thinking beyond the physical objects and the 'core' meanings of words (e.g. 'damage' as tangible or physical

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85 'Few words have fixed significations like the pure numbers of mathematics': S Potter, *Our Language* (London 1959) 104. See also the examples discussed at B Hunt, 'Plain Language in Legislative Drafting: An Achievable Objective or Laudable Ideal?' (2002) 24 Statute Law Review 112, 116–7; R Posner on the 'Plain-Meaning Fallacy' in *The Problems of Jurisprudence* (Harvard University Press, 1993) 262–9.

86 Tanner (n 2, at 57) gives the example of the word 'guarantee'. In the context of bank loans this term usually means that the guarantor becomes liable for paying the debt if the debtor falls short of doing so. However, Tanner suggests that a layperson might think that it means no more than that the person assuming this role is required to make sure that the debtor pays the loan.

87 For a discussion of the difference between words and concepts, see J Raz, 'Can There Be a Theory of Law?' in MP Golding and WA Edmundson (eds), *The Blackwell Guide to the Philosophy of the Law and Legal Theory* (Blackwell Publishing, 2005) 324–8.

injuries or damage already incurred), but also recognizing that legal expressions contain more than their dictionary-based linguistic definitions and that such contents cannot be captured without reference to how they were developed in the law. Conceptual thinking is not necessarily a unique feature of the law language or professional languages in general.[88] Phrases such as 'my word is my bond', or concepts of 'good name' or 'good faith', for example, may well be used in daily life. However, such common usages are generally utilised on an intuitive or abstract level, whereas in the law, concepts (e.g. 'causation', 'foreseeability', 'duty of care', 'liability' and so on) tend to be developed systematically by reference to certain doctrines, principles, and rules that reside outside their linguistic scope (e.g. retribution, deterrence, restitution, joint liability, vicarious liability and so on). In other words, legal concepts form a sophisticated apparatus that non-lawyers cannot capture merely by appealing to their abstract or intuitive perceptions of such concepts. To capture this apparatus one must embark on a comprehensive study of the law and of the specific way in which its concepts developed. The sophistication of this apparatus is particularly evident when the drafter deliberately resorts to such inherently vague legal concepts as *abuse of discretion*, *adequate*, *excessive*, *due process*, *habitual*, *improper*, *malice*, *negligence, reasonable time/person/care/speed*, *undue influence*, *usual/unusual*, *substantial*, *sound mind*, *ordinary*, *normal*. Often, these concepts are employed to leave room for later interpretation that would take account of legal policy and normative considerations, allowing these expressions to evolve on a case-by-case basis, thus deviating from their 'raw' or 'core' ordinary meanings, so to speak. The construction of such concepts is less related to the *words*—say, contract, will, or consent—than to the legal *concepts* of these words, thus creating a gap between ordinary and legal speech. This gap is created not because lawyers have more expertise in the normative spheres or in

[88] It might be arguable, however, that conceptual thinking is used more frequently and on a larger scale in the law than in daily life, but pursuing this proposition is not necessary for this chapter. See Schauer (n 24).

public policy than laypeople but, rather, because they know which normative considerations have been acknowledged by the law in relation to this or that concept, or which considerations are likely to be acknowledged by the court in the light of past experience. The technical and formal nature of legal reasoning cannot be replaced by abstract or intuitive notions of justice, of keeping promises, of morality, or of what is right and wrong, those being too general to illuminate one's specific legal position in a situation of conflict.

The gap between the law language and 'ordinary' language becomes even wider when one recognises that some legal concepts do not deal directly with human behaviour and therefore cannot be said to have any 'ordinary' meaning that the layperson can appeal to. Some expressions are created by the law and they require some specific legal knowledge to decode them and apply them successfully, such as 'distributable net income' or the 'corporate veil'.[89] In the latter example, it may not suffice to explain to the layperson that piercing the corporate veil roughly means imposing personal liability on shareholders, without explaining to her certain tenets of corporate law such as the justification for the principle of corporate liability, and the interests protected by piercing the corporate veil. The same holds true for 'contributory negligence', the application of which may well require sufficient knowledge of the principles of liability, compensation and deterrence, notions of reasonableness, and the relevant legal and social policies. The laws of procedure and evidence provide many similar examples. Take the phrase *res gestae* which serves only as an allusion, a label attached to a certain doctrine, namely, that a statement made following a criminal act in such proximity as to be part of the act itself is admissible as evidence notwithstanding the exclusion of hearsay. The proper application of this doctrine requires knowledge of

[89] Friedman (n 4) 566.

the principles of evidence law, hearsay, reliability, admissibility and weight of evidence, and so on.

What these examples show is that the technicality of the law language cannot be reduced to a linguistic matter. The law language is underpinned by a body of theories, doctrines, principles, and rules—knowledge of which is necessary to fully account for the meaning and scope of legal concepts and to use them effectively and efficiently in court. This explains why one study found particularly poor comprehension levels of legal concepts amongst non-professionals despite the 'translation' of these concepts into plain English.[90] While the content of the law language may not surpass the faculties of laypeople and may be made more accessible, it cannot be made intelligible enough without engaging into comprehensive legal training. One may accept that with sufficient application non-lawyers can grasp legal concepts and complex legal subjects, yet acquiring a sufficient understanding in each individual case would call for a disproportionate investment of effort such that it would be more efficient to hire a lawyer.

CONCLUSION

This chapter has debunked the claim that the law could be made directly and usefully intelligible to its subjects by adopting plain language, and has cast doubt on the utility and efficacy of proposals to simplify the law. It has demonstrated the flawed methodology and insignificant statistical relevance of the empirical studies often presented to show the benefits of plain English. Furthermore, this chapter has explained the ways in which lawyers remain necessary to the person who wishes to conduct effective litigation. This has been achieved by explaining the importance of details to the

[90] Knight (n 10) 38.

precise allocation of legal rights and obligations and illuminating the tension between details, legal precision and linguistic clarity. It has been shown that a detailed body of law creates various complications whose effective handling requires a special expertise. The need for expertise has been further substantiated by explaining the technical nature of the law language and its inevitable departure from so-called 'common speech'. Litigation has been introduced as the paradigmatic example of situations where the need for expertise exceeds whatever increased understanding may result from the plain English project.

CHAPTER 5

THE JUDGE AS THE GOOD SAMARITAN: THE LIMITATION OF JUDICIAL ASSISTANCE TO LITIGANTS IN PERSON

INTRODUCTION

This chapter examines the proposition, often advanced in the literature, that judges should assist LIPs in order that the latter may present their cases effectively. It is widely accepted that adversarial legal systems operate through sophisticated rules of evidence and procedure of which lay persons lack knowledge and fail to avail themselves. Many commentators have argued that, in such circumstances, insisting on judicial passivity would skew the process in favour of represented litigants and, therefore, judges are duty bound to step in and redress the imbalance in order to secure every person's rights to a fair trial, equal treatment and impartial proceedings. Indeed, varying forms and degrees of judicial intervention have been proposed, including: explaining the relevant rules to LIPs, relaxing procedural and evidentiary requirements for them, tolerating their procedural non-compliance, assisting them in examining witnesses and even calling witnesses and conducting limited factual investigations on their behalf.

The claim that LIPs fail to obtain justice under the present system is cogent and persuasive. But is judicial intervention the way forward? This chapter argues that, except in simple and straightforward cases, the models of judicial assistance proposed thus far do not adequately address the disadvantages to which LIPs are subject. What litigants in adversarial adjudication need is not neutral judicial assistance but, rather, more extensive partisan advocacy. The judge, as a neutral official, lacks the tools to provide effective assistance to litigants, who are operating within the procedural structures of Anglo-American legal proceedings that envisage litigation as combat. For judicial assistance to become effective in this setting it would entail a leap from the bench to the bar, from judicial assistance to partisan advocacy. Such a leap is undesirable, both because it undermines judicial impartiality and because it is not cost-effective; partisan activity is best performed by partisan lawyers.

To support this contention, this chapter points to the German system where judges are far more active than their Anglo-American colleagues and self-representation is formally prohibited in most cases. This example is particularly telling, given that the German system is designed with the clear aim of tempering the element of partisanship and enhancing judicial control over the process. The German model demonstrates that even when the process is led by the judge, professional adversarial advocacy is still essential for the adequate functioning of a civil justice system.

The structure of this chapter is as follows:

Section 1 outlines the background for the proposal that judges should assist LIPs. **Section 2** examines the proposals that judges should relax procedural and evidentiary requirements for LIPs, pointing up the ineffectiveness and inefficiencies inherent in these suggestions. **Section 3** examines the proposals that judges should provide LIPs with extensive assistance and guidance throughout the legal process. It argues that for such assistance to be effective judges cannot avoid giving legal advice or engaging in partisan activity, neither of which are consonant with cost-effectiveness or impartiality. **Section 4** discusses the German system, a procedural system that facilitates extensive judicial intervention, showing that this system has not obviated the need for legal representation.

1. JUDICIAL PASSIVITY AND LITIGANTS IN PERSON

As we have seen in chapter 1, judicial passivity has traditionally been considered indispensable for judicial impartiality. Before discussing the specific proposals concerning judicial assistance, it is important to provide a more detailed account of the importance of judicial passivity.

Lord Denning famously described the role of a judge in an adversarial system as holding 'the balance between the contending parties without himself taking part in their disputations'.[1] This quality is thought to yield several benefits. First, it expresses equal treatment of the parties in the formal sense. Furthermore, judicial passivity is thought to reinforce the legitimacy of and the public confidence in the judiciary by maintaining the appearance of objectivity, professionalism, fairness and integrity.[2] Similarly, parties' control over the evidence and arguments, which is the flip side of judicial passivity, is said to enhance their subjective satisfaction with the process and their acceptance of its outcome (this specific aspect is discussed in detail in chapter 7). Moreover, judicial passivity is said to be more efficient and more productive. Parties stand in a better position to know what is relevant to their case than a judge who has no prior knowledge of the dispute and therefore needs to launch an inquiry 'from scratch'. Motivated by

[1] *Jones v National Coal Board* [1957] 2 QB 55 (CA).

[2] See e.g. J Thibaut and L Walker, 'A Theory of Procedure' 66 California Law Review 541, 551; S Landsman, 'A Brief Survey of the Development of the Adversary System' 44 Ohio State Law Journal 713, 715; A Zuckerman, 'Practice and Procedure' in *All England Law Reports Annual Review 1999* (Butterworths, 1999) 273, 274. Moorhead notes that judicial passivity is also more convenient for judges and it reduces the chance of making a mistake, or making it visibly, which in turn promotes legitimacy: R Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' (2007) 16 Social and Legal Studies 405, 406. Cf Pearce who argues that the increased visibility of judicial bias or incompetence brought about by judicial active intervention is desirable because it makes judges susceptible to amelioration: R Pearce, 'Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help' (2004) 73 Fordham Law Review 969, 978.

self-interest the parties are also likely to be most diligent in bringing the relevant information.[3]

In addition to these advantages, judicial passivity is believed to shield the decision-maker from developing a premature judgment. The conceptualisation of impartiality as passivity has as its main patrons Lon Fuller and John Randall, who argue that it would be impossible for a judge to be impartial towards the presentation of a case in which he himself had taken part. They prescribe the adversarial setting as the only way to combat a natural human tendency to judge 'too swiftly'; a judge who presumes to present evidence and form arguments on behalf of litigants would decide what is relevant too soon and so inhibit the flow of information. A premature standard of relevance starts as a tentative model, one necessary in order to bring the hearing into order and coherence but, as Fuller and Randall argue,

> what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.[4]

Fuller and Randall further argue that judicial involvement in the proceedings may also create a sense of 'sympathetic identification sufficiently intense to draw from [the judge's] mind all that is capable of giving, in analysis, patience and creative power'.[5] Thibaut and Walker advocate a similar view based on their empirical work. They argue that conferring substantial process control upon judges would make the developed information tend to conform in important ways to the normative or stereotypic

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[3] This oft-made claim was tested empirically in E Allan Lind, J Thibaut and L Walker, 'Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings' (1973) 71 Michigan Law Review 1129, which found that self-interested parties are more diligent than neutral searchers of facts only when the available facts disfavour the party in question.

[4] L Fuller and J Randall, 'Professional Responsibility: Report of the Joint Conference' (1958) 44 American Bar Association Journal 1159, 1180.

[5] ibid 1180. Other commentators have compared an active judge to a chess player playing against himself or advising each of the players on the best available move: see P Murray and R Sturner, *German Civil Justice* (Carolina Academic Press, 2004) 176–7.

expectations of the judge rather than to those of the parties who are better informed of and directly engaged in the dispute. An active judge

> will bias contextual information about a dispute by asking questions and developing information that conforms to a model formed by [his] own [experience], rather than the experience of the participants in the dispute.[6]

A passive judicial role may be justified not only on its own account but also as something mandated by respect for personal autonomy, irrespective of whether such passivity promotes the aforementioned interests. An expansive judicial role might be found objectionable on the grounds that it constitutes state impingement on the freedom of litigants to conduct their dispute in the manner they see fit. Furthermore, since litigants bear the costs of litigation, they should be allowed to control the ways in which they wish to spend their money and utilise the procedural system to advance their interests. In short, parties are the masters of their substantive rights and should accordingly also be the masters of their lawsuit. (Chapter 6 further discusses these points)

As generally observed in the literature, when LIPs are involved the adversarial process simply does not work and its basic assumption, that the parties would bring all the relevant evidence and make all the pertinent points of law, is not met. Accordingly, the expected cognitive, political and economical benefits of adversarial adjudication will not accrue. The widespread failure of LIPs to obtain justice has led many commentators to question the desirability of judicial passivity. The following exemplifies the typical argument:

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[6] Thibaut and Walker (n 2) 549. See also J Thibaut, L Walker and E Lind, 'Adversary Presentation and Bias in Legal Decisionmaking' (1972) 86 Harvard Law Review 386. Further empirical research is discussed in A Zuckerman, 'Miscarriage of Justice - a Root Treatment' [1992] Criminal Law Review 323, 336.

> A fundamental goal of the adversary system is to provide fairness and justice. Where the operation of the traditional rules frustrates that goal, the rules, rather than the goal, should be modified. A system in which represented parties routinely prevail over unrepresented parties—without regard to the merits of the case—cannot be viewed as fair or impartial: the notion of impartiality should compel judges and mediators to assist unrepresented parties, rather than prevent them from doing so.[7]

To counter the argument that the provision of such assistance is at odds with judicial impartiality, commentators often note that judges are already active. The typical examples given are case management powers and the enhanced role of judges in small claims courts and other specialised tribunals. Accordingly, numerous guidelines and recommendations have attempted to strike a balance among the competing considerations of equity and impartiality. This balance is typically thought to be achieved by requiring judges to provide LIPs with as much procedural assistance as possible while stopping short of giving legal advice or engaging in advocacy.

I shall now examine in detail the principal recommendations that have been made in this regard.

2. LENIENT TREATMENT OF NON-COMPLIANCE AND RELAXATION OF RULES

This section reviews suggestions for lenient application of procedural and evidentiary rules in cases involving LIPs. It argues that (1) if such proposals are aimed merely at simplifying procedures by dispensing with technicalities, they are unlikely to help LIPs; and (2) if they have the effect of compromising the rationales behind the rules, they are

[7] R Engler, 'And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks' (1999) 67 Fordham Law Review 1987, 1989–90. For similar propositions, see R Zorza, 'The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications' (2004) 17 Georgetown Journal of Legal Ethics 423, 428; L Bloom and H Hershkoff, 'Federal Courts, Magistrate Judges, and the Pro Se Plaintiff' (2002) 16 Notre Dame Journal of Law, Ethics and Public Policy 475, 515.

likely to undermine the integrity of the process and the legitimate interests of other litigants in a timely and cost-efficient resolution.

2.1 Time extensions and procedural sanctions

2.1.1 Case law: holding LIPs to the same standards, but not as strictly?

The most visible manifestation of the failure of LIPs to litigate effectively is their frequent failure to comply with the rules of procedure and evidence. This usually happens due to their ignorance of the rules, their failure to appreciate the consequences of non-compliance or their inability to deliver what is required.

Both English and American courts have affirmed the principle that all litigants, whether represented or not, are expected to abide by the same rules.[8] While requiring LIPs to fulfil their procedural duties, judges tend nonetheless to accord them some leeway in such matters as extending deadlines for submissions or according relief from sanction following non-compliance, even to the point of setting aside a default judgment.[9] This might be understandable insofar as a LIP is seen to be acting in good faith and with diligence, or when the non-compliance involves a purely technical

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[8] For England and Wales, see e.g. *Ford & Another v The Commissioner of Police for the Metropolis* [2006] EWHC 3223 (QB) [15]: 'A litigant in person is exercising the right of the citizen to conduct litigation on his or her own behalf but it is a right not a privilege. The rules are to be applied and applied to all parties whether represented or not'; *Ruhaza v Alexander Hancock Recruitment Limited* [2010] EWCA Civ 763 [17]: 'I am afraid a litigant in person (and not only a litigant in person; counsel and solicitors too) have to live with the fact that tribunals have limited time, sometimes limited patience, and a need to make sure that what time they have is devoted to concentrating on the issues'; *Neville Morrison v Hillcrest Care Ltd* [2005] EWCA Civ 1378 [22]: 'Litigants in person must obey the rules as to time, and, in the absence of exceptional circumstances, time limits can properly be insisted on'. For the United States, see e.g. *Rappleyea v Campbell*, 8 Cal4th 975 (1994) 984 (California Supreme Court): 'mere self-representation is not a ground for exceptionally lenient treatment. Except when a particular rule provides otherwise, the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. ... A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation'; *Creative Gifts, Inc v UFO* 235 F3d 540 (2000) (United States Court of Appeal, 10th Circuit) 549: 'Although pro se litigants get the benefit of more generous treatment in some respects, they must nonetheless follow the same rules of procedure that govern other litigants'.

[9] See e.g. *Irwin Mitchell Solicitors v Patel* [2003] EWCA Civ 633; *Flaxman-Binns v Lincolnshire CC* [2004] EWCA Civ 424.

matter.[10] However, in what circumstances should non-compliance be tolerated and how much is too much?

Judges on both sides of the Atlantic have struggled to find a satisfactory balance between the duty to apply the rules equally and the need to accommodate the incompetence of LIPs. While the duty to manage cases efficiently and avoid disproportionate costs requires a firm treatment of non-compliance, judges are also obliged to do justice on the merits, which makes them often reluctant to strike out cases or otherwise inflict potential injustice on LIPs who fail to navigate the labyrinth of legal rules. Indeed, frequent dismissal of cases on procedural grounds would undermine the rule of law as well as public confidence in the judiciary.

Unsurprisingly, these conflicting obligations have produced inconsistent jurisprudence. Some courts have justified a lenient approach based on the need to do justice on the merits and to guarantee a fair and meaningful hearing for LIPs, whereas others have refused to make special allowances, citing the duty to hold litigants to equal standards.[11]

In the US, for example, the Supreme Court held that courts should interpret pro se pleadings liberally, 'however inartfully pleaded', and hold LIPs to 'less stringent

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[10] See e.g. *Ortiz v Cornetta* 867 F2d 146 (1989) (United States Court of Appeal, 2nd Circuit): 'Once a pro se litigant has done everything possible to bring his action, he should not be penalized by strict rules which might otherwise apply if he were represented by counsel'.

[11] In England and Wales, Moorhead (n 2, 410–4) reports inconsistent approaches to LIPs, based on interviews with judges. In the United States, according to Albrecht et al the majority of courts adhere to the principle that LIPs should receive no special treatment. Lenient treatment was observed by them more often in relation to 'soft procedural bars', e.g. vacating default judgments, or raising issues on appeal or contemporaneous objections. They observed a greater reluctance to gloss over procedural defaults with regard to 'hard procedural bars', such as statutory limitation: R Albrecht et al, 'Judicial Techniques for Cases Involving Self-Represented Litigants' (2003) 42 Judges Journal 16, 43. See also Zorza (n 7) 448. Russell Engler (n 7, 2015) argues that the choice of principle depends on the 'annoyance level of the court': 'The more annoyed the court is with an unrepresented litigant, the more likely the invocation of precedent requiring impartiality, the application of similar rules, and a prohibition of playing advocate for the litigant. The more sympathetic the litigant, and the more the absence of counsel seems beyond the litigant's control, the more likely the court will be to articulate a need to provide additional assistance to avoid a miscarriage of justice'.

standards than formal pleadings drafted by lawyers'.[12] Likewise, the United States Court of Appeal (2nd Circuit) held that the court should not strike down or summarily conclude a case unless there is no plausible interpretation under which a claim or a defence can be viewed as meritorious, and that LIPs should be allowed to amend pleadings 'fairly freely'.[13] On the other hand, the Texas Court of Appeal refused to consider a belated appeal, holding that LIPs are not entitled to special consideration from the court.[14] The Court of Appeal in Missouri reinstated a default judgment that had resulted from the reliance of LIPs on mistaken advice given by the court's clerk, stressing that LIPs are 'entitled to no indulgence they wouldn't have received if represented by counsel'.[15] Furthermore, some courts have restricted the according of lenient treatment to prisoners[16] or made it contingent upon the LIPs' showing some effort and diligence to assert their rights.[17]

2.1.2 Lenient treatment undermines the legitimate rights of other litigants

The attempt to assess the justifications for lenient treatment of non-compliance with procedures through the lenses of judicial impartiality and equal access to justice may not prove useful, given the implacable tensions between formal and substantive impartiality, and formal and substantive equality.

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12 *Haines v Kerner* 404 US 519 (1972) 520–1. For a critical assessment of this case and of US jurisprudence on LIPs' pleadings, see R Bacharach and L Entzeroth, 'Judicial Advocacy in Pro Se Litigation: A Return to Neutrality' 42 Indiana Law Review 19 (2009).

13 *Holmes v Goldin* 615 F2d 83 (1980) (United States Court of Appeal, 2nd Circuit) 85. In *Traguth v Zuck* 710 F2d 90 (1983) (United States Court of Appeal, 2nd Circuit) it set aside a default judgment because the defendant did not know that she would face a default judgment if she did not answer the complaint within a certain time; it noted that: 'Implicit in the right to self-representation is an obligation to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training. While the right "does not exempt a party from compliance with relevant rules of procedural and substantive rules", it should not be impaired by harsh application of technical rules'.

14 *Brown v Texas Employment Commission* 801 SW2d 5 (1990).

15 *Boyer v Fisk* 623 SW2d 28 (1981).

16 *Waushara County v Grad*, 480 NW2d 16 (1992) (Wisconsin Supreme Court).

17 *Wright v Black* 856 P2d 477 (Alaska Supreme Court).

On the one hand, a general policy of lenience poses a threat to impartiality and equality in the formal sense. If represented litigants are required to meet a certain standard of compliance, they have a legitimate expectation that opposing litigants (and, for that matter, litigants in general) would be held to the same standard. From this perspective, a system that is less likely to impose sanctions on, or more likely to relieve from sanction, a party who is self-represented than one who is legally represented is not impartial. If the guiding principle is that disputes should be determined on the merits rather than on procedural grounds, then represented litigants would also deserve lenient treatment to ensure their substantive rights.[18]

The counter-arguments are not difficult to foresee. Adhering to formal impartiality and equality may compromise substantive impartiality and equality. There is a greater feeling of injustice when judges hold both represented and self-represented litigants to the same standard of compliance.[19] After all, represented parties, by virtue of their representation, have better access to procedural law and therefore an enhanced duty to conform to it. There is a marginal difference between having and not having legal representation, and if we are to choose between two possible lines to draw for the entitlement to special treatment, we would rather draw it between represented/unrepresented litigants than between strong/weak lawyers.[20]

To tilt the balance between the competing considerations from impartiality and equal access to justice, we must engage in a cost-benefit analysis. The real problem with judicial tolerance is that it undermines the represented party's legitimate right to avoid

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[18] See e.g. Pearce (n 2) 977–8: arguing that the court should redress the imbalance also in cases involving inequality of the quality of representation.

[19] See e.g. Moorhead (n 2) 417: 'Judges must either seek to correct the balance themselves, and risk 'identifying' with the litigant they are helping, or they must leave the imbalance uncorrected. In these circumstances, judicial intervention is likely to be the lesser of two evils'.

[20] Perhaps also because, in appropriate situations, a represented litigant could sue the lawyer for malpractice, but this remedy has its own limitations. See discussion in A Zuckerman, *Civil Procedure: Principles of Practice* (2nd edn Sweet & Maxwell, London 2006) [10.151]–[10.154].

unnecessary protraction. Presumably, a represented litigant might accept that judges have to treat LIPs more leniently and that in doing do judges remain impartial, but what this litigant would refuse to accept is: 'Why at my expense?' If society wishes to assist a certain group of litigants, why should that be at the expense of another group of litigants, namely their represented opponents, or represented litigants generally? This arbitrary choice forces represented litigants to subsidise the LIPs' right to effective access to justice. Add to this the doubtful benefit of judicial tolerance given the high levels of incompetence on the part of LIPs. (See further discussion in section 3)

2.2 Relaxing procedural and evidentiary rules

It is commonly suggested that, to facilitate the presentation of LIPs, judges must gloss over procedural and evidentiary requirements. At times, this suggestion is confined to technicalities, as in the Proposed Best Practices guidelines:

> Follow the rules of evidence that go to reliability but use discretion and overrule objections on technical matters such as establishing a foundation for introducing documents and exhibits, qualifying an expert, and the form of questions or testimony.[21]

Jona Goldschmidt has defended this suggestion in what appear to be more demanding terms. He draws on small claims procedures that are largely informal and unsophisticated, and argues that there is no valid reason not to relax the formal rules of evidence also in cases involving more significant matters or greater monetary sums. In his opinion, the only objection to this is the wish of lawyers to preserve their 'long-standing unfair advantage over pro se litigants';[22] allowing LIPs to adduce all the material in their possession should not be objectionable because judges can be relied on

[21] S 36 of Proposed Best Practices for Cases Involving Self-Represented Litigants (http://www.ajs.org/prose/South%20Central%20Notebook%20Contents/Tab%202/Best%20practices.pdf) (last visited 12.9.2011).

[22] J Goldschmidt, 'The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance' 40 Family Court Review 36, 53. Goldschmidt supports procedural and evidentiary 'delegalisation' to eliminate the 'secrecy regarding basic legal information, such as elements of causes of action'.

to separate the wheat from the chaff and ascribe the appropriate weight to evidence, as they often do in small claims courts.[23]

The notion of informal procedures has found support among other commentators. Albrecht et al, for example, urge judges to create an 'informal environment' for accepting evidence and for examining witnesses, including relaxing the formal rules of direct and cross-examination. If the represented party objects to proceeding informally, Albrecht et al suggest, judges should 'overrule the objection on the grounds that it would be a waste of judicial resources to proceed in formal compliance with the rules of evidence'.[24] Richard Moorhead, too, proposes a 'principled-based communication' model whereby judges should, among other things, adopt a liberal interpretation of legal relevance so as to allow LIPs to tell their stories and present their evidence freely. He advises, however, that while 'judges should be more careful in not using relevance to inhibit communication between the court and the parties prior to judgment', they 'should still use relevance to structure and determine their decision'.[25]

If all that these proposals seek to achieve is to dispense with procedural technicalities and formalities, their benefit for LIPs will be limited. This might ease some of the LIPs' burdens but this does not render their presentation of evidence more meaningful. Moreover, if a particular formal requirement is merely technical and its enforcement wastes judicial resources, the conclusion should be that the rule itself should be abolished altogether or, at least, that its application should be made discretionary. Represented litigants are likewise entitled to be relieved of the burden of

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[23] ibid, 51–3. Other commentators, too, looked at small claims courts for inspiration; see e.g. Bloom and Hershkoff (n 7) 514; Engler (n 7) 2028: 'The judge's role at trials involving unrepresented litigants should be modelled on precedent from the small claims courts and administrative agencies. Judges should conduct trials in the manner "best suited to discover the facts and do [substantial] justice"'.

[24] Albrecht et al (n 11) 47.

[25] Moorhead (n 2) 419.

purposeless and inefficient rules. It would therefore be inconsistent to apply formal rules selectively in cases involving represented litigants in the name of a cherished value while at the same time exempting LIPs from conformity to the same rules on the grounds that they are mere technicalities or the artefact of 'lawyerisation of courts', as ridiculed by Goldschmidt.

If, however, what is sought by the proposals described above is to relax formal rules to such an extent as to exempt LIPs from substantial procedural or evidentiary requirements, this raises serious questions. If a given rule of evidence or procedure has been deemed necessary to preserve the integrity and accuracy of the fact-finding process or to secure fairness among litigants, relaxing or dispensing with that rule must compromise these objectives. Relaxing the enforcement of rules on such matters as admissibility of evidence, disclosure, service, pleadings, experts or cross-examination, requires serious consideration of the rationales underlying these rules. Procedural delegalisation as proposed by Goldschmidt cannot be proposed offhandedly based on some abstract notion of judicial omnipotent discretion over procedural and evidentiary matters.[26] If a rule truly serves a purpose, it should be applied across the board; likewise, if it does not, it should be abolished across the board; the very fact whether a litigant is represented or not is irrelevant in this context.

Furthermore, the inspiration found in small claims proceedings by some commentators is unjustified. What might be procedurally acceptable in simple and low value matters may not be so in more complex cases or cases where the parties have more at stake. That small claims courts tend to adopt informal and unsophisticated procedures signifies merely that informality is perceived to promote the timely and economical disposition of such cases, in the light of their simple nature and low value.

[26] For a critique of free proof, see A Stein, 'The Refoundation of Evidence Law' (1996) 9 Canadian Journal of Law and Jurisprudence 279. For a critique of Bentham's natural procedures, which Goldschmidt's arguments echo, and of the general argument of delegalisation, see chapter 4.

For that matter, when a small claim involves complex factual or legal issues, those courts are empowered to transfer it to a general-jurisdiction court that follows full and formal procedures.[27]

Albrecht et al's proposal to impose informal proceedings on unwilling parties on the grounds of saving judicial resources is similarly difficult to justify. Judicial resources are meant to be utilised by litigants to resolve their disputes according to the law. Thus, if a represented litigant invokes her right to a formal procedure, there could be no justification for preventing her exercising that right merely to save judicial resources, unless an unmeritorious application or abuse of process is involved. Clearly, the determination that an application or an objection lacks merit or constitutes an abuse of process cannot rest on its being made by a represented party against an unrepresented one. Moreover, if conservation of judicial resources is a primary concern, we may just as well reconsider the desirability of accommodating the typical non-compliance of LIPs, given its corresponding waste in resources. Perhaps the public resources saved as a result of not rendering such accommodation could be directed to better legal aid.

3. ASSISTING BY GUIDING AND EXPLAINING

This section discusses the recommendation that judges assist LIPs by guiding them through the legal process. It argues that for assistance to be meaningful it must encompass choices that are partisan by definition—in short, that 'judicial assistance' is no substitute for legal representation.

[27] See e.g. CPR 26.10 which empowers the court to reallocate a case to a different track, and CPR 26.8(1) which contains a list of considerations that have to be taken account in allocating cases, including: the likely complexity of the facts, law or evidence; the number of parties or likely parties; the amount of oral evidence which may be required; the importance of the claim to persons who are not parties to the proceedings; and the circumstances of the parties.

3.1 Brief outline of the recommendations

A number of guidelines and recommendations have been published, advising judges to guide LIPs through the legal process and facilitate their presentation of evidence and argument.[28] While varying in some details, such guidelines generally advise judges to explain to litigants the decision-making process and the different procedural stages, including:

(1) The order of the courtroom, the pre-hearing and hearing, and ADR options.

(2) What pleadings must contain, the elements that must be proved in order to obtain relief and, where possible, what evidence can prove these elements.

(3) The basic rules of evidence presentation, including the burden of proof, the different kinds of evidence and the need to adduce evidence rather than assuming that the judge knows the truth.

Guidelines also advise judges: to provide litigants with written information prior to the hearing and to review such information orally at the outset of the hearing to make sure the LIP understands it; to explain to LIPs the procedure that is required to accomplish their objectives, or refer them to sources that contain the relevant information; to construe pleadings liberally and consider 'obvious possible causes of actions or defences' suggested in the pleadings even if the litigant has failed to convey such causes of actions or defence in adequate legal terms; to notify LIPs of any substantive defects in their pleadings and allow them to amend them as needed; to

[28] See e.g. Albrecht et al (n 11) 45–8; the Recommendation from the Minnesota Conference of Chief Judges (http://www.unbundledlaw.org/Recommendations/Sourcematerials/Minnesota.htm); Proposed Protocol to be Used by Judicial Officers During Hearings Involving Pro Se Litigants: Pro Se Implementation Committee Conference of Chief Judges (http://www.ajs.org/prose/pdfs/Proposed_Protocol.pdf); Best Proposed Practices (n 21). The latter guidelines are further discussed at C Gray, 'Reaching out or Overreaching: Judicial Ethics and Self-Represented Litigants' (2007) 27 Journal of the National Association of Administrative Law Judiciary 97. Similar guidelines were also suggested by Australian courts; see review at Australian Institute of Judicial Administration Incorporated, *Litigants in Person: Issues for Courts and Tribunals* (Victoria, 2001) 5–8 (http://www.aija.org.au/online/LIPREP1.pdf). (Links were accessed on 12.9.2011)

explain the course of the hearing to LIPs and, in addition, to allow for breaks during the hearings or adjourn them as necessary to enable the LIP to seek advice and overcome her inherent disabilities;[29] to assist LIPs in introducing their evidence; to address them with courtesy and respect and prevent lawyers from bullying or intimidating them; to draft court orders in plain language, avoiding arcane language.[30]

The main characteristic feature of all these recommendations is that they require judges to provide LIPs with as much assistance as possible while refraining from offering legal advice or engaging in advocacy. In this way commentators seek to strike a reasonable balance between the competing considerations of equity and impartiality, as described here:

> The judge appears to be caught in a dilemma. If the judge does *not* intervene on behalf of the unrepresented litigant, the party may be unable to present evidence supporting its position and manifest injustice may result. If the judge *does* intervene, he or she may be violating the duty of impartiality and denying the represented party the benefit of retained counsel.[31]

But can judicial assistance really solve or avoid this dilemma? Not if we consider another conundrum: if the judge does *not* engage in advocacy and does *not* give legal advice, his assistance is largely ineffective and wastes resources; but if the judge *does* engage in advocacy and gives legal advice, he is no longer impartial.

[29] S 37 of the Proposed Best Practices (n 21); a strategy of adjournment has been adopted by some courts in England and Wales as well; see Moorhead (n 2) 413.

[30] Courts, too, sometimes express the view that judges should assist LIPs. For example, in *Akintola v Capita Symonds Limited* [2010] EWCA Civ 405 [29] the Court of Appeal held that 'dealing with a litigant in person, some additional responsibility must fall on the employment judge to clarify exactly what is being alleged and to ensure, at the start of the hearing, that the parties know what the issues are and what ground is to be covered'.

[31] Albrecht et al (n 11) 16 (emphasis in original). See also Bloom and Hershkoff (n 7) 513: 'The [LIP] thus places the conscientious judge on the horns of a dilemma: the court can ignore the claimant's obvious position of disadvantage, adhering as a formal matter to ethical norms; or the court can intervene in ways that attempt to ensure a fair and accurate result but deviate from the norm of passivity'.

3.2 Who bears the cost of judicial assistance? 'Judicial funding' and 'private subsidy'

Requesting judges to explain in detail every aspect of procedure, to allow for breaks and adjournments during hearings, to advise litigants on the methods of adducing evidence, and so on, is likely to enhance the costs of proceedings and delay their progress. The more time and effort the judge invests in assisting LIPs in line with the guidelines described above, the greater the imposition on the administration of justice and other litigants, including the LIPs' particular adversaries and litigants at large. Represented parties have a legitimate interest in avoiding extra delay and cost; to disregard this interest whenever the other party is unrepresented is tantamount to assisting the LIP at her adversary's expense.

In addition to this aspect of 'private subsidy' by represented parties, judicial assistance serves to reintroduce legal aid in a more expensive form; it entails having 'judicial funding', so to speak, take over where legal aid leaves off. If society is willing to bear the cost of extensive assistance, spending the equivalent amount on legal aid seems a sounder choice than perverting the course of procedure and requiring judges to assume a role that is not theirs.[32] This raises another problem with judicial assistance as prescribed by commentators: it places a heavy professional burden on judges, exceeding

[32] Pearce argues (n 2, 974–5) that judicial assistance is necessary since a strategy based on finding more resources for legal aid programmes would never resolve the problem of LIPs. He puts forward three reasons for which access to lawyers 'will make only a limited difference in the equality of justice' and that this 'will never eradicate inequality'. First, the demand for legal service would increase if such service is made free so as to exceed supply. Second, even if the demand is constant, budgets necessary to provide each deserved litigant with adequate legal service are simply unaffordable. Third, parties with greater resources can afford a higher quality of legal representation, which would preserve the inequality between parties. However, it is unclear how these three limitations support Pearce's argument in favour of judicial assistance since they are also limitations on judicial assistance. It seems unjustified to exchange inherently-insufficient legal aid with inherently-insufficient judicial assistance.

their skills and responsibilities.[33] Judith Resnik raises a similar concern in relation to judicial case management:

> Judge's time is one of the most expensive resources in the courthouse. Rather than concentrate all of their energies on deciding motions, charging juries, and drafting opinions, managerial judges must meet with parties, develop litigation plans, and compel obedience to their new management rules. Managerial judges have more data sheets to complete, more conferences to attend, and ever more elaborate local procedural rules to drat and debate.[34]

These issues are more troubling in relation to judicial assistance to incompetent LIPs, given the amount of assistance typically required, and the fine line that judges must observe between assistance and advocacy.[35]

3.3 The disadvantages faced by LIPs go beyond the technical aspects of procedure

More importantly, judicial assistance along the lines set forth in the commonly prescribed guidelines is unlikely to bring LIPs substantially closer to parity in the litigation process. These prescriptions imply that the difficulties faced by LIPs have to do mainly with mastering the formalities and technicalities of the courtroom and of the process. The crucial stumbling block faced by LIPs, however, is their lack of familiarity with the substantive law.[36] As demonstrated in the previous chapter, the problems faced by LIPs are far more profound than the issues addressed by judicial assistance

[33] See e.g. Moorhead (n 2) 406: 'Litigants in person disturb the normal conventions of a courtroom and thus pose particular challenges to the judicial craft, impacting on judges' ability to behave consistently; taxing their skills of communication and court management; and forcing judges to balance the competing expectations of professional and lay audiences within the courtroom'.

[34] J Resnik, 'Managerial Judges' (1982) 96 Harvard Law Review 374, 423–4. Similar concerns have also been expressed in England, see e.g. M Zander, 'The Woolf Report: Forwards or Backwards for the New Lord Chancellor' (1997) 16 Civil Justice Quarterly 208.

[35] See e.g. *Bauman v DFYS* 768 P.2d 1097 (1989) (Alaska Supreme Court): 'To require a judge to instruct a pro se litigant as to each step in litigating a claim would compromise the court's impartiality in deciding the case by forcing the judge to act as an advocate for one side'.

[36] It might be worth mentioning, for example, that the rules on hearsay have been largely relaxed in England and Wales and, as discussed in the previous chapter, the CPR use plain language, and yet LIPs are still unable to litigate their cases effectively.

guidelines. Their greatest challenges hinge on the ability to develop an adequate legal theory of the case and a criterion for factual relevance. Without a proper understanding of the substantive law litigants cannot hope to litigate effectively even if the rules of the process are explained to them.

Take the recommendation to consider an 'obvious possible cause of action or defense' that is 'suggested by the facts alleged'.[37] This could be helpful only if the LIP had managed to identify the *relevant* facts and communicate them to the court (albeit only to survive an application for summary judgment). Richard Moorhead, for example, reports from his empirical work that 'judges and lawyers not infrequently complained that it was not clear what [LIPs] were asking for when starting cases or bringing applications' and that '[j]udges complained about being faced with bundles of confusing and largely irrelevant paperwork. Litigants regularly sought to argue each twist and turn of the dispute'.[38]

Likewise, the recommendation to '[g]ive a self-represented litigant notice of any substantive defect in a pleading and an opportunity to remedy the defect' could be useful only if the LIP understood how to amend the defect once it was pointed out to her. The same also applies to the recommendation to explain the elements of cause of action. Unless the case is straightforward, the judge cannot know which elements he needs to explain to the litigant without first interviewing her much as a lawyer would do. For the judge to provide intelligent and useful assistance, he must learn a good deal of the specific details of the case from both sides, but particularly from the LIP whom he seeks to help. Only by doing so would the judge be in a position to know which legal grounds are relevant and which factual inquiries are appropriate. Similarly, the

[37] See e.g. s 14 of the Proposed Best Practices (n 21).

[38] Moorhead (n 2) 409; he adds at 411: 'There is a question mark over the ability of anyone, even skilled judges, to know, often from defective paperwork, what the litigant's case is'.

recommendation to explain the methods of introducing evidence on the record presupposes that the LIP has already identified the relevant items of evidence.

Some have argued that judicial assistance to LIPs is similar to the practice whereby 'judges often assist attorneys by suggesting the correct form of a question, a certain line of inquiry not being pursued, or the manner of properly offering a document or other item into evidence'.[39] However, LIPs tend to need more intensive and extensive assistance than the sporadic or occasional tips that lawyers receive on how to form questions or whether to pursue a particular line of inquiry. Furthermore, the adversarial system is not structured to support a meaningful judicial role because, generally speaking, the vast majority of the information remains in the parties' possession until an advanced stage of the proceedings. The slow pace at which the judge becomes acquainted with the details of the case undermines his ability to provide specific and useful advice at earlier stages.

When both litigants are represented, the judge is better placed to assist, thanks to the lawyers who provide him with the relevant information needed to discuss the case in a useful manner. Moreover, the lawyers can be expected to follow the judge's suggestions without much supervision from the bench and, when necessary, to challenge his perception of the case or of the desirability of a certain direction. This potentially helpful form of collaboration between judge and lawyer is generally cost-effective because the judicial role is quite limited and incidental to the proceedings.

The dynamic described above does not function as productively and efficiently when LIPs are involved. In such cases the judge is not as well placed to offer useful advice because the LIPs are typically unable to adequately define the legal and factual scope of their cases, or otherwise provide him with clear and relevant details. Worse yet,

[39] Goldschmidt (n 22) 48.

most of the *relevant* information the judge is likely to receive may be produced by the represented opponent; consequently the judge lacks a sufficient and unbiased basis upon which to assist LIPs constructively. Even where the judge finds himself able to provide meaningful assistance, LIPs are rarely equipped to realise its potential; in order to understand the judge's comments, to develop appropriate expectations as to the propriety of a particular approach that he has encouraged (or discouraged), they may need further assistance.

To sum up the points made thus far, the proposed guidelines may ease some of the burdens faced by LIPs but they cannot alleviate a fundamental inability to conduct meaningful litigation. At the same time, such activity enhances the costs of proceedings for other litigants.

3.4 What LIPs need is not judicial assistance but partisan advocacy

The main reason why judicial assistance as envisaged in the literature is largely unhelpful lies in the fact that it hinges on objective officials providing objective explanations where professional partisan advocacy is desperately required. What LIPs need is not general explanations but specific, continuous and extensive advice regarding the array of choices that must be made at various junctures in the litigation process.

To a great extent, judicial activity and professional advocacy are incommensurable roles. The degree to which this is so depends on the complexity of the case. Consider, for example, a simple and straightforward case in which:

(1) The factual dispute involves a narrow and relatively well-defined number of *factual elements* (e.g. income of a husband for making an order on child support);

(2) The kind of *evidence* that proves these elements is easy to define (e.g. bank statements, income and tax reports); and

(3) The *legal position* is uncontroversial.

In such cases, where the pertinent facts and law are discrete and simple, the litigants' need for partisan advocacy is not pressing, and judges could conduct the case without crossing the line into advocacy. In these situations, the value that supports judicial intervention is not respect for self-representation but, rather, cost-effectiveness. In such situations both legally represented and self-represented litigants will benefit from judicial intervention, making the intervention even-handed and equally distributed amongst participants. This explains why 'full' adversarial proceedings are not normally required in small claims courts where most cases involve narrowly prescribed items of evidence that, once presented, entail straightforward legal consequences. In such situations the legal system might even be justified in prohibiting legal representation to promote an efficient yet just resolution of disputes.[40]

However, in cases where the facts and the law are more complex and less definite, LIPs need far more than what neutral and objective judges can deliver.[41] They must make a series of substantive decisions, each of which requires legal knowledge of a different kind and may have different consequences and implications. These decisions include, for example, the selection of cause(s) of action, venue, jurisdiction, correct opponents, types of evidence, relevant witnesses, whether to call on experts, and legal theories. The primary feature of such choices is that they are partisan choices, or choices

[40] This might also be true in other contexts. See e.g. *R v Board of Visitors of HM Prison* [1988] AC 379, 391–5, where the House of Lords decided that a prisoner does not have a right to counsel before a disciplinary committee, when legal representation was not necessary for an effective defence.

[41] See e.g. *Steel and Morris v UK* Application No 68416/01 (15.2.2005) (ECtHR) in which litigants in person defended a defamation claim that 'was highly complex, involving 40,000 pages of documentary evidence and 130 oral witnesses, including a number of experts dealing with a range of scientific questions, such as nutrition, diet, degenerative disease and food safety' [65]. Even though the LIPs were 'articulate and resourceful' who litigated 'forcefully and with persistence' and who also received at various stages during the process significant assistance from solicitors, barristers and the judge, they still failed to present an effective defence, and ultimately lost the case. The ECtHR commented on this assistance in the following way: 'in an action of this complexity, neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel' [69].

that presuppose a certain perception of the dispute. Judges cannot help the litigant to make them without assessing and evaluating the case in a way that pertains to the core of parties' autonomy. Any assistance in these spheres is by definition an expression of partisanship. Any information or explanation given in relation to such matters must presuppose or be underpinned by a certain perception of the case, of the relevant facts and of the potential legal theories.[42]

And this is the crux of the problem: if judges refrain from entering these spheres for fear of violating their commitment to impartiality, their assistance and explanations are too general to be substantially helpful; and if they do enter them, they become more like lawyers rendering legal advice than like judges providing technical support.

3.4.1 *The procedural structure of adversarial systems is designed for adversaries, not judges*

A further important limitation on the judge's ability to intervene effectively in the process without running the risk of partisanship is that adversarial systems are designed for rival parties, not objective researchers of facts. Most of the available procedural tools are not conducive to neutral investigation. A judge cannot tell the litigant what facts to plead, which documents to adduce or which witnesses to call. Nor can he interview potential witnesses to ascertain who possesses relevant information that can be put to the court's test, coach such witnesses or prepare them for trial. Furthermore, a judge cannot consult experts who would testify for and be paid by the litigant, or prepare for cross-examination of the opposing litigant's expert. Nor could he initiate discovery proceedings, particularly not under the restrictions of evidence admissibility. All these

[42] Some empirical support for the view that judicial assistance is of limited potential for obviating the need for legal representation can be found in H Genn, B Lever and L Gray, *Tribunals for Diverse Users* (Department for Constitutional Affairs, 2006) 191, which concluded that even though the tribunals examined in this study 'appear to have developed the competence necessary to conduct hearings which offer a fair opportunity for users to present their cases ... [t]here are limits to the enabling role. If tribunals are seeking to ensure "equality of impact" of procedures, there are some differences between users that are so significant that a tribunal cannot realistically be expected to compensate entirely and where an advocate is not merely helpful, but is necessary to the requirements of procedural fairness'.

procedural tools presuppose a singular perspective and require their users to have a certain perception of the facts and the law.

It is true that the partisan nature of adversarial adjudication should not be exaggerated (or be necessarily identified with the 'zealous advocacy' often attributed to American lawyers). To support their claim for active judicial assistance, commentators often point to the fact that Anglo-American judges have been moving for some time towards a more active role in case management.[43] However, this observation can hardly justify placing on the judge the task of rendering self-representation effective. The age-old criticism of the adversarial system, often cited by commentators, that judges were not playing a sufficiently active role in the managerial aspects of the proceedings, sought to have them curb partisan activity and control the costs of the proceedings, not gather or present evidence, raise and develop points of law, or examine witnesses.[44]

Note that the development of case management powers in Anglo-American legal systems has largely avoided the spheres of partisanship. In exercising case management powers judges aim at closely supervising and facilitating the combat, or curbing excessive forms of partisanship on the part of litigants but do not engage in any form of partisan activity.[45] For example, when the CPR entitle the court to limit cross-

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[43] See e.g. Bloom and Hershkoff (n 7) 514; Pearce (n 2) 977; Goldschmidt (n 22) 41.

[44] See e.g. Pound's famous speech before the American Bar Association in 1906 in which he eloquently criticised the 'common-law doctrine of contentious procedure, which turns litigation into a game' as reflecting a 'sporting theory of justice': R Pound, 'The Causes for Popular Dissatisfaction with the Administration of Justice' (1956) 8 Baylor Law Review 1, 14, 17. Pound likewise lamented that judges were prevented from 'restraining the bullying of witnesses' and the 'sensational cross-examination' which turned into 'the slaughter house of reputations' (18). Nonetheless, he objected explicitly to the importation of investigatory methods into the judicial role: 'Methods of investigation by inquiry ... are only preparation for trial ... Experience shows amply that the administrative investigator who goes about interviewing witnesses largely finds what he goes to find' (4). Likewise, the American judge Marvin Frankel, while asserting that the adversarial system should place greater value on finding the truth and ensuring substantive justice, rejected the concept of active judges as a general solution for the defects of the adversarial system: 'The apparatus is organized to equip the judge poorly for the position of attempted leadership. Within the confines of the adversary system, the trial judge probably serves best as relatively passive moderator': M Frankel, 'The Search for Truth: An Umpireal View' (1975) 123 University of Pennsylvania Law Review 1031, 1043.

[45] Furthermore, concerns for judicial impartiality have been expressed even in relation to case management activity, which is presumably even-handed; another concern pertains to the risk that the

examination, exclude otherwise admissible evidence, or require litigants to obtain permission for calling experts, the CPR only seek to reduce unnecessary costs. Gathering and presenting evidence remain party-based under the CPR.[46]

As one commentator has observed, judicial intervention in an adversarial setting does little to achieve justice; in fact, 'the trial judge as a participant is likely to impair the adversary process as frequently as he improves it'.[47]

3.4.2 Calling witnesses and conducting independent investigation

It is occasionally argued that judges should call and examine witnesses, and even conduct a limited independent investigation to

> do such things as verify facts by telephone, including facts alleged to be hearsay by either party, to make other simple, [independent] factual inquires, many of which may fall far short of sending an investigator to develop evidence.[48]

This proposal, made primarily by Goldschmidt with little support in the literature,[49] supplements his other controversial proposal (discussed above) to do away with evidentiary rules; taken together, these recommendations allow the judge to verify the information he has received due to the absence of exclusionary safeguards.[50] To be

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judge may receive extensive information that has not been filtered by the rules of evidence; see Resnik (n 34) 427. Some of this criticism is less applicable in England and Wales where admissibility rules have been relaxed and where there is a division between procedural and trial judges; see R Assy, 'The Power to Reconsider Orders under CPR 3.1(7)' (2010) 29 CJQ 175, 189. See also Zuckerman (n 2) [10.49] arguing that the risk for impartiality in case management is no greater than the risk for impartiality in discharging any judicial function, as it is incumbent on judges to keep an open mind.

46 See e.g. *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] EWCA Civ 429 [63]: 'Although judges were nowadays expected to take a more active role in managing and controlling proceedings than was once the case, it was important that they remained, and were seen to remain, scrupulously impartial. It is true, as the judge observed, that the overriding objective of the CPR is to enable the court to deal with cases justly, but, as rules 1.1(2) and 1.4 make clear, that does not always mean reaching the correct answer in law, come what may'.

47 Frankel (n 44) 1045.

48 Goldschmidt (n 22) 51. The recommendation to call and examination was also made at Engler (n 7) 2028–31.

49 See e.g. Albrecht et al (n 11) 46: 'we do not believe it proper for a judge to decide an additional witness is needed and to subpoena or call that witness. Nor do we think it possible for the judge to conduct an independent investigation …'.

50 Goldschmidt (n 22) 53.

clear, Goldschmidt does not support an inquisitorial system; he merely urges judges to stretch their existing powers to call and examine witnesses to assist LIPs, as they allegedly do in some exceptional criminal or small claims cases.[51]

To begin with, if what is needed is only a limited investigation or inquiry, why not require the judge only to point out to the parties the need for such investigation and leave it to them to decide whether to conduct it? Insisting on having the judge do what he thinks is 'right' for the parties despite their will would trespass on the parties' autonomy and change the role of judges from that of an arbiter to that of an inquisitor who is responsible for ascertaining the truth in each case. If, however, the reason for such insistence is that LIPs cannot be relied on to take on even such a limited investigation, then the judicial role cannot remain limited; judges will need to investigate the whole case on behalf of the litigant who is unable to do even the little she is advised to do.

Moreover, within the available procedural structure, judges are unable to conduct their own investigation. While it is true that courts have the power to pose questions to witnesses, such a power has never been intended to allow judges to take over the parties' responsibility to examine the witnesses. Such powers have always been limited to clarifying what the witness has said without developing the evidence further or eliciting testimony on matters that have not been raised by witness.[52] This is also true of the power to call witnesses. At common law, a judge in civil cases is allowed to call witnesses only with the parties' consent, and only in rare circumstances.[53] Historically,

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[51] ibid 53.

[52] See e.g. *Jones v National Coal Board* (n 1) 63–4, where Lord Denning observed that the judge may pose questions to witnesses 'when it is necessary to clear up any point that has been overlooked or left obscure ... If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well'.

[53] See *In Re Enoch and Zaretsky, Bock & Co.'s Arbitration* [1910] 1 KB 327, 333, 337. For further discussion, see C Tapper, *Cross and Tapper on Evidence* (11th ed, OUP, 2007) 311. Zuckerman (n 20, [10.11]) notes that: 'Although a court has some vestigial powers to call evidence of its own initiative, it is hardly ever

this power was introduced in order to overcome a specific difficulty where neither party wished to call a witness because neither wanted to vouch for his personal credibility (given that litigants would not be able to impeach witnesses that they themselves had called).[54] Thus, such a power cannot be expanded to justify conducting independent investigations. Even in the US, where Rule 614 of the Federal Rules of Evidence expressly allows judges to call and examine witnesses,[55] such a power has been exercised sparingly, mainly in criminal cases.[56]

Expecting judges to intervene in substantial ways to guarantee all litigants substantive justice involves fundamental structural changes that should be considered thoroughly and justified on their own account. A duty to guarantee substantive justice would require judges to step in whenever they perceive that ascertainment of the truth is at risk, whether parties are represented or not, including the situation where the judge is dissatisfied with the competence of one of the attorneys, or when he is of the opinion that a line of inquiry has not been sufficiently developed by the parties. While inequality of representation is a common phenomenon—some represented litigants may be unable to afford extensive discovery, or have a limited budget for legal representation—no legal system, whether common law or civil law, affords judges powers to conduct independent investigations in civil proceedings. A judge who calls witnesses and

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exercised'. Cf *Kesse v Secretary of State for the Home Department* [2001] EWCA Civ 177 [34] where the Court of Appeal left open the question of whether the CPR confer a power to call witnesses over the objection of the parties.

54 See *In Re Enoch and Zaretsky, Bock & Co.'s Arbitration* (n 53) 333: 'It is well known that if a party calls a witness he may not then attack his general credibility. There may be a person whom it would be desirable to have before the court. Neither party wishes to take the responsibility of first vouching his personal credibility, or that he is a witness fit to be called, and the judge may relieve the parties in this way, by letting him go into the box as a witness of neither party …'. The prohibition against impeachment has now been relaxed in England, see Tapper (n 53) 330–6, and completely removed in the United States, see Federal Rules of Evidence rules 607–9.

55 Rules 614(a) and (b) provide: '(a) The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called; (b) The court may interrogate witnesses, whether called by itself or by a party'.

56 See e.g. McCormick, *On Evidence* (3rd edn, West Publishing 1984) [8] fn 17 at 17; J Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd edn, Little, Brown Company 1940) vol 9 [2484].

conducts independent investigations is no longer assisting a weak party to present her evidence; he himself becomes an investigator, a researcher of facts, whose ability to remain impartial is suspect for obvious reasons: for example, he may become too sympathetic to the LIP (or, for that matter, too annoyed by her); he may feel that his prestige rides on his ability to help the David prevail against the Goliath; he could be exposed to information he ought not to know; and a significant part of the judge-LIP interaction might not be recorded and therefore visible or reviewable. (See section 1 above)

3.5 Further judicial impartiality concerns

There is another relevant aspect of impartiality that has not attracted sufficient attention in the literature. Suppose we accept that a judge is capable of advising a LIP as well as a lawyer while still maintaining both de facto impartiality and the appearance of impartiality. Suppose further that at the end of the proceedings the judge finds in favour of the represented party. Such a situation may give rise to questions of fairness and misplaced expectations, because the judge will have ruled against the LIP precisely on those arguments that he himself assisted her to make. A LIP who was advised to conduct her case by someone as knowledgeable and authoritative as the judge may have developed an expectation of winning the case. Under such circumstances, the problem of impartiality is inverted: it is not that the represented party may perceive that the judge who is helping her rival may be biased against her; it is the LIP who may think that he has misled her and that she could have fared better conducting the litigation on her own.

Of course, the extent to which this concern for impartiality becomes significant depends on the circumstances of the case, the degree of engagement between the judge and the litigant and the ability of both judge and litigant to set aside whatever sympathies or expectations they have developed throughout their interaction.

4. ACTIVE JUDGES IN THE GERMAN SYSTEM

One of the main arguments in this chapter is that the adversarial system is ill-suited to neutral judicial activity due to its heavy emphasis on partisanship. This section illustrates this argument by outlining broad features of the German civil justice system that demonstrate how, even in a procedural system designed to be operated by judges, extensive judicial activity cannot obviate the need for legal representation.

4.1 Methodological note: why the German system?

This chapter focuses on the German civil justice system for three main reasons. First, this system has attracted extensive attention in Anglo-American comparative literature; consequently, there is sufficient material in English to enable us to draw concrete conclusions. Second, the German system is highly reputable for being generally efficient and just, making it an interesting model for comparative examination. Third, the German system is a representative example of civil law legal systems even if these systems still differ among themselves in many important details that do not bear on our discussion; for our purposes it is sufficient to examine a good example within the civil law tradition that captures some of the broad differences between the two families of systems.[57]

To be clear, the purpose of the comparative analysis conducted in this section is merely to show that legal representation is needed even when judges play a dominant role in the proceedings, and not to argue that mandatory representation should be

[57] For a brief comparative review of European civil procedure, see A Layton and H Mercer (eds), *European Civil Practice* (2nd edn, Thomson, Sweet & Maxwell, 2004) vol 2. The precision of the civil law/common law dichotomy is subject to an ongoing debate. For a recent collection of essays on this point see J Walker and O Chase (eds), *Common Law, Civil Law and the Future of Categories* (LexisNexis Canada, 2010).

imported from civil law systems, nor to take a stance on the bitter debate over which system is more effective in achieving justice.[58] This thesis defends mandatory representation from within as a desirable procedural rule based on the very features of Anglo-American legal systems.

4.2 Broad features of the German system

It is by now a cliché to say that the differences between civil law and common law systems have been exaggerated or misrepresented and that civil law judges are not 'inquisitorial'. Indeed, the German system, for example, shares a number of features with Anglo-American systems. To name just a few: judges neither initiate legal proceedings nor conduct independent investigations; parties are autonomous in defining the scope of their dispute, its subject matter, the cause of action and the scope of evidence, and in identifying sources of factual proof and witnesses; furthermore, German litigants contest facts, suggest evidentiary inferences, advance partisan positions and make legal arguments.[59] In all these respects, German and Anglo-American procedures are not substantially different.

Notwithstanding these important similarities, it would be facile to obscure the fundamental differences between these two families of systems. German civil proceedings develop in a substantially different way than Anglo-American ones. Subject to the parties' autonomy over the initiation and termination of the proceedings, the proof-taking process is led and developed by the judge, not the parties. Furthermore, the procedural apparatus is designed to obtain information from objective and neutral

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[58] See e.g. the famous debate between Langbein and Allen et al: J Langbein, 'The German Advantage in Civil Procedure' (1985) 52 The University of Chicago Law Review 823; R Allen et al, 'The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship' (1988) 82 Northwestern University Law Review 705. See also the discussion at D Luban, *Lawyers and Justice* (Princeton University Press, 1988) 93–103. For a brief discussion of the debate between Damaska on the one hand and Thibaut and Walker on the other, see chapter 7.1.3.

[59] See in general Murray and Sturner (n 5) 154–7, 310; Langbein (n 58) 824; Layton and Mercer (n 57) ch 52.

sources of evidence, while excluding many of the Anglo-American partisan devices that could contaminate or tamper with the evidence, such as rigorous cross-examination, witness coaching, party-appointed experts and party testimony. Discovery, too, is limited. Overtones of battle, enmity or drama are largely absent. Matters such as amendments of pleadings, the order of presentations and admissibility of evidence are discussed informally among the judge, the lawyers and the litigants themselves. Outlined below are some of the major features of the German system that facilitate judicial leadership of the case and its tendency to suppress excessive partisanship.

4.2.1 Informative pleadings and no significant admissibility restrictions

German judges obtain a good deal of information about the dispute at the pleadings stage. Pleadings must be detailed to an extent that far exceeds Anglo-American standards. Litigants must set forth the details of their claims, the underlying facts, and the 'sources of evidence' on which they intend to rely; usually, the relevant documents are also attached. As a consequence, the judge is sufficiently informed at the outset to become a powerful participant in the process, and to lead it. Judicial leadership would not have been possible were the bulk of relevant information to remain with the parties until an advanced stage of the proceedings, as in Anglo-American systems. The early sharing of information is possible by virtue of the absence of strict rules of admissibility, which affords the parties the freedom to attach all the relevant documents to their pleadings without concern for potential formal objections.[60]

4.2.2 Episodic evidence-gathering, no dramatic trial

The overtones of battle and drama characterising Anglo-American trials are absent because there is no clear division between the pre-trial and trial stages; there is no

[60] Murray and Sturner (n 5) 269–70, 307; Langbein (n 58) 827.

precise point at which the 'trial' begins, and thus it does not take place as a single, intensive exercise. Evidence is adduced in an 'episodic fashion'.[61] Furthermore, the introduction of evidence is not conducted in the claimant-defendant sequence typical of Anglo-American systems. Litigants do not each occupy their own 'slot' in the sequence that is theirs to control and during which they can adduce their particular evidence. Instead, the judge receives evidence from both parties at all stages of a process that unfolds in the manner he deems best, which attenuates the atmosphere of enmity and partisanship.

4.2.3 Judges examine witnesses, no common-law-style cross-examination

Another corollary of proceedings in which parties' presentations are not confined to specific time slots and partisanship is kept in check is seen in the way witnesses are examined in court. This does not follow the Anglo-American model of examination-in-chief, cross-examination and re-examination but, rather, is conducted and controlled by the judge. A witness is first asked by the judge to give a narrative account of her testimony in her own words. Following that the judge poses follow-up questions aimed at clarifying the testimony, supplementing it, or testing the witness's credibility. Only after the judge is satisfied with the testimony are the parties' lawyers allowed to suggest additional questions to the court and, with permission, to approach the witness directly.

While lawyers are ordinarily given permission to examine witnesses directly, 'yes/no' questions, which characterise the Anglo-American style of cross-examination, are normally disallowed as strongly leading questions. Murray and Sturner remark that by observing the examination of witnesses in both systems one may notice a considerable difference in tone and rigor.[62] Layton and Mercer make a similar

[61] M Damaska, *The Faces of Justice and State Authority* (Yale University Press, 1986) 51; Langbein (n 58) 830; Murray and Sturner (n 5) 14.

[62] Murray and Sturner (n 5) 295–7.

observation as they describe the role of parties' examination in the German system as 'no more than to emphasise particular points or to clear up ambiguities' and accordingly, they conclude, there is 'no cross-examination of the kind found in common law systems'.[63]

Moreover, unlike in Anglo-American systems where the testimony is recorded verbatim, in Germany the testimony is summarised by the judge who will even read the summary to the witness to be sure that she agrees with its contents.[64] Whether a verbatim record better promotes the ascertainment of truth than a summary of the witness's essential points is beyond the scope of this inquiry; the fact that the German system finds no need to record every word uttered by the witness highlights the flexibility of the proof-taking process and the minimally adversarial atmosphere in which it is conducted.

4.2.4 No witness coaching

In common law systems, one of the major weapons in the arsenal of parties is witness coaching, where each party typically prepares her own witnesses for the trial, has them rehearse their testimony, fine-tunes the troublesome elements, and warns them of the possible traps of cross-examination. None of these techniques are utilised in Germany. Witnesses are normally not interviewed or prepared by the parties or their lawyers before their testimony; if a party were to contact a witness, that witness's testimony would be accorded far less weight.[65] Again, whether witness coaching contributes to the quality of the fact-finding process is unimportant for our purposes; what is significant is that this system functions without it, which reflects an aspiration to protect the fact-finding process from contamination by excessive partisanship.

[63] Layton and Mercer (n 57) [52.077].

[64] ibid [52.077]; Langbein (n 58) 828, 833.

[65] Murray and Sturner (n 5) 294–5.

4.2.5 No interested witnesses

German procedure's general aim of obtaining evidence from objective and neutral sources that are free from partisan influence is reflected in two additional features. First, the litigants do not testify unless it is not possible to obtain the information from other sources. Second, expert witnesses are court-appointed and act as officers of the court, distinct from ordinary witnesses and are not testifying on behalf of or paid by any of the parties. Parties exercise considerable influence over the appointment of experts but, once appointed, the expert is a neutral agent of the court. Furthermore, while parties may still hire their own experts to support their pleadings or to challenge the court-appointed expert, the court may only base its judgment on the testimony of court-appointed experts. Thus, if a party succeeds in discrediting a court-appointed expert, this can only result in the court's appointing another expert.

The fact that German courts are sometimes criticised for excessive reliance on experts[66] underscores the tendency of German courts to seek information that is not only objective but also originates from professional sources. It also highlights the court's rejection of partisanship.

4.2.6 Participation of litigants in open discussions with the court, and 'hints and feedback'

While litigants may not be allowed to testify and in most cases are obliged to be represented by counsel, the judge is expected to interact with them directly during the hearings in regard to vital matters, including their statements and contentions. The purpose of such interaction is not to obtain evidence but, rather, to obtain clarifications that might assist the court in directing the inquiry.[67]

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[66] ibid 280–90; Langbein (n 58) 835–40.

[67] Murray and Sturner (n 5) 163, 257.

Moreover, the hearings are conducted in a way that promotes joint deliberation and discussion among the various participants. They are not nearly as structured or formal as in Anglo-American courts. The parties are adversaries, but the expression of their partisanship does not take the form of combat as in England and the US. It is more moderate, fine-tuned and channelled by the judge in a way that lacks both the drama and the rigour that characterise Anglo-American trials. As some commentators observe:

> Adversarial argument [in Germany] is difficult to describe. The form of argumentation is not statutorily regulated... It is not like the competitive presentations of common-law lawyers who argue their points of fact and law before largely passive tribunals and juries. The German judge or judges are very much involved in the discussions. The proceedings perhaps resemble a somewhat formalized, sometimes animated, conference between judges, parties and lawyers... The importance of the judge's engagement in this discourse cannot be overstressed. The parties do not merely argue to the court, they argue with the judges, and expect to receive feedback on where the court stands and how they are doing.[68]

This atmosphere of collaboration, discussion and joint investigation into the dispute is underpinned by the judge's obligation to provide parties with 'hints and feedback', an obligation that further underscores the German aversion to too adversarial procedures. Judges are expected to inform the parties of any defects in their pleadings, or other procedural mistakes, and offer them the opportunity to rectify errors, clarify their assertions, and supply missing details. Judges are also supposed to ensure that the parties have offered sufficient sources of proof to establish the elements of their claim or defence.[69] In fact, a judge may not base his decision on a point that a party has failed to highlight unless the court has notified the party of its wish to rely on that point and given her full opportunity to comment.[70] In the same vein, judges are expected to communicate their tentative conclusions and impressions with the evidence and

[68] ibid 259.

[69] ibid 160–1.

[70] ibid 166–77, 308–9.

allegations advanced by the litigants, in order to given the latter an opportunity to discuss the factual inferences with the court and, where necessary, to produce any additional evidence that may be required in the light of the judge's feedback. This duty is considered fundamental, so much so that the court's failure to fulfil it adequately may be faulted on appeal as a denial of the right to be heard.

4.3 Brief note on the impartiality of German active judges

It is clear that the German civil justice system is not only conducive to an active judiciary but is actually based on it. For the machinery of justice to operate and for the case to develop the judge cannot maintain silence; he must act, and he does so in a way that is not possible in Anglo-American courts.

This does not necessarily mean that the activity of German judges is immune to criticism for potential breaches of partiality, or that Anglo-American judges inevitably stray into partisanship when they actively advise litigants. The extent to which German judges are allowed to provide 'hints and feedback' or to suggest what relevant fact a party may wish to consider has been the subject of debate.[71] Likewise, as discussed in section 3.3, it is possible to conceive of situations in which Anglo-American judges might suggest a certain factual or legal direction for the parties to consider, or might express their tentative opinion on this or that matter, without casting doubt on their impartiality.

The main difference, however, is that German civil procedure is structured in such a way that judges have far more leeway for focussed activity without raising the question of partisanship, whereas the ability of Anglo-American judges to manipulate

[71] Murray and Sturner (n 5, 177, 263) further indicate that questions of 'How far should the judge go to support the apparently weak party or to do justice to the case irrespective of the presentations of the parties' are debated in the literature and to a lesser extent in case law.

and participate in the trial process is fundamentally restricted by the partisan nature of that process.

4.4 Mandatory representation in Germany

While the legal process in Germany is judge-based and partisanship is not as predominant or as pervasive as it is in the United States and England, self-representation is formally prohibited there in all but a few situations.[72] In other words, legal representation is required despite the fact that Germany's judge-centred procedures might well afford LIPs better prospects of obtaining justice than are available when procedures are party-centred.

This fact is telling. The intervention of German judges in the conduct of proceedings is far more extensive than that proposed to remedy the disadvantages of LIPs as discussed in this chapter. Most of the recommendations discussed above are already operating in the German system, including: a great degree of procedural informality, open discussions between judge and parties, provision of hints and feedback, minimal restrictions on admissibility, and restraints on partisanship, adding up potentially to a reduction of inequities between the parties. And yet, self-representation is not permitted in that system, which suggests that even when judges are very active, self-representation remains ineffective and inefficient.

While this claim is speculative as German courts have no experience with self-representation,[73] there are good reasons to support it. Simply put, judicial activity does

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[72] Self-representation is allowed only in small claims that are not family cases. See section 78(1) of the German Code of Civil Procedure, which requires legal representation before the Regional Court, the Court of Appeal and the Federal Court of Justice. For further discussion of this requirement see *Eckardt v Germany* (2007) 45 EHRR SE7, 52 (ECtHR); Murray and Sturner (n 5) 162.

[73] This issue has not been addressed in comparative literature published in English. For example, Murray and Sturner devote only a few paragraphs (ibid 162–4) to describing the rules and the practice without discussing the rationales behind them. In one of the earlier and classic studies of the German system, the rule requiring legal representation is stated in one sentence without further discussion: B Kaplan, Av

not render the litigants mere 'attendants'. As John Langbein has noted, the German system is also adversarial, but in the right measure and without the abusive and wasteful aspects of zealous partisanship found in American courts.[74] Thus, litigants still play a crucial role in German litigation, a role that cannot be played effectively without legal representation. Even when many aspects of the procedure are facilitated by the judge, substantive expertise is still required over and above procedural expertise; without the former, litigants would not be able to provide the judge with sufficient information for him to assume a leadership role.

Thus, partisan advocacy is essential even when judges are as active as those in Germany. Indeed the professional input and cooperation of lawyers is needed as much by the judge as by the parties themselves in order to be able to develop the case together. Murray and Sturner emphasise the importance for the proper functioning of the German system of the division of labour among judge, lawyers, and litigants. They observe that the German system 'assigns the various functions involved in the presentation and disposition of a civil law suit to the participants most able to perform those functions in an efficient and economical manner'.[75] Lawyers play an important part in optimising this division of labour. For judicial activity to be effective and efficient, it must be assisted and supplemented by lawyers. Legal expertise is required in order to adequately define the scope of the dispute, the relief sought, and its legal grounds. Parties must be able to file detailed pleadings, to know what documents to attach and which witnesses to nominate. Moreover, the joint discussion and deliberation during the hearings cannot be productive without the input of lawyers. Furthermore, German judges need the lawyers' professional input in order to fulfil their duty to

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Mehren and R Schaefer, 'Phases of German Civil Procedure: Part 1' (1958) 71 Harvard Law Review 1193, 1199.

[74] Langbein (n 58) 846.

[75] Murray and Sturner (n 5) 20.

provide parties with 'hints and feedback'. Such input is likewise needed by the parties themselves in order to utilise the 'hints and feedback' provided by the judge, which may require, for instance, amending pleadings, refining factual and legal arguments, clarifying allegations, and so on.

All this demonstrates that even if the process were not as formal and as structured as the adversarial process, self-representation would remain a poor tool for achieving justice due to the need for parties to have sufficient knowledge of the substantive law for effective pursuit of their litigation. Thus, the restriction of self-representation in the German system notwithstanding the highly active role of judges in that system should not be surprising but, rather, telling.

4.5 The solution is not self-representation but affordable fees

Another important lesson that can be learnt from the German experience is that the restriction of self-representation is not necessarily unjust. While self-representation is largely prohibited, legal fees are reasonable, there is no extensive discovery,[76] lawyers' fees are usually predictable and fixed,[77] legal aid is widely available, and legal insurance provides a practical solution for many Germans.[78] The German experience shows that it is possible to deliver a satisfactory level of justice at an affordable cost, even if not every German has unlimited access to the best law firms. Making legal fees affordable seems a

[76] According to Murray and Sturner (ibid, 239–45), courts obtained power to order third parties to produce a document only through procedural reforms in 2001.

[77] See e.g. Layton and Mercer (n 57) [52.083]. A client may agree to higher fees but they will not be recoverable. Such agreements are not a common practice; however, in recent years hourly fees are becoming more frequent among large law firms. See Murray and Sturner (n 5) 112–5.

[78] See Murray and Sturner (n 5) 20, 116–23, 626–8. In one of the earlier and extensive study of the German system, it was observed that 'Fair predictability of ligation expenses is a chief characteristic of the German system' B Kaplan, Av Mehren and R Schaefer, 'Phases of German Civil Procedure: Part 2' (1958) 71 Harvard Law Review 1443, 1462. It should be noted that a decision to grant legal aid usually takes into consideration the prospects of success. The compatibility of this arrangement with Article 6 of the ECHR is discussed in chapter 8.

better way to enhance access to the courts and eliminate, or at least moderate, the objection to mandatory representation on grounds of its unfair impact on the poor.

CONCLUSION

This chapter has discussed a series of proposals that require judges to assist LIPs in presenting their cases effectively. It has evaluated these proposals and found them to be both inefficient and ineffective in bringing about a substantial improvement in the position of LIPs in the litigation process. The main contention has been that litigants need partisan advocacy, not judicial assistance, to equip them to succeed. Judges in Anglo-American courts cannot render effective assistance to LIPs unless they engage in partisan activity that compromises their objectivity. Furthermore, if judges are to act in the capacity of lawyers for LIPs, it would be more cost-effective to appoint lawyers for them. This chapter has also shown that even in a legal system that features an active judiciary, as is the case in Germany, legal representation is still necessary for effective litigation. These conclusions should not be surprising; after all, the proposals that judges should assist LIPs have been developed as alternative solutions given that legal representation is not always available.

This and the previous chapter have demonstrated the limited value of self-representation as a tool for achieving justice on the merits. The next two chapters will examine whether self-representation can be defended on grounds other than its contribution to the outcome of legal proceedings.

CHAPTER 6

FROM LOSERS TO CHOOSERS: SELF-REPRESENTED LITIGANTS AS 'AUTHORS OF THEIR LIVES'

INTRODUCTION

The two previous chapters have shown that, except in simple cases, a right to self-representation is ineffective and inefficient in obtaining justice on the merits. This chapter examines whether a right to self-representation might be intrinsically valuable on the grounds of autonomy.

Chapter 2 has assessed the autonomy rationale in the light of the specific considerations that could come into play in the criminal context. This chapter examines the question of autonomy from a more abstract point of view and investigates the extent to which a procedural rule requiring legal representation in civil proceedings is compatible with the liberal commitment to personal autonomy. It argues that what respect for autonomy requires is a procedural system that provides citizens with a reasonable opportunity to protect their interests and enforce their substantive rights. When self-representation is expected to be a poor tool for performing this task, requiring legal representation would be perfectly compatible with respect for autonomy. A litigant who wishes to avail herself of the legal system remains free to do so through legal representation.

Section 1 outlines the autonomy rationale and shows that a rule requiring legal representation has been objected to primarily because it is thought to interfere in the individual's freedom to make choices. **Section 2** argues that while a rule requiring legal representation could be defended as a justified infringement upon autonomy, it is important to insist that such a requirement does not at all infringe upon autonomy. **Section 3** argues that the objection to a rule requiring legal representation on the grounds of freedom of choice seems to be based on the false premises that procedural rules restrict litigants' freedom or that litigants are entitled to unlimited choice. Instead, this section argues that procedural rules are generally not coercive or restrictive of freedom but optional and facilitative of freedom, and that respect for autonomy does not require that litigants be provided with unlimited procedural choices. It further argues that in certain circumstances self-representation would be autonomy-undermining and that, therefore, its elimination is not merely consistent with respect for autonomy but could also be required by it. **Section 4** argues that respect for autonomy requires that litigants be provided with adequate procedural options that enable them to present their cases before a competent and impartial tribunal whose task is to determine substantive rights. When legal representation is a substantially more effective tool for presenting the litigant's case, making it a condition for litigation would be compatible with autonomy. **Section 5** argues that a rule requiring legal representation does not pose a special threat to the litigant's autonomy because the litigant's control over the proceedings is preserved, if not enhanced, by legal representation. Furthermore, the procedural activity normally has no normative significance that requires permitting litigants to insist on exercising all their procedural rights in person rather than by proxy. This section also discusses the view that respect for autonomy requires affording litigants the freedom to participate in the process, arguing that legal representation coexists with such freedom. **Section 6** discusses the relationship between autonomy and the burdens that litigation imposes on litigants, arguing that respect for autonomy requires that these burdens be reasonable.

1. OUTLINING THE AUTONOMY RATIONALE

As has been noted in this thesis, the leading text on self-representation in common law jurisdictions is the decision of the United States Supreme Court (USSC) in the case of *Faretta v California*.[1] In this case, the USSC held that the 'inestimable value of free choice'[2] underwrites the Sixth Amendment and, accordingly, an accused is constitutionally entitled to decide for herself whether to proceed in person or through counsel, even where the defendant lacks the competence required to present an effective and efficient defence. The value of free choice has since been highlighted on numerous occasions by the USSC[3] and other state courts; as often reiterated, '[t]he right to self-representation by a defendant embodies one of the most cherished ideals of civilization: the right of an individual to determine his own destiny'.[4]

Indeed, the 'inestimable value of free choice' has been said to trump other competing considerations, including the efficient administration of justice and the integrity of court proceedings. The USSC further noted that a defendant appealing from a conviction need not show that her defence was prejudiced as a result of the failure to respect her choice of representation; such a failure is an independent reason for

[1] *Faretta v California* 422 US 806 (1975).

[2] ibid 834.

[3] See e.g. *Martinez v Court of Appeal of California* 528 US 152 (2000) 165, per Justice Scalia: 'That asserting the right of self-representation may often, or even usually, work to the defendant's disadvantage is no more remarkable—and no more a basis for withdrawing the right—than is the fact that proceeding without counsel in custodial interrogation, or confessing to the crime, usually works to the defendant's disadvantage. Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people'; *Mckaskle v Wiggins* 465 US 168 (1984) 176–7: 'The right to appear *pro se* exists to affirm the dignity and autonomy of the accused'.

[4] *People v Gordon* 688 NYS2d 380 (1999) (Supreme Court of New York) 382; see also *People v Bloom* 48 Cal3d 1194 (1989) (Supreme Court of California) 1222: 'On numerous occasions we have "recognized the need to respect the defendant's personal choice on the most "fundamental" decisions in a criminal case"'. The Canadian Supreme Court expressed a similar view in an obiter in *R v Swain* [1991] 1 SCR 933 [36]: 'An accused person has control over the decision of whether to have counsel, whether to testify on his or her own behalf, and what witness to call. This is a reflection of our society's traditional respect for individual autonomy within an adversarial system'.

reversal.[5] By the same token, the USSC recognised that a defendant 'may conduct his own defense ultimately to his detriment' and yet 'his choice must be honoured out of "that respect for the individual which is the lifeblood of the law"'.[6] Other courts put this position as bluntly as this: 'even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice "with eyes open"'.[7] The importance of free choice is underscored by the fact that it is given precedence over the risk of false convictions, a risk that is so important that the legal system is ready to set free many guilty defendants (ten, a hundred, or a thousand) just to save a single innocent individual from being erroneously convicted and punished. With the powerful rhetoric of free choice in the background, the risk of a false conviction and therefore of an unjustified punishment have been made the private business of defendants even in cases involving matters of life and death.[8]

While the *Faretta* jurisprudence has been heavily criticised in the literature, the criticism has been limited to the question of balance: as we have seen in chapter 2.3, the criticism revolved around the argument that the public interest in fair and efficient proceedings should outweigh the value of autonomy expressed in the decision to proceed in person. The very position that autonomy requires a right to self-representation or that the choice to proceed in person is an expression of autonomy has gone unquestioned.

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[5] The intrinsic value of free choice was further highlighted in *Flanagan v US* 465 US 259 (1984) 269 where the USSC stated that a violation of the constitutional protection of the defendant's free choice concerning his representation is independent of the objective fairness of the proceedings and therefore prejudice to the defence need not be established.

[6] *Faretta v California* (n 1) 835.

[7] *United States ex el Maldonado v Denno* 348 F2d 12, 15 (1965).

[8] *People v Gordon* (n 4) 383: 'That this trial involved capital crimes, thus raising the stakes to life or death, did not vitiate the [defendant's] right to self-representation'.

The idea that being the master of one's life includes being the master of one's lawsuit has been seductive and endorsed by important scholars, including George Fletcher[9] and Mirjan Damaska. In particular, Damaska has described a right to self-representation as analytically entailed by the liberal commitment to autonomy in civil and criminal proceedings alike. Considering self-representation as 'a clear entailment of individual self-definition',[10] he says:

> ... the reactive state, reluctant to embrace any philosophy of the good life, allows individuals to be sovereign in the management of their own concerns. Transposed to the administration of justice, this sovereignty requires that a party be recognized as the master of his lawsuit (*dominus litis*), entitled to conduct it as he pleases ... the [reactive] state cannot *impose* counsel on the litigant, for where individual autonomy is extolled, parties must be free to hire and fire their lawyers, no matter how important the issues involved in the case or how skewed the proceedings become when a party chooses to manage his case personally'.[11]

It should be stressed that, in the aforementioned texts, autonomy has been used in a loose way to signify a general and undefined commitment to free choice and individual control over one's destiny, without reference to any specific theory of autonomy. The primary way in which self-representation has been related to autonomy is through a general notion of freedom of choice: being a free person, a litigant must be allowed to conduct his lawsuit 'as he pleases', to which a requirement to be legally represented is thought to be anathema.

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[9] G Fletcher, *Basic Concepts of Criminal Law* (OUP 1998) 55: 'We assume that the defendant, acting alone, is autonomous and capable of deciding his own faith'. Fletcher considers this feature of the common law system as reflecting a treatment of defendants as subjects, not objects, showing respect for defendants as ends in themselves, allowing them to plead guilty as they wish, even in capital cases.

[10] M Damaska, *The Faces of Justice and State Authority* (Yale University Press, 1986) 105: 'so seriously is autonomy taken in the reactive state that it is protected even in those instances where the parties' exercise of autonomy seriously strains the optional functioning of the legal process designed as a context. A telling illustration is the right of the citizen to self-representation—a clear entailment of individual self-definition'.

[11] ibid 104, 142 (respectively) (emphasis in original); see also p 94 and M Damaska, 'Assignment of Counsel and Perceptions of Fairness' (2005) 3 Journal of International Criminal Justice 3, 5.

This chapter will now set out to demonstrate that an abstract notion of freedom of choice is an inadequate standard for assessing the compatibility of procedural rules with autonomy.

2. LEGAL REPRESENTATION AS A LEGITIMATE INFRINGEMENT

The fact that a liberal state has no specific interest in the particular outcomes of private legal disputes does not mean that it has no interest in the way such disputes are resolved. First and foremost, the legal system must be rational and seek to return correct outcomes. Even a minimalist government may refuse to adopt such irrational methods of dispute resolution as tossing a coin or invoking divine intervention. Furthermore, since court adjudication is a public service, a minimalist government may insist on keeping the service efficient and ensuring its integrity and legitimacy.

Thus, a society that extols the value of individual autonomy may still refuse to afford individuals unconditional freedom in legal proceedings (and in fact in most other contexts). Even if we accept as a starting point that litigants ought to have a certain degree of freedom and control over their lawsuit,[12] it would be an exaggeration of the implications of our respect for autonomy to insist on excessive freedom and control. By the same token, even if a right to self-representation shows some respect for the litigant's autonomy, it is by no means the only or best way to do so.

A quite orthodox way to make this point goes along the lines suggested by the critics of *Faretta* with regard to criminal proceedings. The legal system needs to consider the competing interests of all litigants, not only those who insist on proceeding in person. To the extent that self-representation has some autonomy value, a rule requiring legal representation could be defended as a legitimate restriction on the litigant's

[12] It is important to note that party autonomy could also be justified on grounds other than the liberal notion of free choice, e.g. economic, cognitive or political grounds; see discussion in chapters 1 and 5.

freedom in order to prevent harm to other litigants; a litigant who has a right to control her own destiny has no additional right to control the destiny of the court or of other litigants.

To support this argument, attention could be drawn to a number of procedural arrangements that have circumscribed the procedural freedom of litigants in significant ways. For example, case management powers have reduced the degree of party control over the proceedings in favour of judicial management. Furthermore, in some common law countries the freedom to choose whether to proceed in person or through counsel is restricted by prohibiting legal representation in small claims.[13] Moreover, the procedural device of class actions, as in the US, has circumscribed parties' autonomy over their substantive rights by allowing some litigants to litigate on behalf of a group and obtain a judgment that would be binding on the members of that group, even if these members had not positively expressed their consent to it and 'opted in'.[14]

Having said that, it is possible to insist that even based on autonomy alone a requirement of legal representation as a condition for litigation does not at all restrict the litigant's freedom. Objecting to such a requirement only because it denies a choice would lead, by the same logic, to faulting all the other procedural rules because they, too, allow only certain choices to be made and eliminate others. If the criterion for measuring restrictions on autonomy were as simple as whether a rule makes available

[13] Legal representation may sometimes be allowed by judicial permission; see e.g. California Code of Civil Procedure s 116.530; Revised Code of Washington s 12.40.080; Nebraska Revised Statute 25-2803; Magistrates Court Act 1991 s 38(4) (South Australia); Victorian Civil and Administrative Tribunal Act 1998 s 78. In England and Wales, however, legal representation is permitted in small claims; see in general CPR Pt 27.

[14] English law, however, has an opt-in regime whereby the outcome of group litigation would be binding only on the litigants who positively opted in (and filed claims): see CPR Pt 19 and discussion in A Zuckerman, *Civil Procedure: Principles of Practice* (2nd edn, Sweet & Maxwell, 2006) [12.35]–[12.67]. This is not the place to assess the advantages of these two different regimes in terms of autonomy, but it is interesting to mention the findings cited by Mulheron that people tend not to take a positive action, either to opt in or to opt out, meaning that an opt-out system produces higher rates of participation which in turn suggests that an opt-out system may better serve to enhance the autonomy of litigants. See R Mulheron, 'Justice Enhanced: Framing an Opt-Out Class Action for England' (2007) 70 Modern Law Review 550, 557.

certain or all possible choices, then a rule requiring legal representation would be as restrictive of the litigant's freedom as rules requiring litigants, say, to disclose a cause of action recognised by law and not merely a moral claim, testify only on relevant facts and refrain from expressing opinion, show prospects of success as a prerequisite for setting aside a default judgment, serve statements of case or applications on the opponent and within so-and-so days, pay a certain fee, and so on.

All these rules prescribe certain choices and bar others (such as serving pleadings in a different period, paying a different fee, if at all, filing pleadings in artistic shapes, testifying on gossip and irrelevant stories, etc), and yet it would be unreasonable to classify them as restrictions on autonomy. Doing so would debase the currency: a concept of freedom that is constantly infringed upon, albeit justifiably, cannot be conceptually helpful. This is particularly so given that access to court is inconceivable without rules. Any procedural system must create rules to regulate the activity of its users and function effectively; litigants cannot merely choose to appear at any time or argue whatever they wish in whatever form they prefer.[15] So it is both undesirable and analytically wrong to treat such necessary rules as restrictions on autonomy.

To conclude, procedural rules cannot be usefully conceptualised as restrictions on freedom, and the liberal commitment to autonomy must not be regularly invoked merely to resist any sort of regulation and elimination of choices. A more nuanced approach to procedural rules is required to account for their relation to autonomy.

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[15] See e.g. *Golder v UK* 1 EHRR 524 [38], indicating that the right of access to court 'by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals' (endorsed in *Ashingdane v UK* (1985) 7 EHRR 528 [57] and *Woodhouse v Consignia Plc* [2002] EWCA Civ 275 [43]); *R v Immigration Appeal Tribunal Ex p S* [1998] Imm AR 252 (QB) 268 (per Sullivan J): 'A right to a hearing is rarely unconditional, even where matters of life and liberty are at stake. One may have to appeal within a certain time, appear at a certain time, not be abusive or disruptive, file certain documents in support ... and so forth. Having an opportunity for a hearing does not mean that one may not disentitle oneself from taking up that opportunity if one behaves in a certain manner'; Zuckerman (n 14) [2.30]: '[c]ourt proceedings are of necessity regulated by rules, for without rules there can be no system of justice, only anarchy and arbitrariness'; [2.31] 'For instance, a claimant who wants to bring an action must issue a claim form; he cannot do so by simply sending a letter to the defendant'.

3. REBUTTING THE PREMISES OF THE AUTONOMY RATIONALE

Requiring legal representation has been said to compromise litigants' autonomy because it intervenes in their decision whether to proceed in person or through counsel. The primary value put forward in defence of self-representation has been the 'inestimable value of free choice'.[16] In the civil context, this objection to a rule requiring legal representation is unpersuasive. It presupposes that procedural rules are coercive or otherwise restrictive of litigants' freedom, or that litigants are entitled to unlimited procedural choices. This section challenges these premises and argues that the utilisation of procedural rules is voluntary and optional rather than restrictive, and that respect for autonomy does not require that litigants be provided with as many choices as possible.

3.1 Reconceptualising procedural rules as optional, not restrictive

To ascertain whether or not a rule requiring legal representation is respectful of autonomy, it is critical to understand that litigation is a voluntary rather than compulsory or coercive activity. Civil proceedings are typically conducted by private parties and the state has no interest in their outcome. Robert Summers has rightly argued that the decision whether or not to participate in a legal process is as voluntary as the decision whether or not to vote in an election. For him, the voluntary nature of the participation in both processes is intrinsically valuable regardless of the value of the outcome of participation or non-participation in such processes:

> Features of legal processes, at least in many Western democracies, permit prospective participants to *decline* to participate. Thus, it is generally not a crime to refrain from voting in an election. ... Even a criminal suspect can refuse to participate in his trial, and a civil litigant can decline to respond to a claim. Moreover, the laws generally do not require that citizens exercise their legal rights to invoke a legal process.

[16] *Faretta v California* (n 1) 834.

> These and other examples illustrate bias against coercion and in favor of voluntarist values.[17]

The reason why Summers is right in saying that the decision whether or not to participate in civil proceedings is voluntary is that this decision is identical to the decision whether or not to assert or exercise one's substantive right or rather give it away (Summer's comment on the criminal context does not concern us here). Since every individual has the freedom to give away her assets or money, she also has the right to refrain from bringing a claim or to refuse to defend herself in a claim brought against her, regardless of the merits of the claim brought or defended. A creditor, for example, is free to decide to forgive a debtor and therefore refrain from suing her for not returning a loan, and a debtor is equally free to decline to defend herself even if she thinks that a claimant seeks more money than actually deserved. Thus, it is precisely because the decision whether or not to participate in the legal process involves one's autonomy over one's substantive rights that such a decision is and should remain voluntary and free, and it is also for this reason that such a decision can be legitimately analogised with the decision whether or not to exercise one's *substantive* right to vote. This reason also underlies the longstanding principle of party autonomy over the scope of litigation and the court's tendency to approve of settlements whereby litigants redefine their substantive rights (bar exceptional circumstances of duress, fraud and the like).

It is often thought, however, that there is a reason to distinguish between claimants and defendants. While claimants are indeed free to decide whether to commence a claim, so the argument goes, defendants do not choose to be sued.[18] This

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17 R Summers, 'Evaluating and Improving Legal Processes: A Plea For "Process Values"' (1974) 60 Cornell Law Review 1, 24 (emphasis in original).

18 See e.g. C Gray, 'Reaching out or Overreaching: Judicial Ethics and Self-Represented Litigants' (2007) 27 Journal of the National Association of Administrative Law Judiciary 97, 110: 'many people who appear who appear without an attorney are not even in court by "choice" because they are the defendant or respondent in a case'; *Traguth v Zuck* 710 F2d 90 (1983) 95: 'The court's duty [to apply a lenient standard

distinction is questionable. The defendant does not decide to be sued or when to be sued in the same way that the claimant does not decide to be injured or when to be injured (or to have a contract breached, or a loan not returned, and so on). Accordingly, both claimants and defendants have the same degree of freedom in deciding whether to take part in litigation or not: a claimant is free to drop his claim as much as a defendant is free to decline to respond to it and in either situation the implication of declining to litigate is precisely the same for the litigant's substantive rights.[19]

Another common view is that the decision whether or not to participate in litigation is not always 'really' or 'genuinely' free. Arguably, in certain circumstances participation is the only rational choice: a tenant sued by a bank seeking to obtain possession of her house has a good reason to litigate given the serious consequences of declining to do so; a person who is seriously injured in a road accident has a good reason to file a claim for damages; a person whose assets are frozen by an interim

of procedural compliance] is even broader in the case of a *pro se* defendant who finds herself in court *against her will* with little time to learn the intricacies of civil procedure'. For a discussion of this distinction in the USSC's case law on court fees, see: F Michelman, 'The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights (Part 1)' (1974) 1973 Duke Law Journal 1153. Even historically, in 'writs of right', only the tenant/defendant who was in possession of the land could choose whether to have the claim against him tried by battle or rather by the 'grand assize', i.e. a number of knights who would be sworn to 'recognise' whether the 'demandant' or the tenant has a greater right to the land; a claimant could be compelled to stake their claims on the issue of a combat; see F Maitland, *Equity: Also the Forms of Action at Common Law* (CUP, 1910), Lecture III p 320-1. By contrast, some procedural arrangements favour claimants for practical reasons, e.g. CFAs.

[19] The argument in the text is confined to the distinction between claimants and defendants on the grounds of freedom of choice, which is the matter discussed in this chapter. There may be other reasons to distinguish between claimants and defendants, which we do not need to assess. For example, the ECtHR distinguished between the different interests protected by claimants and defendants in a defamation claim; in *Steel and Morris v UK* Application No 68416/01 (15.2.2005) (ECtHR) [63] the ECtHR observed that a defendant seeking to defend his freedom of expression would have a stronger entitlement to legal aid than a claimant seeking to protect his reputation. Another example could be the burden of proof, which favours the defendant. Dale Nance distinguished between defendants and claimants based on the value of the status-quo and on assumptions of civility and conformity to the law: D Nance, 'Civility and the Burden of Proof' (1994) 17 Harvard Journal of Law and Public Policy 652; Porat and Stein distinguished between claimants and defendants for the purpose of the burden of proof by referring to the different marginal values of taking a pound and giving a pound; see A Porat and A Stein, *Tort Liability Under Uncertainty* (OUP, 2011).

injunction has a good reason to apply to set it aside in order to be able to exercise her autonomy over her substantive rights; and so on.[20]

However, having a good or rational reason to litigate does not mean that one has no choice or that litigation is coercive. Even a person seriously injured in a road accident is free to decide not to sue for damages, as irrational as this decision might be. That a decision to file a claim or a defence could be motivated by financial or other important considerations should not be automatically analogised with a 'your money or your life' situation; many decisions one makes in relation to one's substantive rights are motivated by financial considerations or other constraints.

The procedural activity following the initial decision to participate is also optional. First, this conclusion could be derived from the optional nature of the initial decision to participate in litigation; having chosen to litigate, a litigant is seen to have accepted the terms of litigation. The optional nature of such procedural activity could also be established independent of whether the initial decision was voluntary or not. Even in those specific situations where the initial decision to participate was not perfectly or 'genuinely' free but motivated by some external pressure to avoid undesirable consequences, the decision how to utilise the procedural rules remains largely free. These rules only offer options for advancing one's interests and ways to facilitate the presentation of one's position. In other words, even if autonomy is somewhat imperilled by the incidence giving rise to the rational pressure to litigate (be it a road accident inducing a person to sue or an existing lawsuit inducing a person to defend), once the decision to participate has been made most procedural rules offer tools to carry out the initial decision and avoid the consequences the litigant is seeking

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[20] Toone has argued that, in criminal proceedings, it would be incoherent to defend a right to self-representation on grounds of autonomy due to the restrictive nature of such proceedings, which have the effect of diminishing the defendant's autonomy and severely restricting the options available to her: see R Toone, 'The Incoherence of Defendant Autonomy' (2005) 83 North Carolina Law Review 621.

to avoid by litigating. (For this reason, even in the criminal context the procedural rules might generally be described as optional because they offer an opportunity to defend oneself, but this chapter does not need to defend this argument beyond the civil context.)

The proposed conceptualisation of procedural rules as optional and facilitative underwrites Zuckerman's criticism of common descriptions of procedural requirements as imposing 'duties' or 'obligations':

> The 'duty' to serve a witness statement is not the same kind of duty as the duty to pay income tax, or damages for breach of contract, because most procedural obligations are not enforceable in the same way that substantive rights are enforceable. When CPR 7.5 provides that a claim form must be served within four months of its issue, it does not impose any obligation whatever on the claimant, who is free not to effect service. By the same token, a defendant is not obliged to serve a defence, but is free to allow the claim to take its course without his response or participation. Claimants must pay court fees, but if they fail to do so, they are merely notified that unless payment is made (or exemption obtained) the claim will be struck out (CPR 3.7). They remain completely free to choose whether to pay or not.[21]

The voluntary nature of the procedural activity also underwrites the flip side of Zuckerman's argument, namely his criticism of the common descriptions of the consequences of procedural non-compliance as 'sanctions' (as in the CPR):

> The term sanction normally implies punishment for failure to perform a duty. In this sense, a sanction is designed to inflict a disadvantage for breach of duty in order to deter further breaches and to encourage future compliance. But this is hardly true of most consequences of procedural defaults. Where a defendant fails to serve a defence, the claimant may obtain a default judgment, but this is not a punishment intended to encourage defendants to defend claims brought against them. On the contrary, defendants with no real prospect of success should be discouraged from doing so otherwise the court would be burdened with unmeritorious litigation.[22]

A rule requiring legal representation is not different from all the other ordinary rules that regulate the litigation activity. In principle, such a rule provides litigants with

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[21] Zuckerman (n 14) [10.12].

[22] ibid [10.13].

an effective option to present their cases, namely through counsel, and in doing so it cannot be said to restrict their freedom or otherwise compromise their right of access to court.[23] (As a reminder, at this point the element of financial ability should not be considered.)

Parenthetically, it might be worth noting that the optional feature of procedural requirements is characteristic also of non-legal contexts. Many aspects of our lives are subject to some kind of regulation, whether public or private, formal or informal. For example, a hopeful job candidate may be required to fill an application form, attach a CV, deliver a presentation or attend other kinds of interviews; a library may require readers to swipe their card in a machine as a condition for entering the premises; and so on. These conditions for using a certain service or engaging in a certain activity are not restrictions on autonomy but options that are available in sophisticated societies that offer their members diverse opportunities to develop their pursuits and life plans.[24]

3.2 Autonomy does not require as many choices as possible

Defending self-representation only because it is a possible procedural choice, without introducing a particular value that might underpin it other than an abstract idea of the freedom of choice, seems to presuppose an entitlement to unlimited choice or to as many choices as possible. However, this is not required by respect for autonomy. Joseph Raz, for example, has argued that personal autonomy is a positive concept that goes beyond the simple notion of the freedom from coercion or the freedom to make any choice. The extent to which society is conducive to autonomy is a matter of degree

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[23] It might be helpful to recall that even if one did not accept the interpretation proposed in the text, and procedural rules were to be viewed as restrictions, a rule requiring legal representation would be just another restriction that poses no special difficulty, a point that would take us back to the 'balance argument' in section 2.

[24] It should also be noted that the argument in this section is conceptual, not linguistic. From a linguistic point of view, the words 'requirement' or 'condition' (and also the phrase 'mandatory representation') might imply some measure of restriction and, therefore, conflict with their description as 'voluntary' or 'optional'.

that is determined by whether individuals have an *adequate* range of morally diverse short-term and long-term choices and alternatives, to enable different individuals with different and inconsistent moral codes to develop as autonomous entities.[25]

Gerald Dworkin has challenged the general idea that more choices are better. He observes that sometimes people may become less free when more options are introduced to them. For instance, allowing employees to work seven days a week may undermine their freedom to take a day off because it renders them susceptible to social or economic pressure to work seven days a week. Thus, to protect workers from exploitation, the option of working seven days a week may need to be excluded. Likewise, raising the speed limit on a certain road from 50m/h to 100 m/h gives drivers more choices regarding the speed of their journey, but it also makes driving at 50m/h or slower more dangerous.[26] According to Dworkin, such examples demonstrate that having more choices does not always enhance one's autonomy and, in fact, that under certain circumstances autonomy is better served by eliminating some choices.[27] For him, what the commitment to autonomy requires is the recognition that individuals are capable of making choices, and this requires making available to them only *some* options that offer sufficient alternatives for individuals to create their own life-plans and follow their pursuits.[28]

Dori Kimel made a similar argument in the context of freedom of contract. In his view, '[r]espect for personal autonomy... does not always entail more rather than less

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[25] J Raz, *The Morality of Freedom* (Clarendon Press, Oxford 1986) 204–5, 369–76.

[26] These are slightly modified versions of Dworkin's example: G Dworkin, *The Theory and Practice of Autonomy* (CUP, 1988) 71, 77.

[27] ibid 80.

[28] ibid 80–1: 'What makes a life *ours* is that it is shaped by our choices, is selected from alternatives, and therefore choice is valued as a necessary part of a larger complex. But, again, this would at most support the view that, with respect for certain range of choices, it is desirable to have *some* options'.

freedom, or less rather than more intervention in the freedom of contract'.[29] The notion that respect for autonomy requires creating or leaving open as many options as possible for those whose autonomy is at stake 'is a grave misconception, and one which is responsible for much of the misunderstanding concerning the liberal approach to the freedom of contract'.[30] Thus, he argues, not every contract should have binding force, especially when arrived at in circumstances of undue influence or significant inequality in bargaining power. Respect for autonomy does not require making available all the bad or worthless options. Even outside the realm of the morally worthless options, not every freely undertaken obligation could be defended as an expression of autonomy because certain options can have the effect of 'reducing one's overall autonomy, or one's chances of leading an autonomous life, even if chosen freely'.[31] Contracts in which employees accept serious restrictions on alternative employment in the future undermine their long-term autonomy and therefore should not be binding; this view seeks to protect the autonomy of individuals who happen to be in a position of serious inequality in bargaining power.

Drawing on these views, this chapter submits that self-representation cannot be defended only because it is a possible choice that litigants could opt for. This argument need not have the paternalistic flavour of Kimel's and Dworkin's arguments. The restriction of self-representation could also be motivated by the legal system's own duty to avoid irrationality and inefficiency. A legal system should not be expected to make irrational choices available, especially not ones likely to attract further irrational choices: self-representation is an irrational choice for achieving what is sought by representation in a legal process, and it is likely to attract mistaken procedural choices that could

[29] D Kimel, 'Neutrality, Autonomy, and Freedom of Contract' (2001) 21 Oxford Journal of Legal Studies 473, 485.

[30] ibid, 485.

[31] ibid, 485.

jeopardise the rationality and integrity of the process. Add to this the additional argument from the principle of harm, that self-representation is likely to undermine other litigants' opportunity to defend their own plans and choices effectively and efficiently. Yielding to the litigant's irrational insistence on self-representation would be as unjustified in terms of autonomy as yielding to her irrational insistence on, say, calling an expert witness to prove a matter of common sense or adducing inadmissible unreliable evidence; such applications are dismissed day in day out by case management decisions without raising special concerns.

As indicated, this thesis does not rely on paternalistic considerations. However, it is worth noting that self-representation is likely to compromise the autonomy of self-represented litigants since it is a poor tool for defending their plans and choices. Unless motivated by financial necessity, opting for self-representation in complex cases is likely to indicate a certain degree of irrationality or a misinformed perception of the qualifications required for conducting litigation. In such circumstances, a paternalistic approach may be justified in order to protect the autonomy of litigants; in other words, autonomy may require the exclusion of self-representation.[32]

4. AUTONOMY IS SERVED BY A PROCEDURAL SYSTEM

If procedural rules are optional and if litigants are not entitled to unlimited choice, the question becomes this: how can we decide which procedural options are worth offering in a procedural system that is compatible with autonomy? Having established that freedom of choice is an inadequate criterion, this chapter proposes that the basic criterion for assessing the compatibility of procedural rules with autonomy is, all other

[32] Chapter 2.3.1 has described the difficult experience American courts have had with self-represented defendants, and how distorted the discourse of autonomy has become in the light of the grave self-inflicted injustice suffered by self-represented defendants.

things being equal, the extent to which the procedural option in question facilitates the determination of legal rights.

4.1 Respect for autonomy requires a procedural apparatus for rights enforcement

The argument advanced so far that the procedural apparatus is based on voluntary participation and utilisation by its users does not immediately mean that the commitment to personal autonomy places no demands on the design of that apparatus. Quite the contrary, for the argument that procedural requirements are optional to avoid becoming dogmatic, the procedural system must facilitate the process of enforcing substantive rights. This is because the state has a monopoly over the use of force and therefore litigation is the only way through which individuals could protect their interests; failing to provide subjects with a reasonably effective and efficient service of peaceful dispute resolution, the state would be abusing its monopoly over the use of force and unjustifiably depriving individuals of the ability to self-enforce their rights.

It is therefore submitted that, as a matter of principle, not only are procedural rules that facilitate litigation consistent with the commitment to autonomy due to their optional nature, but they are also required by it. A procedural system that facilitates the enforcement of rights is essential to any social structure that is conducive to autonomy. Without rights enforcement people would not be able to sustain a free life of their own choosing and pursue goals that are important to their well-being. The individual's ability to be the 'author of her life' is conditional upon her ability to enforce her choices and prevent others from unduly jeopardising them. Thus, by facilitating the enforcement of rights, procedural rules facilitate the exercise of freedom and allow people to defend their choices and life plans.[33]

The flip side of this argument is that failing to provide individuals with a machinery of rights enforcement would show disrespect for their autonomy because it fails to treat them as capable of planning pursuits that are worthy of protection.[34]

4.2 The facilitative potential of procedural rules as a criterion for measuring conformity to autonomy

Since rights enforcement is a necessary part of any social structure that is conducive to autonomy, it follows that arbitrary, irrational or ineffective procedural rules detract from the individual's ability to prosper as an autonomous agent. It also follows that when a rule provides or eliminates procedural choices the rule could be praised or criticised in terms of autonomy based on the extent to which the provision or the elimination of the

[33] Frank Michelman briefly made a similar but not identical proposition: F Michelman, 'Formal and Associational Aims in Procedural Due Process' in R Pennock and J Chapman (eds), *Nomos: Due Process* (vol 18, New York University Press, 1977). He described a 'positivistic-libertarian' or 'liberal-positivistic' conception of autonomy that identifies autonomy with the freedom to utilise the substantive law and whose boundaries are delineated by those actions that are prohibited by law. Within such a conception of autonomy, Michelman sided with Bentham that the only conceivable purpose of a formal legal process is to preserve autonomy by enforcing substantive rights: 'According to this model, all allowable impairments of our immediate freedom are clearly set out in general rules emanating from a legislative sovereign whose rule-enactments can be seen as somehow embodying our more fundamental and comprehensive consent. The rules thus have a double aspect. By their very effect of staking out zones of autonomy wherein each is protected from exposure to unpredictable, arbitrary or discretionary interferences by others. In this model, the only, but necessary, job of judges is to make sure that the rules are applied as enacted. If the sovereign says ... that we are free to do or to have this or that unless such-and-such a fact is present, then the model demands that impartial officers have the last word about whether enjoyment of this or that has been denied despite the absence of such-and-such. The model requires confirmation from outside the arena of dispute that the rules being applied are the ones which the sovereign has legislated' (129). The problem with Michelman's account is that he confines autonomy to the positive law and accordingly unjustifiably strips autonomy of its moral force. What constitutes 'our more fundamental and comprehensive consent' is often subject to controversy. Matters such as homosexual relationship, same-sex marriage, contraception, abortion, child rearing, family relationship, and child custody might not be protected by a given legal system and yet they could undoubtedly be debated in terms of autonomy. See section 5 below.

[34] See e.g. J Raz, *Authority of Law* (OUP, 1979) 221: 'observance of the rule of law is necessary if the law is to respect human dignity. Respecting human dignity entails treating humans as persons capable of planning and plotting their future'; 226: 'Quite apart from the fact that conformity to the rule of law is also a moral virtue, it is a moral requirement when necessary to enable the law to perform useful social functions'.

choices in question contributes to the court's ability to determine cases in accordance with the law (whether in a specific case or in the long run).[35]

For example, if to testify in an Israeli court a Palestinian litigant is required to swear allegiance to the Jewish state or to Zionism, her autonomy would be compromised because this condition does not rationally contribute to facilitating the determination of the outcome. Such a litigant would have to do something which is unnecessary from a rational point of view in order to succeed in enforcing her right (in addition, the condition in question is not trivial but requires the litigant to adopt (or pretend to adopt, all the same) substantial political views).

By contrast, if to testify the litigant is required to take an oath in whatever form suitable to the litigant (be it a religious oath or a secular warning to tell true facts), such a condition is compatible with autonomy even if it eliminates the choice of testifying without any oath/warning at all. This is because the oath or warning is reasonably thought to induce litigants to tell the truth and for this reason it constitutes a legitimate condition for using the procedural tool of testimony. To challenge such a condition, we have to say more than that it eliminated a choice. For example, one might say that an oath requirement insults some people as it presupposes that without taking an oath they might not tell the truth; such an objection would rely on the specific effect of the oath requirement rather than on an abstract notion of freedom of choice. Thus, when the purpose of the condition for testifying seeks to advance the reliability of the testimony and accordingly the disposal of the case, without conflicting with other important values, it would be compatible with autonomy.

Take another example. Suppose that C lends £1000 to D and that when the money is due D refuses to return it. Suppose further that the only dispute-resolution

[35] This includes not only the accuracy of the outcome but also its efficiency and timeliness. Some procedural rules may be important even if they merely deal with technical forms or court administration.

method available to C and D is to toss a coin. Under such circumstances, whether or not C is offered to choose who tosses the coin or which side of the coin is hers does not make C any more or less autonomous because the procedure of tossing a coin and the freedom within it have no rational impact on the enforcement of C's substantive right, i.e. the reimbursement of the £1000 (although having such a choice might have been relevant if it were a game).

The upshot of this discussion is that, as a general principle, for a procedural choice to be valuable in terms of autonomy it should be rationally linked to the ability to enforce substantive rights.

4.3 Assessing self-representation by the proposed criterion

Based on the above, it is submitted that in those situations where a right to self-representation is unlikely to be an effective tool for presenting the litigant's case, granting or denying such a right cannot be said to enhance or undermine autonomy, respectively. The primary way in which a rights-enforcement system shows respect for litigants is by providing them with a reasonable opportunity to present their cases, because in doing so it treats them as subjects who are worth being heard and having their views considered before a final resolution is made. Legal representation is fully compatible with this, since litigants could utilise their opportunity to participate through counsel.

In other words, the compatibility of a legal system with autonomy should be examined by assessing the system as a whole, *all things considered*, not based on whether a specific form of representation was or was not allowed. Thus, for example, if a given legal system prohibits legal representation in small claims, such a system may not be fairly criticised as showing disrespect for litigants; this is because, given the simplicity of such cases, litigants could still represent their position just as effectively without legal representation. By contrast, if the legal system prohibits legal representation in complex cases, such a system cannot be said to show sufficient respect to litigants merely by allowing them to proceed in person, because it denies them a real opportunity to protect their interests and, to this end, avail themselves of professional assistance.

It should be noted that the fact that ineffective or irrational procedural choices are not entailed by respect for autonomy does not mean that all the effective or rational choices should be made readily available to litigants under all circumstances. Not every possible procedural tool that could in certain circumstances help litigants represent their cases should be made available. This echoes Ronald Dworkin's proposition that people do not have a morally legitimate claim to the best available legal system but only to a reasonable one.[36] If this is true of procedural tools that may improve the function of the procedural system, it should also be true of tools that undermine its function, such as self-representation. In the same vein, even when self-representation is not completely ineffective or detrimental, litigants would still not have a legitimate claim for self-representation just as they do not have a legitimate claim for calling several experts to prove one single point of fact or for cross-examining witnesses on collateral issues or without reasonable time constraints. All these possible procedural tools might make some minor contribution to the final judgment, and yet the legal system is justified in refraining from providing them to litigants in order to avoid disproportionate cost and delay. The rules on summary judgments and small-claims track provide good examples of situations whereby litigants are duly denied the benefit of the full procedural apparatus when there is no genuine need for it (as would usually be the case in multi-track procedure). As long as a legal system is fair, reasonable and rational, and delivers a satisfactory level of justice, it would be sufficiently respectful of personal autonomy.

[36] R Dworkin, *A Matter of Principle* (Clarendon Press, Oxford 1986) 92.

To conclude, whenever legal representation is substantially more effective and efficient in presenting the litigant's case than self-representation, the latter could be restricted without showing disrespect for autonomy. It remains open to discussion, of course, whether in a given case the advantage of legal representation over self-representation is sufficiently substantial to justify requiring litigants to bear the burden of legal representation.

4.4 Qualification: substantive law may not be conducive to autonomy

While it has no direct bearing on the question of self-representation, one qualification is required to complete the analysis of the relationship between procedural rules and autonomy. The claim that autonomy is served by the enforcement of rights is conditional upon the extent to which the substantive law is autonomy-friendly or autonomy-unfriendly. To illustrate this, consider the example of a defendant who has been sentenced to death. Surely, giving such a person more or fewer choices of equally painful or painless methods of execution (or equally humiliating or respectful means of execution) can hardly be defended on grounds of autonomy, because all of them would eventually bring about the same result that is autonomy-compromising. Telling a Jew who is about to be exterminated in a concentration camp that she has a choice between an electrical chair, a lethal injection, hanging, burning, or even more brutal methods of execution such as lynching or stoning, does not respect her autonomy. When the substantive outcome is autonomy-compromising, a choice among different methods of execution could at most be valuable if the different choices could be distinguished based on specific grounds such as being more painful or demeaning, not merely the very availability of a choice.

5. PROCEDURAL CHOICES ARE TRIVIAL OPTIONS

So far, this chapter has argued that in terms of the freedom to make choices a rule requiring legal representation is just like all other procedural rules; it prescribes a certain way of presenting one's case while eliminating others (such as self-representation or representation by a non-lawyer). It might be thought, however, that respect for autonomy requires affording litigants direct and personal control over their lawsuit, and that litigants should therefore be allowed to exercise their procedural rights personally. Arguably, while other procedural requirements could well be conceptualised as options, legal representation is an exceptional requirement: by allowing a litigant to utilise the procedural apparatus only by proxy, the litigant forgoes her power to use the procedural options herself and therefore her freedom is compromised both in terms of 'what to do' and 'who will do that that should be done'. Tempting as it may, this argument should be rejected.

5.1 Personal exercise of procedural rights versus exercise by proxy

There are certain actions which are sufficiently important to justify their personal performance by the right holders, such as delivering a speech, rearing one's own child or attending a close-friend's birthday party. It is normatively important to allow people to exercise these rights in person, if they wish to do so. But not every activity is sufficiently important to justify personal performance. There are many contexts in which rights or activities could be delegated to professional agents without any substantial normative loss. For example, we may be allowed to exercise our right to build a house only through the services of engineers and certified professional builders; likewise, we may exercise our right of access to a hospital by yielding to medical expertise, or our right to purchase medicine by obtaining prescriptions; in the same vein, we may exercise our right to movement by yielding to an airplane pilot's expertise; and so on.

What is common in these examples is that the exercise of the right requires a good deal of expertise and at the same time the activity as such is not normatively valuable independent of the outcome sought by such activity (having a house, getting healthy, arriving at a certain destination).[37] The same applies to litigation. Indeed, as far as autonomy is concerned, the procedural activity in a civil suit involves trivial actions. Activities such as preparing a statement of case or a witness statement, filing expert reports, making applications, seeking disclosure or cross-examining witnesses, carry no normative value that demands personal exercise. Autonomy cannot be invoked in relation to these actions in the same way that it is normally invoked in relation to substantive choices, such as to work, to speak freely and publicly, to move, to have private spheres, to own property, to engage in relationships, to marry, to obtain education, to decide on one's children's upbringing and education, and so on. For example, when the USSC quashed a Texas statute criminalising homosexual intercourse, it invoked the concept of 'autonomy of self' in relation the concept of 'liberty' under the Due Process Clause; here, autonomy was understood as the 'freedom of thought, belief, expression, and certain intimate conduct'[38] such as 'personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education'.[39] Likewise, in the context of abortion the USSC expounded its perception of autonomy as follows:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth

[37] To be clear, it is not argued that autonomy does not require some degree of control over trivial matters; see Raz (n 25) 374. The argument is, however, that when a matter is trivial it might be legitimate to have it delegated to others.

[38] *Lawrence v Texas* 539 US 558 (2003) 562.

[39] ibid 574.

> Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[40]

The procedural activity *per se* cannot be classified as involving such 'intimate decisions' that are related to 'one's own concept of existence, of meaning, of the universe, and of the mystery of human life'. There is nothing of independent normative value in the procedural freedom other than that derived from its second-order nature as directed to protect first-order freedoms (unless litigation is desired as a profession, which is a different matter). Using freedom of choice to support a right to self-representation would be tantamount to using the freedom of speech to support a right of witnesses or litigants to testify on irrelevant matters or without time limits, or using the right to privacy to introduce a right of judges to refrain from providing reasons for their judgments. All these matters are morally or normatively too trivial to involve a question of autonomy, privacy or freedom of speech, as the case may be. It follows that, as a matter of principle, a requirement that litigants be legally represented cannot be legitimately criticised merely because it requires that procedural rights be exercised through an expert.

5.2 Self-representation and litigants' control over the process

The second part of the objection discussed in this section is that a rule requiring legal representation compromises the litigant's autonomy not because it merely eliminates a choice that could have otherwise been available, but because the choice in question could affect the extent to which the litigant is capable of controlling her lawsuit. While procedural rules may well create options, the litigant would be prevented from using

[40] *Planned Parenthood v Casey* 505 US 833 (1992) 851.

these options freely and would become dependent on her lawyer's willingness to follow her instructions as well as her competence to carry them out.

This concern will be addressed in chapter 8.3.3 and, therefore, will be discussed here only briefly. Litigants cannot have genuine control over the proceedings when they do not have a basic grasp of the different procedural choices or their implications. Even if individuals need not be fully informed whenever they wish to make a choice, a basic understanding of the available choices is a precondition for calling a choice a choice. Thus, by having a lawyer, a litigant does not forgo her control over the proceedings but maximises her ability to utilise the procedural apparatus to her benefit. Lawyers are required to fulfil their client's instructions and express their client's position in the most favourable way within the law; a dissatisfied litigant also retains the power to replace her lawyer. Thus, the very fact that a client is represented by a lawyer is not in conflict with the client's ability to maintain control over her lawsuit.

It is true that litigants are the ones who bear the cost of the procedural activity and should therefore be free to decide how and how much to litigate as might be financially suitable for them. However, self-representation is an inadequate solution; due to their lack of legal expertise, self-represented litigants are unlikely to be able to control their costs. Furthermore, it would be an exaggeration of this point to hold that litigants could have substantial control over the precise way in which their cases proceed; litigation involves opposite parties and the costs depend on the overall activity of all the parties involved (the implications of the rule on costs are discussed in chapter 8.4.1). Moreover, represented litigants might enhance their relative control over the costs by providing their lawyers with specific instructions or by getting involved in the decision-making process; if a given system does not provide litigants with reasonable control over their expenses, then it is the legal system and the rules regulating the client-lawyer relationship that should be revisited, not the very requirement to be legally represented.

The same applies to the related problem of agency. Sometimes the interests of lawyers may not entirely overlap with those of the clients. Some lawyers might overwork or protract proceedings to enhance their fees, or advise clients to settle on a sum lower than the deserved amount of compensation just because the lawyer is happy with the amount of fees she would be entitled to under the settlement. This problem should be confronted on its own account by rules that aim to minimise or control it. An abstract risk of possible conflict of interests does not necessarily render the idea of agency incompatible with the exercise of control over the conduct of litigation. Furthermore, a rule requiring legal representation might still be preferable, as a lesser evil, to the total injustice normally produced by a right to self-representation.

5.3 The value of participation

The facilitative nature of procedural rules has been noted by Jeremy Bentham, who characterised procedural rules as 'adjective' law, as subordinate to substantive law and whose primary function is to apply the correct law on the correct facts:

> For in jurisprudence, the laws termed adjective, can no more exist without the laws termed substantive, than in grammar a noun termed adjective, can present a distinct idea without the help of a noun of the substantive class, conjoined with it. … Of the adjective branch of the law, the only defensible object, or say end in view, is the maximization of the execution and effect given to the substantive branch of law.[41]

While Bentham's definitive claim that rights enforcement is the *only* defensible purpose of procedural law might be debated, it is hard to dispute the general claim that rights enforcement is a primary and main purpose of litigation; after all, this is why litigants go to court. Furthermore, one need not be a sworn utilitarian or an obedient

[41] J Bentham, *The Rationale of Judicial Evidence* (Bowring ed, 1842) vol 2 at 6. The substance/procedure distinction is not always clear-cut and, as in most distinctions, some grey area is unavoidable; see e.g. Fletcher (n 9 above) Nevertheless, this distinction is important. Perhaps one of the most important developments of English law has been the separation between form and substance. In the past, procedure dominated over substance; if a litigant failed to find the precise form of action, she was not entitled to obtain relief. See in general: H Patrick Glenn, *Legal Traditions of the World* (3rd edn, OUP 2007) 225–31.

disciple of Bentham to accept that a legal system should be effective and efficient in enforcing rights and that rights enforcement lies at the heart of the rule of law; without enforcement there are no rights and therefore no rule of law.[42]

To be clear, this chapter does not argue that all procedural rules must be outcome-oriented or that procedural rules can never infringe upon autonomy as long as they seek to facilitate the enforcement of rights. It only defends the goal of rights enforcement as a general criterion for assessing the extent to which procedural rights promote autonomy, which provides a better alternative to the criterion suggested by the supporters of self-representation, namely freedom of choice.

The rights-enforcement criterion is general and therefore by no means exclusive. There might be additional criteria for offering specific procedural choices or for curbing the quest for rights enforcement.[43] Take, for example, a procedural rule that prohibits obtaining evidence by torture or adducing illegally obtained evidence, privileges communication with priests or lawyers, prohibits the use of the criminal records of witnesses or litigants as evidence against them, or prohibits a lawyer from examining witnesses on their sexual history or pose offensive questions to them. These prohibitions could be justified independent of their impact on the outcome, based on values such as privacy, body integrity, reputation, physical liberty or human dignity. They may even be related to a 'dignitarian' concept of autonomy. What matters here, however, is that these prohibitions are not motivated merely by the wish to protect the freedom to make procedural choices. In fact, these prohibitions eliminate certain

[42] For the argument that access to court is a prerequisite for the rule of law, see Raz (n 34) 221. See also J Waldron, 'The Rule of Law and the Importance of Procedure' (2010) New York University Public Law and Legal Theory Working Papers (Paper 234) (http://lsr.nellco.org/nyu_plltwp/234 (accessed on 10.9.2011).

[43] Furthermore, some procedural rules, such as allowing the police to arrest a suspect, may infringe upon autonomy in order to promote other values, such as public safety or the safety of a victim.

procedural choices (such as the use of privileged evidence or evidence obtained illegally, the use of criminal record, etc).

A few commentators have attempted to establish that citizens have a right to have a voice in proceedings that concern them, irrespective of how effective that voice could be.[44] This claim has been defended based on some psychological assumptions that are examined in the next chapter. Such a claim has also been defended based on 'dignitarian' considerations. It is said that to treat litigants as subjects, rather than objects, they have to be allowed to participate in processes that affect them. As Lawrence Tribe put it:

> Both the right to be heard, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one … For when the government acts in a way that singles out identifiable individuals ... it activates the special concern about being personally *talked to* about the decision rather than simply being *dealt with*.[45]

However, these commentators have not attended to the specific question of whether such a free-standing entitlement to participate requires personal performance; their general premise has been that legal representation enhances participation.[46] It is possible to argue that while having a voice is one thing, litigating in person is another. A general right to self-representation entails much more than a right to speak up and

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44 Additional procedural values that have been defended as 'intrinsically' important and not outcome-oriented include: procedural rationality and legality, intelligibility, voluntariness, peacefulness, legitimacy, fairness and equality, timeliness and finality, transparency, privacy and humaneness (avoiding torture, racism, etc); see e.g. Summers (n 17) 20-7; M Bayles, 'Principles for Legal Procedure' (1986) 5 Law and Philosophy 33, 50–7; L Tribe, *American Constitutional Law* (2nd edn, Foundation Press, 1988) 666–7. Such claims have been rebuked on different grounds. The typical responses are both economical and epistemological: the need for procedural rights is derived from the inevitable fallibility of human fact-finding; free-standing rights do not stand for free; and procedural rights prolong the temporary denial of the litigant's right to enjoy her substantive right, which results from litigation; see e.g. A Stein, *Foundation of Evidence Law* (OUP, 2005) 31–3; L Alexander, 'Are Procedural Rights Derivative Substantive Rights?' (1998) 17 Law and Philosophy 19; J Mashaw, 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 Boston University Law Review 885; M Redish and L Marshall, 'Adjudicatory Independence and the Values of Procedural Due Process' (1986) 95 Yale Law Journal 455, 481–91.

45 Tribe (n 44) 666–7 (emphasis in original).

46 See e.g. Summers (n 17) 25.

therefore requires further justification. A right to speak in court could be satisfied in all sorts of limited forms that fall short of self-representation, such as through the litigant's testimony or a direct and limited speech to the court; the amount of personal involvement may well be a function of the sensitivity of the case (so, for example, a family case might require affording litigants a greater opportunity to participate personally). These limited forms of personal voice coexist with legal representation. It should be recalled that the right to be heard is not a synonym for anarchy or regulation-free litigation; the right to be heard has to be performed within the procedural apparatus and a rule requiring legal representation would simply facilitate its performance. In ordinary civil cases, there is a tendency to depart from the traditional principle of oral evidence by using witness statements instead of evidence in chief, to save trial time (CPR 32.5(2));[47] this suggests that, whether a litigant is represented or not, a personal voice is not taken to reflect an important value in this context.

Thus, to reduce the instrumental flavour of the argument made in this chapter, it could be rephrased thus: while respect for autonomy requires providing litigants with a reasonable opportunity to participate in the process—be the justification for this opportunity outcome-oriented or otherwise—litigants cannot insist on conducting the whole proceedings in person. Legal representation facilitates and enhances the right to be heard whether this right is outcome-oriented or not.

It may also be indicated that while speaking up in court might be justified based on some dignitarian considerations that are not outcome-oriented, the other activities of calling witnesses and experts, seeking disclosure, tendering evidence, and so on, are primarily outcome-oriented or concerned with rendering one's voice *effective*, and are therefore compatible with legal representation. This is why the right to be heard cannot

[47] See e.g. *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow Ernst & Young and Swiss Bank Corporation (No.2)* [1995] 2 Lloyd's Rep 404 (QB) 408.

be legitimately invoked to challenge a court's refusal to allow litigants to call unnecessary witnesses, file unnecessary expert reports, require disclosure of irrelevant information, etc.

6. AUTONOMY AND THE BURDENS OF LITIGATION

In arguing that an effective procedural apparatus is required by respect for autonomy, regard must be given to the burdens generated by litigation. Litigation requires effort, induces anxiety and demands time and costs. Since rights are not self-enforcing and litigation is not cost-free, the process of litigation is an inevitable evil for a person who is keen on protecting her interests.

Thus, respect for autonomy requires that these burdens be reduced to a reasonable degree. In particular, access to court should be affordable; if it is achieved at a disproportionate and high price, the value of rights enforcement and respect for litigants' autonomy are undermined. However, it is equally important to stress that some of the burden resulting from litigation must be accommodated in our conception of autonomy. If some procedural requirements constrain litigants' freedom of action or inflict some burdens on them, at least some of these constraints and burdens should be viewed as part of the background that is necessary for the prosperity of autonomous agents. This is because some constraints and burdens are inherent in any institution that purports to resolve disputes by means of investigating competing claims concerning substantive rights, a process that is essential to enabling people to benefit from the social structure and flourish as autonomous entities. Otherwise, anything short of a cost-free legal system that enforces rights swiftly would be disrespectful of autonomy.

This discussion could benefit from Raz's theory of autonomy, and particularly from his emphasis on the social nature of autonomy. According to Raz, people are not born autonomous; they become autonomous by positively engaging in short-term and long-term activities and pursuing short-term and long-terms goals. The social nature of autonomy was so important to Raz that he made clear that autonomy could be achieved through social activities that are offered only in a complex society and which are unavailable outside it. In his example,

> one cannot practise medicine except in a society in which such a practice is recognized. Notice that in principle one may be born into a society with no medical practice or knowledge endowed with an innate knowledge of medicine. One could then cure many diseases, but one could not be a medical doctor, of the kind we have in our society. It takes more than medical knowledge or curing powers to do that. A doctor participates in a complex social form, involving a general recognition of a medical practice, its social organization, its status in society, its conventions about which matters are addressed to doctors and which not ... and its conventions about the suitable relations between doctors and their patients.[48]

So, if we accept that the existence of rich and complex social forms is essential to the ability of individuals to prosper as autonomous entities, we must also accept that the inherent requirements that might be needed to facilitate such forms and the inconveniences and burdens produced by them are not necessarily incompatible with autonomy.[49] When legal representation is necessary for the legal system to function, the unavoidable inconveniences, constraints or burdens caused by it should also be

[48] Raz (n 25) 310–11. Raz takes pain to explain this point at 311: '... individual behaviour would not have the significance it has but for the existence of social forms. ... The point is that engaging in the same activities will play a different role, have a different significance in the life of the individual depending on social practices and attitudes to such activities. Much of the interest that people have in goals of these kinds is available to them because of the existence of suitable social forms'.

[49] Raz observes that autonomy can develop and flourish only against a background of biological and social constraints, rendering false the idea of a completely unconstrained autonomous person: 'Autonomy is possible only within a framework of constraints. The completely autonomous person is an impossibility. The ideal of the perfect existentialist with no fixed biological and social nature who creates himself as he goes along is an incoherent dream. An autonomous personality can only develop and flourish against a background of biological and social constraints which fix some of its human needs. Some choices are inevitably determined by those needs' (ibid, 155–7). This point need not be limited to social constraints that are inherent in the individual's inclinations or desires; it could also encompass certain constraints imposed by society when they are inevitable to promote autonomy.

compliant with autonomy, in the same way that other important services impose unavoidable inconveniences and burdens, including health care, transportation, engineering or architecture.

Traffic rules are a good illustration. To coordinate the effectuation of the right of movement by different drivers and provide them with safe, convenient and effective ways of transportation, traffic rules are bound to stipulate requirements that eliminate choices that drivers could have otherwise had and place burdens on drivers who wish to exercise their right to movement. Drivers may be required to obtain a licence before they are allowed to drive, a process that involves qualifying training and tests; they may be permitted to drive only on designated areas marked as roads and not, say, on meadows or pavements; they may be expected to drive on a certain side of the road; certain paths may be used only by public transportation, within certain times or upon the payment of some fee; and so on.

Self-representation may not be an adequate alternative for litigants who cannot afford legal representation in circumstances where the case is too complex to be handled by them. Thus, in those complex cases respect for autonomy requires enhancing access to legal services, not permitting self-representation. The extent to which some or all of the financial burdens associated with litigation should be borne by the litigant or funded by the state is a question of social policy and allocation of resources that is not unique to the legal context; such a question could be raised in relation to health care, housing, transportation, and other services. This aspect is further discussed in chapter 8.4.3.

CONCLUSION

This chapter has argued that an entitlement to self-representation cannot be grounded in autonomy as long as the legal system, taken as a whole, offers litigants adequate alternatives to present their cases and obtain a reasonable opportunity to enforce legal rights. To this end, this chapter has shown that procedural rules are generally not restrictive but facilitative of autonomy, and that requiring legal representation as a condition for litigation is no exception. Furthermore, this chapter has demonstrated that the procedural activity as such does not represent a normative value that provides sufficient justification for litigants to insist on exercising their procedural rights in person rather than through counsel. Moreover, a litigant's control over the process is not diminished by legal representation; on the contrary, legal representation enhances the litigant's control and renders her participation in the process more meaningful, regardless of whether one views the right to litigate as outcome-oriented. This chapter has also argued that a litigant's entitlement to have a personal input in the proceedings is coexistence with the requirement to be legally represented.

CHAPTER 7

SELF-REPRESENTATION AS PSYCHOLOGICAL THERAPY?

INTRODUCTION

It is common among legal scholars to stress the importance of participation in a legal process that concerns one's interest and, in doing so, to make some empirical assumptions. Michael Bayles argued that 'parties that have been able to participate are more likely to accept a decision; although they might not agree with the decision, they are more likely to comply with it'.[1] Frank Michelman similarly maintained that the individual may want an opportunity to discuss the decision with an agent because 'to have played part in, to have made one's apt contribution to decisions which are about oneself may be counted important even though the decision, as it turns out, is the most unfavorable one imaginable and one's efforts have not proved influential'.[2] Jerry Mashaw, too, reiterated the claim that 'participation increases self-respect to the degree that participation gives the participant control over the process of decisionmaking. And loss of control ... is particularly damaging to self-respect'.[3]

During the 1970s, John Thibaut and Laurens Walker conducted a series of experiments on different aspects of court adjudication, including the psychological effect of participation. Their influential work has generated a great deal of further research by cognitive psychologists. The most commonly corroborated findings have

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[1] M Bayles, 'Principles for Legal Procedure' (1986) 5 Law and Philosophy 33, 54.

[2] F Michelman, 'Formal and Associational Aims in Procedural Due Process' in R Pennock and J Chapman (eds), *Nomos: Due Process* (vol 18, New York University Press, 1977) 127.

[3] J Mashaw, 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 Boston University Law Review 885, 903 (emphasis in original).

been that litigants consider adversarial procedures fairer and more satisfying than non-adversarial procedures and that favourable outcomes are perceived as fairer and more satisfying than adverse outcomes.[4] Important but not as clear-cut was the finding that adversarial procedures enhance the perceived fairness and acceptability of outcomes.[5] There is contradictory data on whether the favourability of the outcome affects the litigant's assessment of procedural fairness.[6]

These findings are relevant to this thesis in two potentially conflicting ways. On the one hand, the finding that favourable outcomes are perceived as fairer and more satisfying supports the proposition that self-representation is an undesirable procedural tool, since it enhances the likelihood of an unfavourable outcome and consequently the likelihood of the outcome being perceived by the litigant as dissatisfying and unfair. On the other hand, the popularity of adversarial over non-adversarial procedures has been attributed to the enhanced process control afforded by the former.[7] The prevalent interpretation is that vesting litigants with high levels of control over the process tends to enhance their perception of the fairness of the trial experience and their acceptance of its outcomes, irrespective of favourability. If this is the case, a right to self-representation might be defended as a form of enhanced process control.

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[4] L Walker et al, 'Reactions of Participants and Observers of Modes of Adjudication' (1974) 4 Journal of Applied Social Psychology 295, 303, 305 (Walker et al 1974); L Walker, EA Lind and J Thibaut, 'The Relation between Procedural and Distributive Justice' (1979) 65 Virginia Law Review 1401, 1412, 1413–4, 1416 (Walker, Lind and Thibaut); S LaTour, 'Determinants of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication' (1978) 36 Journal of Personality and Social Psychology 1531 (Latour (1978)); EA Lind et al, 'Procedure and Outcome Effects on Reaction to Adjudicated Resolution of Conflicts of Interest' (1980) 39 Journal of Personality and Social Psychology 643, 649 (Lind et al (1980)); EA Lind, R Lissak and D Conlon, 'Decision Control and Process Control Effects on Procedural Fairness Judgments' (1983) 13 Journal of Applied Social Psychology 338, 346 (Lind, Lissak and Conlon); EA Lind and R Lissak, 'Apparent Impropriety and Procedural Fairness Judgments' (1985) 21 Journal of Experimental Social Psychology 19, 25 (Lind and Lissak).

[5] See e.g. Walker et al (1974) (n 4) 303; Lind et al (1980) (n 4) 649, 652; Walker, Lind and Thibaut (n 4) 1413–4. Cf Lind, Lissak and Conlon (n 4) 348. Generally speaking, caution is required in interpreting null findings.

[6] See e.g. LaTour (1978) (n 4) 1537 and Lind, Lissak and Conlon (n 4) who found such a relation, and Lind et al (1980) (n 4) 649 and Walker, Lind and Thibaut (n 4) 1413 who did not. As a general note, this chapter does not distinguish between perceptions of fairness and satisfaction, as the two have not been treated as independent factors in the studies in question.

[7] J Thibaut and L Walker, 'A Theory of Procedure' (1978) 66 California Law Review 541, 546.

This chapter argues that the available empirical data do not support a right to self-representation. In making this argument, this chapter is critical of the empirical work generated by Thibaut and Walker for their overstatement of the importance of process control, and their reliance upon a simplistic trial simulation that failed to capture the highly complex conditions under which subjective perceptions of fairness might be affected. Moreover, the normative value of satisfaction is doubtful, and should not override the public interest in the integrity of legal proceedings and the protection of the legitimate interests of litigants.

The structure of this chapter is as follows:

Section 1 argues that the simplistic design of the trial simulation used in the empirical studies conducted in this area failed to capture the complex circumstances under which satisfaction might be affected, and that therefore the findings reached in these studies do not lend adequate support to the general claim that higher process control enhances litigants' satisfaction. **Section 2** challenges the tendency of the studies done in this area to focus on the statistical significance of the relationship between process control and satisfaction, while neglecting its small magnitude. Moreover, this section questions the normative value of satisfaction, arguing that enhanced satisfaction can be undesirable, and that it is not the sole or primary value a legal system needs to promote. This section suggests that, regardless of its potentially positive psychological impact, self-representation is undesirable since it undermines the integrity and efficiency of the legal process. **Section 3** assesses the evidence that allegedly support the claim that participation in a process has intrinsic value beyond the opportunity it provides to influence the outcome. It reveals the unsound empirical basis for this claim and argues that the available evidence indicates that participation is sought by litigants mainly for instrumental purposes. Since self-representation is a poor tool for influencing the outcome of a legal process, this section concludes that the restriction of its use is unlikely to diminish the psychological effect of participation.

1. PROCESS CONTROL AND SATISFACTION: THE LIMITATIONS OF THE EMPIRICAL WORK

It is clear from the start that the finding that litigants favour high process control in the resolution of a legal dispute cannot be taken at face value. Leaving too much process control in the hands of litigants could be devastating to the legal process, and the litigants' satisfaction and perceptions of fairness would necessarily be negatively affected by this outcome. Experience has shown that pre-CPR party-based civil proceedings were excessively long and costly, bringing English civil procedure into disrepute.[8]

To fully understand the scope of the finding concerning the positive value of placing process control in the hands of litigants, we must take a closer look at precisely what 'process control' was taken to mean in the studies in question, and the circumstances under which process control yielded a positive psychological effect.

1.1 Outline of the trial simulation

Most of the studies in this area have utilised a similar trial simulation.[9] The subjects, most commonly American university undergraduates, would be requested to participate in 'a large-scale business simulation' whereby they would compete with another company for an award of $4. During the experiment, the researchers would create a dispute over whether the subject's company had spied on the competing company. To resolve this dispute, a trial would be held. The researchers would then devise two types of procedures: 'adversarial' and 'non-adversarial'/'inquisitorial'. In both scenarios the

[8] See in general A Zuckerman, *Civil Procedure: Principles of Practice* (Sweet and Maxwell, 2006) [1.57]-[1.70]

[9] The simulation's description in this section is mainly based on Walker, Lind and Thibaut (n 4).

subject would assume the defendant's role and the claimant, the judge and the lawyers would all act as confederates.

In the 'adversarial procedure', each subject would choose a lawyer to represent him. The subject and the lawyer would hold a short interview to prepare for the trial, during which the lawyer would inform the subject of the proposed line of defence, promising to do his best to win the case. The subject would merely play a passive role in the preparation of the evidence and the argument.[10]

In the 'non-adversarial' procedure, each subject would be told that the court would appoint one lawyer whose task would be to investigate the matter, gather the evidence and present the arguments for both sides in the most objective way possible.

In both scenarios, at the end of the trial the subjects would receive a verdict of either 'guilty' or 'innocent'.

1.2 Self-representation was not tested

The trial simulation described above clearly did not test the effect of self-representation on the subject's satisfaction with the trial. Each subject was represented by a lawyer without having the opportunity to represent themselves in person. What was tested, therefore, was the psychological impact of different forms of *representation by lawyers*. In fact, in these studies, having control over the process was taken to mean having the ability to choose a partisan lawyer as opposed to having a neutral investigator appointed by the court. It is therefore possible to conclude that a requirement to be legally represented is compatible with 'process control' as understood in these simulations because actual litigants retain the option of choosing their lawyer and effectively enhance their participation in the process by cooperating with him.

[10] See e.g. Lind and Lissak (n 4) 22; Lind, Lissak and Conlon (n 4) 343.

1.3 The traditional criticism and beyond: the trial simulation did not reproduce actual legal settings

There are fundamental reasons for questioning the validity of the general claim that increased process control is better. Mirjan Damaska has forcefully criticised the trial simulation described above on the grounds that, among other things, it did not reproduce actual non-adversarial procedures. In the simulated trial, judges were completely passive and the arguments were presented by a single, court-appointed lawyer, whereas judges are active and lead the development of the evidence in actual non-adversarial procedures. Furthermore, in actual non-adversarial procedures, litigants are represented by their own partisan lawyers who advance legal arguments in an adversarial manner.[11]

This thesis argues that the simulated trial did not reproduce actual legal procedures, either adversarial or non-adversarial. Its simplistic design failed to reproduce the complex structure of actual procedures and overlooked the wide variety of procedural variables and forms of participation available in actual legal systems. Litigation involves diverse and conflicting interests, expectations and financial and emotional consequences, as well as a spectrum of different activities that can be undertaken by litigants, lawyers and judges, none of which featured in the trial simulation.

[11] M Damaska, 'Presentation of Evidence and Factfinding Precision' (1975) 123 University of Pennsylvania Law Review 1083. See further criticism in R Hayden and J Anderson, 'On the Evaluation of Procedural Systems in Laboratory Experiments: A Critique of Thibaut and Walker' (1979) 3 Law and Human Behaviour 21; P Chevigny, 'Book Review: Fairness and Participation' (1989) 64 NYU L Rev 1211, 1215.

1.3.1 The complexity of litigation and the various forms of participation

The 'large-scale business' simulation tested only one specific form of process control, which actually involved little, if any, control. In the supposedly 'high process control' condition, subjects had only one choice to make—that is, upon reviewing a number of résumés, to choose a lawyer who would be instructed to present their case in the most favourable way. In all other respects, the subjects were mere observers. They took no role whatsoever in preparing or presenting the arguments and exercised no influence on, let alone control over, their lawyer's activity, the direction of the proceedings, the content of their claims or the scope of the subject matter.

This state of affairs dwarfs the often recited proposition that 'high process control' enhances satisfaction. At most, one might say that *some* control produces a positive psychological impact, which is a quite trivial point. The critical questions of how much control is optimal for satisfaction, which elements of control are necessary to enhance satisfaction and whether self-representation is included among them, remain unanswered.

In actual litigation, whether in common law or civil law systems, represented litigants participate in the proceedings and play a far more meaningful role than the limited observer-like role assumed by the subjects in the trial simulation. Actual litigation normally comprises a lengthy process and continuous activities in which the client may be engaged in different ways and to varying degrees. So even if the litigant's participation in the process is necessary to enhance satisfaction, there is no good reason to assume that self-representation is the only or most effective way to do so. It might be the case that the psychological effect discerned in the experiments in question, where subjects were passive and distant observers of a quick trial, could be achieved by other forms of personal participation, such as by engaging litigants in the evidence-gathering rather than the evidence-presenting process, by permitting them to address the court directly through a brief speech, or by allowing them to testify. Actual litigation offers a variety of opportunities for participation and decision-making, whether before, during or after litigation.

The sophistication of the litigation activity also highlights the potential malleability of satisfaction. Arguably, subjective perceptions of fairness would be susceptible to many procedural variables, such as the rigour of cross-examination (both in its effect on the litigant who is cross-examined and its effect on the litigant observing his lawyer cross-examining others), the performance of the lawyer (for example his skills, articulation or passion), coaching witnesses, giving testimony in chief, paying or being paid costs, filing or responding to applications, and so on. Put conversely, satisfaction might be influenced by so many variables that it may not be influenced by any one single variable alone. The sophistication of the process and the multiplicity of variables at play make it difficult to predict the overall satisfaction of a litigant or isolate the effect of one variable from all the others.[12]

1.3.2 The risk of a zero-sum satisfaction game

The experiments on litigant satisfaction have failed to take into account the conflicting interests and expectations of opponents. In the studies in question subjects served only as defendants, and the claimants were confederates. This design fails to provide

[12] For a comprehensive review of the empirical studies published from 2000 to 2008, which illustrate the complexity of the satisfaction measure and the variety of factors that might affect the satisfaction of participants in a legal process (albeit with emphasis on criminal and family cases), see R Moorhead, M Sefton and L Scanlan, *Just Satisfaction? What Drives Public and Participant Satisfaction with Courts and Tribunals* (Ministry of Justice Research Series 05/08, 2008).

information on the overall level of satisfaction of claimants,[13] defendants and other participants in the legal process (witnesses, lawyers, judges, staff, etc).

More specifically, the described experimental setting does not provide information regarding how the process control of one party impacts his opponent's satisfaction. This failure is particularly problematic given the potential for a zero-sum control game: process control of one party might undermine the process control of his opponent. While it might be correct to speak of process control of the parties as a group, it does not make much sense to say that any party alone possesses process control. For example, one party's right to disclosure of information means the opponent's duty to disclose the information sought (or otherwise face adverse consequences); one party's right to testify or call a witness means another party's right to cross-examine the witness (and the witness' duty to testify); and so on.

Self-representation could present a good example of this conflict: even if we accept that self-representation enhances the satisfaction of LIPs, it may still cause distress and dissatisfaction to their represented opponents due to extra cost and delay. We may also consider the adverse effect of self-representation on the satisfaction of other litigants, which could result from its potential to obstruct the administration of justice. All things considered, the overall level of satisfaction of litigants in a procedural regime that allows self-representation may turn out to be lower rather than higher.

[13] Interestingly, one experiment that came close to testing this variable found that 'accusers' react differently than the 'accused'. Researchers found that accusers evaluated both the procedure and the outcome more positively than did the accused, and raised the possibility that this difference could be attributed to differences in the nature of adverse decisions: for the 'accused' an unfavourable verdict might have suggested guilt and wrongdoing, whereas for the 'accuser' it might have only meant that the other party was not guilty. The effect of this explanation in civil proceedings that involve no significant moral guilt or wrongdoing cannot be assumed to be negligible and remains open to examination. See L Musante, M Gilbert and J Thibaut, 'The Effects of Control in Perceived Fairness of Procedures and Outcomes' (1983) 19 Journal of Experimental Social Psychology 223, 237.

Indeed, if personal control were so important to satisfaction, few would employ lawyers.[14]

1.3.3 Intelligibility of proceedings

In the trial simulation, the subjects were presumably able to understand all that occurred before their eyes due to the simplicity of both the subject matter and the procedures. All the arguments put forward were simple and based on common sense. In real litigation, however, a good deal of litigation activity may not be intelligible to the litigant, who will be lost amid the legal arguments unfolding before him, the paper-work filed to court, the subtleties of the cross-examination, and so on. If we accept that the intelligibility of a process is relevant to the satisfaction of those participating in it, LIPs are unlikely to be satisfied with a process that they fail to comprehend, and therefore self-representation is expected to decrease a litigant's sense of being in control and, consequently, his satisfaction. Furthermore, LIPs are likely to end up restricting their own participation rather than enhancing it due to their failure to use the procedural tools.[15] The extent to which litigants' satisfaction would benefit from legal representation would, of course, depend on several variables, including the relationship and cooperation between the litigant and his lawyer, the lawyer's skills and reputation which influence the client's faith in him, and so on. All these aspects add further complexity to the standard of satisfaction.

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[14] One study found that two thirds of the litigants who proceeded in person before English tribunals said that in hindsight they would have opted for legal representation: H Genn, B Lever and L Gray, *Tribunals for Diverse Users* (Department for Constitutional Affairs, 2006) 228.

[15] Some anecdotal evidence supporting this proposition is reported in R Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' (2007) 16 Social and Legal Studies 405, 414. See also EA Lind, R Kanfer and PC Early, 'Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments' (1990) 59 Journal of Personality and Social Psychology 952, 954–7, where subjects who received relevant information on several strategies that would be useful in achieving better outcomes thought the process and the outcome were fairer than subjects who received irrelevant information or no information at all.

1.3.4 Trivial stakes and costs

The alleged finding that litigants prefer process control was reached in low-stakes and low-cost conditions. In fact, the trial simulation involved trivial values: the award and the attorney fees ranged from $3 to $10. Actual litigation, however, involves far higher stakes and costs, and those are likely to influence the litigants' criteria of satisfaction and fairness. It is plausible to expect the favourability of the outcome to have a stronger effect on litigants' satisfaction with actual litigation than in a simulated trial with trivial values. The high costs of process control and the high value of the outcome might intensify the instrumental nature of the process and downplay its intrinsic importance. Stated differently, even if participation or process control enhances satisfaction independent of the favourability of the outcome, as claimed in some studies, litigants may still prefer to exchange the gratifying elements of their process control for more favourable outcomes given the high stakes of actual litigation; in high stakes litigation, litigants may prefer a process that yields more-favourable-outcomes-but-less-participation/gratification to one that offers more-participation/gratification-but-less-favourable-outcomes.

The studies in question do not test any of these possible empirical propositions and therefore the conclusions defended in them are limited to low-stakes and low-cost conditions.

1.3.5 Lack of personal involvement in the dispute giving rise to litigation

In the business simulation, the subjects themselves were not at all involved in the incidence of spying. The espionage charge was directed against another member of their company, who was a confederate, and the subjects did not interact with that member in any substantial or personal way. Rather, they were separated and only communicated briefly via headphones or an intercom system.[16]

It is plausible to expect people to react differently to factual findings of illegal or immoral conduct (spying, in this case) concerning themselves and events which they have experienced firsthand, than to similar findings concerning somebody else who they have never met and incidents they have not experienced. The impact of the factual findings on the litigant's perception of the fairness of his court experience might be higher when they pertain to him personally than when such findings are made in relation to somebody else with whom he has no personal relationship.

1.4 Summary

It is possible now to conclude that the empirical research led by Thibaut and Walker provides little guidance on how procedural systems can best enhance their users satisfaction and fairness perceptions. Litigant satisfaction is affected by such a complexity of factors that attempts to maximise it are largely futile, especially in situations of conflict such as a legal process. Thus, a right to self-representation cannot be supported by the general claim that higher process control is more popular amongst litigants.

2. THE STRUCTURE OF SATISFACTION AND FAIRNESS PERCEPTION: MAGNITUDE AND JUSTIFIABILITY

Suppose we accept that enhanced process control, whatever that means in practice, indeed enhances satisfaction. This alone does not justify any attempt to enhance process control. This section argues that the magnitude of the increase in satisfaction has often

[16] Walker, Lind and Thibaut (n 4) 1408; Lind, Lissak and Conlon (n 4) 342; Lind and Lissak (n 4) 22.

been small, that enhanced satisfaction is not always desirable and that satisfaction is not the only or the central value that a procedural system has to advance.

2.1 The question of magnitude

There is a tendency in the studies examined in this chapter to overstate the importance of process control by focusing merely on the statistical significance of the alleged increase in satisfaction and neglecting the equally important aspect concerning its magnitude. Statistical significance only tells us that the increase in satisfaction (whatever its magnitude) did not occur randomly and that it could be related to process control;[17] it does not provide information about how big the increase in satisfaction actually is. For example, I might go to the gym for a month and increase my muscle mass by 2mm; 2mm could be statistically significant and yet too small to be important or to justify the effort involved in my gym activity. Information on the magnitude of the increase in satisfaction is necessary in order to balance the adverse impact of high process control with the benefits gained from it in satisfaction. This information is also needed in order to determine which forms of participation produce greater satisfaction.

Consider for example Walker et al (1974). This study concluded that high process control resulted in greater trust in and satisfaction with the procedure as well as the judgment, irrespective of its favourability or correctness. However, when put in context, this conclusion loses much of its force. Their data shows that, regardless of the type of the procedure used (high or low process control), subjects who received an innocent verdict were substantially more satisfied than those pronounced guilty. On a scale of 1 to 9 (9 indicating greater satisfaction), subjects who were exonerated rated their satisfaction on 8.220/9.000 (on average) whereas those who were convicted rated

[17] The distinction between statistical correlation and causation is not relevant to our discussion.

their satisfaction on 1.976/9.000 (on average).[18] These values indicate that the procedural modification did not cause any fundamental change in the subjective feelings of litigants towards the trial; the winners remained substantially satisfied and the losers substantially dissatisfied with either procedure, high or low process control. In the high process control condition, those who were convicted gave the outcome a satisfaction rating of 2.000–3.429/9.000 (as opposed to 1.000–2.250/9.000 in the low process control condition), which is indicative of dissatisfaction.[19] This should not be surprising; after all, litigants who go on to a final judgment and incur the corresponding costs would be primarily interested in obtaining a favourable outcome.

It is possible to conclude that statements such as '[t]he freedom of the disputants to control the statement of their claims constitutes the best assurance that they will subsequently believe that justice has been done regardless of the verdict'[20] overstate the importance of process control.

2.2 The normative value of satisfaction

2.2.1 Accuracy is the primary value

Beyond the empirical lenses there are normative questions that require answers. To appreciate the value of an increase in satisfaction we need to know not only its magnitude but also the reasons for it and its normative value. For example, some people might be satisfied when a mass-murderer is executed, or when someone who has

18 Walker et al (1974) (n 4) 302. The use of averages might be misleading because it does not show the distribution of values within the group composing the mean. In our case, however, it stands to reason that since the means are close to the edges of the scale, i.e. to 1.000 or to 9.000, the values composing the means do not spread too widely on the 1-to-9 scale and accordingly it is likely that the overlap between the distributions of those two groups is small; this means that the difference in the means is meaningful.

19 ibid 304; the pair of values refers to the rates given by those who received wrong decisions and those who received correct decisions, respectively. For additional example of studies where the favourability of the outcome had a fundamental impact on the litigants' perception of decision fairness, see LaTour (1978) (n 4); Genn, Lever and Gray (n 14) 236.

20 Thibaut and Walker (n 7) 551.

inflicted blindness upon a victim is punished with blindness, but this does not necessarily justify such retributive approaches.

The studies discussed in this chapter have often measured satisfaction and perceptions of fairness against 'favourable' or 'unfavourable' outcomes without paying sufficient attention to correctness under the law or, at least, the extent to which a decision is reasonable from a legal point of view. Consider, for example, Thibaut and Walker's following statement:

> ... the ultimate test of any particular solution is the character of the distribution of outcomes among the interested parties, and no solution will ultimately be recognized as 'correct' by all of them. ... [in legal disputes] a distribution favoring one party will be correspondingly unfavorable to the opposing party.[21]

While it is true that from a subjective point of view a judgment might 'favour' one party and 'disfavour' another, from a more objective standpoint a civil judgment does neither; it merely enforces rights. In that sense the judgment takes from a person what does not belong to him and re-assigns it to its rightful owner. Describing legal procedures as 'procedures used to decide how the outcomes are distributed'[22] mischaracterises the function of a legal process because it implies that there is a store of commodity that needs to be distributed among people through certain procedures.[23] This characterisation fails to account for the basic function of a legal process, namely to resolve disputes according to the objective criteria of the law, which are external to the

[21] ibid 544.

[22] Lind et al (1980) (n 4) 643.

[23] There are other ways to describe legal procedures in terms of distributive justice, which are not relevant here, such as to view them as allocating the risk of error or as allocating judicial resources among the users of legal system; see respectively: A Stein, *Foundation of Evidence Law* (OUP, 2005); A Zuckerman, 'Quality and Economy in Civil Procedure the Case for Commuting Correct Judgments for Timely Judgments' (1994) 14 Oxford Journal of Legal Studies 353.

relationship between the disputants and to their 'respective contributions or input' to the 'goods' in dispute.[24]

2.2.2 *The deceptive effect of satisfaction*

As a matter of principle, when accuracy conflicts with satisfaction the former should have the upper hand because accuracy is normatively more valuable than satisfaction.[25] Moreover, a procedural rule that undermines the ability of the court to deliver a correct judgement exchanges accuracy with satisfaction of an undesirable kind. This is because inducing litigants to perceive 'adverse' or 'unfavourable' outcomes as fair or satisfactory is normatively valuable only when these outcomes are correct. Increasing satisfaction with erroneous or legally unsound judgments is not a good thing. Litigants who receive a wrong judgment should not be led to think that the outcome was fair or satisfactory. Nor should they be led to believe that a process that systematically produces questionable outcomes is fair or satisfactory. To do so would be to deceive them and to deprive the public of a valuable source of criticism. LIPs who falsely believe that they are best able to influence the outcome through self-representation should not be encouraged by deceptive feelings of satisfaction and the illusory sense of control that might be created by self-representation. Likewise, governments which fall short of providing adequate and effective access to legal services must not be allowed to use psychological therapy as a fig-leaf. Such a strategy is also self-defeating in the long-run: a

[24] Thibaut and Walker's defence of high process control presupposes a version of palm tree justice, where the rules are 'merely suggestive', and where judges ought to follow abstract and undefined notions of 'equity', 'justice' or 'subcultural standards'. See n 7, 548–9, 552–3.

[25] This line of argument should not be criticised as crude utilitarianism that seeks to promote accurate results at the expense of people's feelings and fairness perceptions. It is common for procedural rules to circumscribe parties' control in order to promote efficiency and accuracy. For example, exclusionary rules may have negative impact on litigant's satisfaction because they prevent him from presenting information which he thinks is relevant; so might be the effect of case management powers. The normative value of process control and autonomy has been discussed in the previous chapter.

process that fails on a regular basis to deliver fair outcomes would ultimately lead its users to lose faith in it.[26]

3. ASSESSING THE EVIDENCE FOR AN EXPRESSIVE AND NON-INSTRUMENTAL VALUE OF PARTICIPATION

One possible objection to the arguments made in the previous section could be that participation has an expressive and non-instrumental value irrespective of accuracy. This section assesses the evidence for this 'expressive value' hypothesis, showing that its empirical foundations are weak and that the available evidence seems to favour an instrumental account of participation.

3.1 The traditional account for the popularity of process control

A clear understanding of why some process control has produced a positive psychological effect is essential to an assessment of its normative value. For example, if process control is popular merely because it satisfies feelings of hostility or thirst for a 'dramatic show' (as some think of adversarial procedures), we might prefer to discourage such feelings and therefore restrict rather than enhance process control.

The traditional view among cognitive psychologists has been that participants prefer process control for instrumental reasons. The godfathers of this genre of research, Thibaut and Walker, and their co-authors, theorised that subjects prefer high

[26] This point has been made in the political context and in relation to political leaders; some researchers have suggested that 'when people feel that their opportunity to speak is a "sham", rather than an honest opportunity to influence the decision, they may react to that opportunity with anger', which would 'heighten feelings of procedural injustice and dissatisfaction with leaders': T Tyler, K Rasinski and N Spodick, 'Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control' (1985) 48 Journal of Personality and Social Psychology 72, 74. See also Lind, Kanfer and Early (n 15) 953, which cites studies showing that 'people actively reject procedures that appear to offer process control but that do not provide any real input into the decision-making process ... experiments showed that people react quite negatively to ostensibly high voice procedures when repeated unfavorable outcomes or communications from others focus attention on possible biases that might subvert the impact of their voice'.

process control because they believe that control over the process enables them to increase the probability of a favourable outcome.[27] As argued in this chapter, a rule requiring legal representation would be compatible with this instrumental approach because it normally enhances the litigant's participation and ability to influence the outcome.

3.2 The expressive value hypothesis

Later researchers, mainly Tom Tyler and his co-authors, hypothesised that an opportunity to express an opinion in a process has an expressive value that is not outcome-oriented. To be clear, however, these authors speak only of limited process control in the form of an opportunity to express an opinion and have a voice in the decision-making process.[28] This need not be objectionable; it stands to reason that people are likely to feel more pleased and respected when they have been given an opportunity to express themselves and be listened to. This might be particularly true in cases involving sensitive matters, as perhaps in family cases or in serious tort cases where victims need to speak up and tell their story in order to 'seek some satisfaction of honor or even simple human contact for which the legal theory is a mere occasion'.[29]

Even in these situations, however, a voice option entails nothing like the high degree of control afforded by a right to self-representation; such a limited option of participation can be available for a represented litigant. Furthermore, legal representation promotes such a non-instrumental aspect of participation since it

[27] See e.g. Thibaut and Walker (n 7) 549; P Houlden et al, 'Preference for Modes of Dispute Resolution as a Function of Process and Decision Control' (1978) Journal of Experimental Social Psychology 13, 16; T Tyler, *Why People Obey the Law* (Princeton University Press, Princeton 2006) 116.

[28] See the definition of 'process control' at T Tyler, 'Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test for Four Models' (1987) 52 Journal of Personality and Social Psychology 333, 334; Tyler, Rasinski and Spodick (n 26) 75.

[29] Chevigny (n 11) 1221.

provides the litigant with the professional assistance needed to participate effectively in the legal process.

3.3 Why do people seek to express themselves in legal process? Actual versus potential influence

The main reason why some researchers have inferred that participation has a non-instrumental value lies in their narrow understanding of instrumentality as confined only to actual influence over the outcome. Consider, for example, this passage from Tyler, Rasinski and Spodick (1985):

> If the influence of voice were linked to the ability to influence decisions ... we should find lesser influence of process control at low levels of decision control. In fact, however, heightened process control is equally influential [on perceptions of procedural fairness] at high and low levels of decision control. ... Instead of viewing judgments of procedural justice as developing from rational judgments about maximizing outcomes obtained, these results suggest that the chance to speak has value in itself. ... [citizens] seem to be seeking the opportunity to be listened to, irrespective of whether that opportunity leads to favorable outcomes.[30]

This inference is a non-sequitur. The fact that in the studies reported by these researchers the power to issue a binding decision was conferred upon a third party (i.e. the 'low decision control' condition) or that the actual decision was not influenced by the subjects' views (i.e. the outcome was unfavourable) does not necessarily mean that the subjects did not hope to influence the decision through their process control. Instrumentality need not be limited to *actual* influence on the outcome and exclude *potential* influence. Indeed, litigants may prefer a procedure which gives them an opportunity to influence the final decision even if it does not guarantee that the decision will eventually overlap with their attitudes. Presumably, litigants know that they cannot

[30] N 26 above, 79; see also Tyler (n 28) 333: 'The key to differentiating between instrumental and value-expressive theories of procedure is to explore the effects of process control independent of the level of decision control'.

always influence the outcome and would instead contend themselves with a fair opportunity to influence it.

This interpretation makes better sense of Tyler, Rasinski and Spodick's own finding that subjects who were given high process control were more likely to feel that they also had high decision control even when, in fact, they did not.[31] Moreover, this interpretation explains the finding of another study, Tyler (1987), in which the key precondition for a 'voice effect' was the 'extent to which a citizen feels that his or her views have been considered by the decision-making authority'.[32] In Tyler's own words, 'simply providing structural opportunities to speak is not enough to produce voice effects. It is also necessary for citizens to infer that what they say is being considered by the decision maker'.[33] But, if all that litigants wanted was to express themselves, 'vent' their feelings and be listened to, why did they care whether their views were considered by the decision-maker or not?[34]

This proposed instrumental account of the psychological effect of a voice option becomes even more persuasive in the light of the findings by Lind, Kanfer and Early (1990). This study sought to test whether a voice option could produce a positive effect on satisfaction even when the decision had already been made. While finding that the post-decision voice produced a positive psychological effect, the study also found that the subjects in this group still believed that they had influenced the decision even though they were told in express terms that the decision had been made and that their views would not influence it.[35] This demonstrates how difficult it is to disentangle the

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[31] Tyler, Rasinski and Spodick (n 26) 75–8.

[32] Tyler (n 28) 337.

[33] ibid, 342.

[34] Towards the end of his analysis, Tyler seems to admit that further evidence is required to substantiate the expressive value hypothesis. See ibid, 342–3.

[35] Lind, Kanfer and Early (n 15) 956. The authors offered two possible explanations, without favouring either: 'these elevated control ratings may have been due to an illusion of control effect in the postdecision voice condition or they may have been the result of generally enhanced feelings of group

instrumental nature of participation from whatever expressive value it might also embody.[36]

CONCLUSION

This chapter has shown that a right to self-representation cannot be defended based on the proposition that high process control enhances litigants' satisfaction with the legal process and their perception of its fairness. It has pointed out the limitations of the empirical studies that have supported this finding, the malleability and complexity of the measure of satisfaction, and the normative questions that a focus on subjective perceptions is prone to raise. It may be concluded that since self-representation is a poor tool for exercising control over the presentation of one's case, it is unlikely to produce a positive psychological effect. To the extent that it did, this would be undesirable because it would stem from the litigant having a false sense of having participated in the process and exercised influence on the outcome, when this is unlikely to have been the case.

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involvement'. Cf Chevigny (n 11) 1220: 'The creation of an artificial situation in which the participant is told to act as though she were persuading someone, while she is at the same time told that her act can have no effect, cannot change those habits [of perceiving process control as an instrument to influence the outcome] ... we understand the very nature of a "hearing" to be that the decisionmaker is going to take the arguments into account, with an outcome likely to be "accurate" for the dispute'.

[36] With the help of some statistical analysis the authors insisted that the post-decision voice effect cannot be wholly explained by the illusion of control. However, they conceded that their 'data makes it clear also that it is premature to conclude, as Tyler et al (1985) did, that "people seem insensitive to whether their heightened process control is linked to actual control over decisions"', concluding that the 'answer to the instrumental-noninstrumental debate is that both sides are right, but neither side is entirely right': Lind, Kanfer and Early (n 15) 954–5.

CHAPTER 8

MANDATORY REPRESENTATION UNDER ARTICLE 6 OF THE ECHR: BETWEEN A DEFECTIVE AND EFFECTIVE REPRESENTATION

INTRODUCTION

This chapter discusses the case law of the ECtHR, according to which a right to represent oneself is not guaranteed by Article 6 of the ECHR, either in criminal or civil proceedings. The ECtHR has affirmed the laws of several European countries requiring legal representation, holding that the right to a fair trial entitles litigants and defendants to have an adequate opportunity to effectively represent their case; as such, this right does not require an unqualified right to represent oneself. To have a justifiable claim under Article 6, a litigant or a defendant has to show that an alleged denial of a procedural entitlement has prejudiced the presentation of her case or defence.

The general importance of this case law lies in its treatment of self-representation as an ordinary procedural matter of no intrinsic value. The ECtHR's outcome-oriented approach to the procedural entitlements in Article 6 can be contrasted with the USSC's approach, according to which the procedural protections in the Sixth Amendment are treated as intrinsically valuable and as concerned with freedom of choice rather than the impact of a specific choice on the outcome of the legal process (see chapter 2.2).

In the criminal context, the importance of this case law lies in its approval of mandatory representation even though Article 6(3)(c) expressly mentions a defendant's entitlement to defend herself 'in person or through legal assistance'. This position supports the view presented in chapter 3.4 that this provision contains two alternative rather than cumulative entitlements. Moreover, this chapter develops the ECtHR's view and argues that it is defensible in spite of the potential risk that defendants may refuse to cooperate with the imposed counsel and, consequently, undermine the efficacy of legal representation. It argues that for defendants to have a justifiable claim under Article 6 they have to cooperate with their court-appointed lawyer or otherwise provide a good reason why such cooperation is not possible.

In the civil context, the importance of this case law is that it approves of mandatory representation even though civil courts have powers that might potentially reduce the inefficiencies created by litigation in person, namely the powers to impose costs orders and strike out statements of case on the grounds of procedural non-compliance. This chapter defends the ECtHR's approach and argues that mandatory representation does not violate the principle of proportionality because in complex cases such representation is necessary to obtain access to court. Moreover, this chapter defends the ECtHR's treatment of litigants who are unable to afford legal representation, and its definition of this problem as a legal aid issue rather than a problem of self-representation.

The structure of this chapter is as follows:

Section 1 discusses the case law of the European Commission on Human Rights (EComHR). **Section 2** discusses the case law of the ECtHR in the criminal context and **section 3** defends the ECtHR's view despite the specific difficulties mandatory representation could raise in criminal proceedings. **Section 4** discusses the

ECtHR's case law in civil proceedings and defends it despite the difficulties that mandatory representation could present in civil proceedings, including the problem of litigants who cannot afford legal representation and do not qualify for legal aid.

1. The case law of the European Commission on Human Rights

In a series of cases the EComHR laid the ground for the ECHR's approach to the right to defend oneself under Article 6(3)(c). Interestingly, the right to defend oneself in person was often invoked by defendants and discussed by the EComHR in relation to the right to be present in court rather than to litigate in person without any form of legal representation. For example, in *X v Austria*[1] an Austrian defendant alleged that his right 'to defend himself in person' under Article 6(3)(c) was violated because he was not allowed to attend the hearing at an appellate court as he was in detention for remand. Proceeding from the assumption that the correct legal basis for the right to be present was the right 'to defend oneself in person', the EComHR rejected this allegation on the grounds that the hearing was conducted in his lawyer's presence. In its view, Article 6(3)(c)

> guarantees to an accused person that the proceedings against him will not take place without an adequate representation of the case for the defence, but [it] does not give an accused person the right to decide himself in what manner his defence should be assured; ... the decision as to which of the two alternatives mentioned in the provision should be chosen, namely, the Applicant's right either to defend himself in person or to be represented by a lawyer of his own choosing or, in certain circumstances, one appointed by the Court, rests with the competent authorities concerned ...[2]

[1] *X v Austria* Application No 2676/65 (3.4.1967) (EComHR).

[2] ibid. This position has been reiterated in other decisions: see e.g. *Philis v Greece* Application No 16598/90 (11.12.1990) (EComHR); *Philis v Greece* Application No 19773/92 (31.8.1994) (EComHR).

This position was not limited to the right to be present at the appellate hearing and it was reiterated by the EComHR also in relation to the right to conduct the trial in person. In *X v Norway*[3] the trial court had agreed with the defence lawyer to try the case before it without calling a particular witness. Thinking that this was detrimental to him, the defendant alleged that his right under Article 6(3)(c) was violated because he was not given the option of defending himself in person, which would have enabled him to call the witness in question. The EComHR dismissed this allegation on the grounds that legal representation did not prejudice his defence because the witness in question was unimportant to the determination of the case. It stressed that compliance with Article 6(3)(c) should be measured by taking 'account of the treatment of the defence as a whole rather than the position of the accused taken in isolation'.[4]

This observation expresses an outcome-oriented approach to Article 6(3)(c) and underscores the impersonal nature of the right to defend oneself under it. It suggests that compliance with Article 6 is measured by whether the defendant was afforded a reasonable opportunity to present a *relevant and effective* defence rather than by whether he was provided with an unconditional entitlement to make any defence, however irrelevant, in the name of respect for autonomy.

The emphasis on the ability to make an effective defence, and the consequent low value attached to the defendant's freedom as such, could be further illustrated by the EComHR's position on the defendant's other right to choose his own counsel (also expressed in Article 6(3)(c)). In *X v UK*[5] a barrister was prohibited by an organ of the English Bar to represent his father in a criminal trial due to his involvement in the subject matter. The father challenged this restriction on the grounds that it interfered in

[3] *X v Norway* Application No 5923/72 (30.5.1975) (EComHR).

[4] ibid.

[5] *X v UK* Application No 8295/78 (9.10.1978) (EComHR).

his freedom to choose his own lawyer. The EComHR dismissed this allegation holding that the right to choose one's lawyer under Article 6(3)(c) is not absolute. It reiterated the principle that in examining compliance with Article 6(3)(c) the treatment of the defence should be evaluated 'as a whole' and not necessarily by referring to the defendant's attitude 'in isolation'.[6] Thus, the EComHR concluded, the father was not disadvantaged by the Bar's decision because he had had 'an ample opportunity to present his own case' and appoint any other lawyer, but he made no effort to do so and opted for self-representation.

Additional restrictions on the defendant's freedom to participate in the proceedings and choose her own lawyer were discussed in the case of *Ensslin, Baader and Raspe v Germany*.[7] Prominent figures of a criminal association called the 'Red Army Faction' (RAF) were charged of serious crimes before a German court, and certain lawyers were not allowed to represent them on the grounds that they were suspected of supporting the association (and therefore subject to criminal proceedings themselves). A power to do so was provided by the German Code of Criminal Procedure (CCP), which further restricted the ability of defendants to appoint more than three lawyers.

The EComHR decided that these restrictions on the freedom to choose one's own lawyer were compliant with Article 6(3)(c). It held that limiting the number of defence lawyers to three was legitimate because 'the purpose of [Article 6(3)(c)] is to ensure that both sides of the case are actually heard by giving the accused, as necessary, the assistance of an independent professional',[8] and to achieve this purpose it was not necessary to afford a defendant unconditional freedom to choose as many lawyers as she might want. This was particularly so considering the court's power under the CCP

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[6] ibid.

[7] *Ensslin, Baader and Raspe v Germany* Applications No 7572/76, 7586/76, 7587/76 (8.7.1978) (EComHR).

[8] ibid [19] at 114.

to appoint additional defence lawyers *ex officio* in order to guarantee that the defendant was properly heard.[9] This not only meant that the defendant would not be prejudiced by the three-lawyer limitation because if necessary the court could appoint additional counsel, but more importantly it also meant that the conduct of the defence was not exclusively the business of the defendant. Courts have an independent duty to ensure that defendants are adequately represented, which might not be the case when the lawyers chosen by defendants are not performing their duties adequately or when they are conducting litigation in a manner that could jeopardise the fairness, integrity and the flow of the proceedings. The EComHR also indicated that the exclusion of certain lawyers who were strongly suspected of supporting the RAF did not undermine the defendants' effective defence because they were still represented by several other lawyers, some of whom the defendants had personally chosen.

The importance of public considerations in shaping the EComHR's approach to Article 6 manifested even more clearly in its approval of the German court's decision to proceed with the case despite the absence of the defendants; at some point in the proceedings the defendants were no longer able to keep up with the trial's pace due to ill health, which was self-inflicted by the defendants' repeated hunger strikes and refusal to follow the medical advice given to them. Nevertheless, the EComHR affirmed the German court's decision to proceed without the defendants, noting that Article 6(3)(c) did not secure a right to be present in all circumstances or in all the hearings.[10] What determined whether Article 6(3)(c) was violated, the EComHR went on to say, was the overall opportunity given to the defendants to present their arguments adequately, while also considering the 'requirement that justice be done, and be done within a reasonable

[9] ibid.

[10] ibid [21]–[22] at 114–6.

time'.[11] Thus, the EComHR concluded, the defendants were not put at any disadvantage by proceeding with the case without them as they had constant contact with their defence lawyers.[12]

To sum up this section, the EComHR's jurisprudence defined the defendant's right to defend herself in terms of an adequate opportunity to present an effective defence. Mandatory legal representation is perfectly consistent and in fact very often a necessary condition for such a defence.

2. THE ECTHR'S CASE LAW

2.1 An outcome-oriented approach

The ECtHR has endorsed the EComHR's position that Article 6 only guarantees a right to participate effectively in the proceedings, leaving the state to decide how to secure this entitlement. The prominent case in which mandatory representation was declared compliant with Article 6 is *Croissant v Germany*.[13] Mr Croissant was represented by two lawyers of his own choosing. Given the complexity and expected length of the case, the German court decided to appoint a third lawyer, reasoning that this appointment was necessary to ensure the adequate representation of the defendant and the proper conduct of the proceedings in accordance with the rules.[14] Mr Croissant had objected to the very appointment of a third lawyer as well as to the specific lawyer who was appointed on the grounds that the lawyer in question belonged to a political party to

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[11] ibid [22] at 115–6.

[12] ibid.

[13] *Croissant v Germany* (1993) 16 EHRR 135 (ECtHR).

[14] The specific provision requiring legal representation is section 140 of the German Criminal Code of Procedure (German CCP); an English translation can be accessed online: http://www.gesetze-im-internet.de/englisch_stpo/index.html (last visited 12.9.2011).

which the defendant was 'fundamentally opposed'.[15] Croissant argued before the ECtHR that in appointing this lawyer notwithstanding his objection the German court violated his right to 'defend himself in person or through counsel' as articulated in Article 6(3)(c). The ECtHR dismissed this allegation, stating that as a matter of principle

> The requirement that a defendant be assisted by counsel at all stages of the Regional Court's proceedings ... which finds parallels in the legislation of other Contracting States—cannot, in the Court's opinion, be deemed incompatible with the Convention. ... the appointment of more than one defence counsel is not of itself inconsistent with the Convention and may indeed be called for in specific cases in the interests of justice.[16]

In this paragraph the ECtHR not only approved of mandatory representation but also of the court's power to appoint additional lawyers for a defendant who is already legally represented. This means that even when the defendant complied with the obligation to be legally represented, the court could still step in and appoint additional lawyers if it decided that such appointments were necessary to conduct a fair trial, for example in situations in which a case is too complex to be handled by the lawyer chosen by the defendant, or when there are reasons to think that the lawyer chosen by the defendant is incompetent or may otherwise cause unnecessary protraction of the proceedings.

These restrictions upon a defendant's freedom to have exclusive autonomy over her representation reflect a broad conception of a fair trial, which encompasses not only the defendant's interest in defending himself but also the public interest in preserving the integrity of the proceedings and the reliability of their outcomes. The ECtHR's outcome-oriented approach and emphasis upon the defendant's opportunity to present an *effective* defence could be well illustrated by the Court's examination of the specific circumstances of the case in question. In justifying its refusal to find a violation of

[15] *Croissant v Germany* (n 13) [9].

[16] ibid [27].

Article 6, the ECtHR indicated that Croissant's ability to present an effective defence was not adversely affected by his lack of confidence in the third counsel because the other two lawyers enjoyed his confidence; better still, the ECtHR pointed to the fact that the imposed lawyer 'took an active part in the defence and was closely involved with the other two counsel in planning the strategy to be adopted'.[17] The very fact that the court did not give full effect to Croissant's choice of representation was not sufficient to establish a violation of Article 6.[18]

The ECtHR's conception of a fair trial as concerned with both the defendant's ability to defend herself effectively and the independent public interest in conducting fair proceedings stands in contrast to the individual-centred approach taken by the USSC in *Faretta*, which interpreted the right to defend oneself as a personal right that leaves the question of representation to the free and autonomous decision of the defendant herself, irrespective of public considerations. As chapter 6.1 has shown, an American defendant who was denied her right to self-representation can challenge her conviction even if her defence was not prejudiced by the forced appointment of a lawyer.

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[17] ibid [31].

[18] For an example of the court's independent duty to ensure effective and fair representation of the defendant's interest, see *Belziuk v Poland* Application No 23103/93 (25.3.98) (ECtHR). In this case, a Polish appellate court did not allow a defendant to be brought from custody to be present at the hearing, and it did not appoint counsel to represent him at the appellate level because the defendant-appellant refused to be legally represented. The ECtHR found that the hearing breached Article 6(3)(c) and that the court should have appointed counsel to represent the interests of the defendant even if the latter wished to represent himself. Likewise, in *Shulepov v Russia* Application No 15435/03 (2008) (ECtHR) the ECtHR faulted a Russian appellate court for failing to appoint counsel to a defendant-appellant who did not request to be represented, emphasising that the defendant's waiver of any of the guarantees in Article 6 'must not run counter to any important public interest' ([33]). As Bassiouni explains: 'Because representation of counsel is not only a matter of interest to the accused, but is also paramount to due process of law and to the integrity of the judicial process ... whenever it is in the best interest of justice and in the interest of adequate and effective representation, the court should disallow self-representation and appoint professional counsel': C Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993) 3 Duke Journal of Comparative and International Law 235, 283–4. Note that that the public interest encompasses the adequacy of the defence and is not necessarily motivated by paternalistic considerations. This point is discussed in chapters 2.3.3 and 6.3.2.

2.2 A 'holistic' approach to the right to a fair trial

In the case of *Lagerblom v Sweden* a Swedish court appointed a lawyer to represent a Finnish defendant tried before it.[19] Since the appointed lawyer did not speak Finnish, the defendant requested that he be replaced with another who spoke Finnish and who had already assisted him in the past. The Swedish court refused this application on the grounds that the language difficulty could be resolved by appointing an interpreter and that language preference was therefore not a 'sufficient reason' for replacing counsel.[20] In affirming the Swedish court's decision, the ECtHR reiterated the principle that the guarantees in Article 6(3) 'are specific aspects of the right to a fair trial in criminal proceedings' and accordingly 'the applicant's complaint will be examined under these provisions taken together'.[21] '[R]ead as a whole', the ECtHR went on to say, 'Article 6 ... guarantees the right of an accused to participate effectively in a criminal trial'.[22]

In the specific circumstances of the case, the ECtHR found that there was no evidence that the appointed counsel who represented the defendant throughout the proceedings 'was unable to provide [Lagerblom] with effective assistance or that [Lagerblom] lacked confidence in [him], nor is there any indication of a manifest failure on the part of [the appointed counsel]'.[23] The ECtHR further noted that the Swedish court was entitled to refuse to replace counsel in order to avoid 'inconvenience and ... additional costs'.[24]

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19 According to the Swedish Code of Judicial Procedure a defendant must be legally represented when facing imprisonment for a period longer than six months or when other special circumstances require it: *Lagerblom v Sweden* Application No 26891/95 (ECtHR) [30]–[32].

20 ibid [33]–[37].

21 ibid [48].

22 ibid [49].

23 ibid [60].

24 ibid [59].

This is a 'holistic' approach that measures the overall justice of the trial with emphasis on the efficacy of the defence. In *Mayzit v Russia*[25] a Russian court imposed legal representation on a defendant who had refused the appointment of eight lawyers nominated by the court for him, without himself suggesting an alternative. During the trial the defendant requested to be represented by his lay mother and sister.[26] Not only did the defendant's relatives lack the professional knowledge and expertise required to handle the case in question, but they were also unable to dedicate themselves adequately to the proceedings and attend to them regularly.[27] Thus, while a power to authorise 'close relatives' as defenders existed under the Russian Code of Criminal Procedure of 1960, the court declined to exercise it given the complexity and gravity of the subject matter.

Mayzit challenged this decision before the ECtHR based on the right to 'defend himself in person or through legal assistance of his own choosing' under Article 6(3)(c). The ECtHR rejected this allegation, holding that Mayzit had enjoyed 'an ample opportunity to present his case' and participate effectively, and that the appointment of counsel did not disadvantage Mayzit's defence in any way.[28] The ECtHR further underscored the importance of a holistic examination of the effectiveness of the defence, stating that the defendant's control over his representation is not intrinsically valuable because '[t]he guarantees enshrined in Article 6(3) are ... not an end in

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[25] *Mayzit v Russia* (2006) 43 EHRR 38 (ECtHR).

[26] It is interesting to notice the reasons expressed by Mayzit in support of his insistence upon representation by relatives rather than by public lawyers, which strongly echo the kind of concerns that prompted the USSC to recognise the *Faretta* right (see chapter 2). While he was charged with crimes of a non-political nature (causing damage to property, and the like) Mayzit rationalised his refusal of the eight legal aid lawyers proposed to him by the court by his concern that 'the whole proceedings were but a criminally fabricated political persecution', which requires, in his opinion, 'independent witnesses of [the government's] misdoings' (ibid, [60]). He insisted on having relatives as representatives in order to enable them to visit him whilst in custody without obstruction, and in doing so to facilitate passing his complaints 'to the outside' and consequently prevent the prison authorities from blocking them ([61]).

[27] ibid [25], [68].

[28] ibid [70].

themselves, and they must accordingly be interpreted in the light of the *function* which they have in the overall context of the proceedings'.[29]

In other words, according to the ECtHR's observations in *Langerblom* and *Mayzit*, the different entitlements mentioned in Article 6(3) are not absolute or minimal guarantees in themselves, but different aspects of the general right to a fair trial. It follows that the right to a fair trial is not violated merely because domestic law does not give full effect to each element of Article 6 in all the possible circumstances. Rather, the determination of whether the right to a fair trial was violated depends on the overall evaluation of the circumstances. This evaluation must be guided by reference to the outcome, rather than by the extent to which the wishes of the defendant were respected. The right provided by Article 6(3)(c), as stated by the ECtHR in *Lagerblom*, is a right to 'participate *effectively*', which downplays the value of any procedural activity that does not contribute to an effective defence. Thus, mandatory representation is compatible with the Convention because it does not undermine the ability of a defendant to participate effectively; on the contrary, speaking through counsel is likely to increase the defendant's chances of effective participation (subject to the question of cooperation which is discussed below).

2.3 A defendant in person who has legal knowledge

The low value attached by the ECtHR to self-representation is perhaps best illustrated by the decision in *Correia de Matos v Portugal*.[30] In this case the, defendant was himself a lawyer, but due to his other occupation as an auditor his name had been temporarily removed from the bar. Nevertheless, the Portuguese court refused his request to represent himself, and accordingly imposed a lawyer on him. The ECtHR affirmed this

[29] ibid [77]; see also [64]–[65].
[30] *Correia De Matos v Portugal* Application No 48188/99 (2001) (ECtHR).

decision, reasoning that it falls within the state's margin of appreciation to impose legal representation on a defendant-lawyer, who 'for that very reason [may] not be in a position to assess the interest at stake properly or, accordingly, to conduct his own defence effectively'.[31]

Of course, one need not agree with the specific conclusions reached by the ECtHR. Arguably, the interest of justice could accommodate a greater deference to the defendants' preferences. For example, one might argue that, all other things being equal, there is no need to impose legal representation on a legally qualified person even if her formal title was suspended for a technical reason; if a person is able to litigate reasonably without inflicting unnecessary or disproportionate costs on the administration of justice, there may be no justification for preventing her from doing so. In the same vein, one might argue that the Swedish court in *Lagerblom* could have replaced the lawyer who did not speak Finnish, or that the German court in *Croissant* could have avoided the appointment of a lawyer with whom the defendant had a fundamental political dispute.

These reservations, however, do not detract from the essential point: mandatory representation is generally compatible with Article 6, and while greater deference to the defendant's preferences might be possible or even desirable, the complete deference of common law systems in the form of an unqualified right to self-representation is certainly neither.[32] The important principle articulated in the ECtHR's case law is that

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[31] ibid.

[32] In G Boas, 'The Right to Self-Representation in International and Domestic Criminal Law: Limitations and Qualifications on That Right' in H Abtahi and G Boas (eds), *The Dynamics of International Criminal Justice* (Martinus Nijhoff, 2006), Gideon Boas argues that the ECtHR would uphold a limitation of self-representation in common law systems 'in light of developing exceptions in common law countries to an accused's absolute right to represent himself' (56). He points out that several common law countries restrict the accused's right to cross-examine vulnerable victims (for example in sex crimes or crimes involving minors) or his ability to obstruct or abuse the court's order and, accordingly, suggests that 'there may be emerging something of a trend towards the erosion of that right, based on a broader concern for the interest of a fair trial' (49). However, while there is no good reason to doubt that the ECtHR would approve of mandatory representation if it were introduced in England and Wales, it is doubtful that the

compliance with Article 6 should be determined based on an evaluation of the overall justice of the proceedings rather than by referring to the narrow question of whether a defendant was strictly afforded all the procedural safeguards nominated in Article 6 to their full extent.[33] All that Article 6 requires is that defendants be afforded a reasonable opportunity to have their defence adequately presented, which can be perfectly accomplished through counsel.

3. THE PROBLEM OF CLIENT-LAWYER COOPERATION AND CONFIDENCE

The emphasis put by the ECtHR on the opportunity to participate effectively in the process may give rise to the concern that if a defendant refuses to cooperate and insists on representing herself, mandatory representation may be unproductive and therefore fail to achieve its purpose. In other words, the imposition of counsel on an unwilling defendant may undermine rather than preserve the integrity of the process. This section argues that, despite this possible complication, the ECtHR's position is defensible.

3.1 The possible conflict between the imposition of counsel and the public interest

The risk of a problematic client-lawyer relationship accompanies any attempt by the court to step in and appoint a lawyer against the defendant's will. This could happen in three situations: when the court appoints a lawyer for a defendant who does not wish to

restrictions described by Boas demonstrate a 'trend towards the erosion' of the right to self-representation in common law jurisdictions. The exceptional instances mentioned by him involve special considerations that pertain to the fringes of the right to self-representation, not to its core. Restricting self-representation in these circumstances may not necessarily indicate that common law systems are likely to restrict self-representation also in ordinary circumstances on the grounds that a self-represented defendant lacks the ability to present her defence effectively and efficiently.

33 For a recent case that reaffirms this principle see *Sakhnovskiy v Russia* Application No 21272/03 (5.2.2009) [40]–[41].

be represented by anyone else but herself (a *Faretta*-like situation); when the court appoints a lawyer to a defendant who wants to be represented but lacks the means to hire a lawyer in whom she is willing to confide and the one appointed for her by the court is not to her liking (a *Langerblom*-like situation); or when the court imposes an additional lawyer on a defendant who is already represented by a lawyer in whom she confides and does not wish to be represented by the additional lawyer (a *Croissant*-like situation).[34] In these situations the unwelcome appointment could be construed by the defendant as an intrusion into her private domain by a state attempting to 'spy' on her defence tactics and strategies.

Clearly, the defendant's attitude towards her appointed lawyer is an important factor in determining the efficacy of her representation. The better the cooperation between lawyer and client the more likely it is for the defence to be effective and capable of influencing the outcome of the proceedings. Given the vital role of cooperation in ensuring that the court's assignment of counsel achieves its goals, it was plausible and quite desirable that the ECtHR in *Croissant v Germany* instructed courts to take account of the defendant's attitude towards both the identity and quantity of the appointed lawyers; in order to assign a lawyer that the defendant does not approve of the court must have 'relevant and sufficient justification'.[35]

But the ECtHR was also sufficiently careful to stress that courts are not confined to the preferences of the defendant and that they have their own duty to ensure the overall fairness and justice of the process. This independent duty includes ensuring not only the adequate representation of the defendant but also the proper administration of justice; 'avoiding interruptions or adjournments corresponds to an

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[34] As we have seen, in a *Croissant*-like situation, lack of cooperation between the appointed lawyer and the defendant may be less harmful to the defendant because she could still participate effectively through the lawyers in whom she confides.

[35] *Croissant v Germany* (n 13) [27]. This is particularly important because under German law if the defendant is convicted she has to pay the fees of the assigned lawyers. See n 38 below and accompanying text.

interest of justice which is relevant in the present context and may well justify an appointment against the accused's wishes'.[36] As the ECtHR explained:

> notwithstanding the importance of a relationship of confidence between lawyer and client, this right [under Article 6(3)(c)] cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes... However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice.[37]

While this statement of principle is sufficiently general to enable courts to appoint counsel even when a defendant persistently refuses to cooperate with a lawyer appointed against her will, the specific cases before the ECtHR did not involve such a difficult situation. In all these cases the ECtHR established in clear terms that the effectiveness of the defence was not undermined by mandatory representation; in *Croissant v Germany* the defendant was represented by two other lawyers who he trusted, and in *Lagerblom v Sweden, Mayzit v Russia*, and *Correia de Matos v Portugal* the defendant cooperated with the lawyer. Thus, we still need to address the more difficult situation in which a defendant persists in her refusal to cooperate (or cooperate sufficiently) with any lawyer or with the specific lawyer appointed to her. In such a situation, should the court nevertheless appoint a lawyer?

3.2 Refusing to cooperate with counsel is a choice, and as such could be scrutinised

The ECtHR was right in endorsing the civil law practice of mandatory legal representation without qualifying this endorsement to situations whereby the defendant agreed to cooperate. If mandatory representation were to be conditional upon the fact

[36] ibid [28].

[37] ibid [29]. For similar statements see *Mayzit v Russia* (n 25) [66]; *Lagerblom v Sweden* (n 19) [54].

of cooperation it would have lost all its force: defendants could easily bypass and defeat this requirement simply by persisting in their non-cooperation. Furthermore, mandatory representation that is not conditional upon cooperation operates as an incentive for defendants to cooperate, as this will be their only rational choice. Some civil law countries, including Germany and Sweden, create a further incentive to cooperate with the court appointed lawyer, as the government could seek reimbursement of the legal fees if the defendant is convicted.[38]

More generally, this chapter argues that the right to defend oneself and in fact the right to be heard do not necessarily entail a right to proceed in person and refuse to cooperate with a court-appointed lawyer, whatever the circumstances. To begin with, the very requirement to be legally represented does not necessarily undermine the defendant's ability to control her defence or defend herself effectively, unless the defendant *chooses* not to cooperate with her lawyer. In other words, the problem of client-lawyer confidence is not inevitable but rather reflects a *choice*, and as such its reasonableness should be scrutinised. From a normative point of view, defendants should not be entitled to refuse to cooperate without reasonable justification, because in doing so they hinder the process. There is no justification whatsoever to respect every rejection of representation without regard to the reasons for such rejection, and thereby conflate the right to be heard with the right to behave irrationally or arbitrarily. If a defendant refuses to cooperate without reasonable justification, it is her arbitrary non-cooperation with the appointed lawyer that might undermine her access to justice, rather

[38] For Sweden, see chapter 21 of the Code of Judicial Procedure, discussed in *Lagerblom v Sweden* (n 19) [38], [53]. For Germany see section 465 of the German CCP: http://www.gesetze-im-internet.de/englisch_stpo/index.html (last visited 12.9.2011). In *Croissant v Germany* (n 13) the ECtHR approved of the requirement to pay costs following the event as being compatible with Article 6. It held that since every defendant is provided with a lawyer at the trial stage, irrespective of her financial ability, seeking to recover the fees of the lawyer *ex post* does not undermine the fairness of the trial and therefore does not involve Article 6(3)(c). The ECtHR supported its view by pointing to the fact that the financial ability of the defendant came to play at the enforcement stage; a defendant who was unable to pay the fees could be exempted from a large portion of the debt or have it deferred for a certain period.

than the very appointment of a lawyer. Lack of confidence or cooperation must be genuine and reasonable, which also means that defendants should make efforts to cooperate with their lawyers and promote their common interest in presenting an effective defence. When a defendant refuses any form of legal representation, or when she insists on being represented by a specific lawyer and no other, she must be required to present a good reason.[39]

From this point of view, the harm to the defendant's right of access when she arbitrarily refuses to cooperate is as self-inflicted and unnecessary as the harm caused when a defendant representing herself in person raises a defence unfounded on reasonable factual or legal grounds. To illustrate, imagine two situations. Situation A: a defendant decides to proceed in person and is falsely convicted due to her failure to conduct her case properly. Situation B: a defendant decides not to cooperate with her lawyer and is therefore falsely convicted due to an ineffective defence. Both situations are equally undesirable. In both situations the injustice was inflicted by the defendant's own (largely irrational) choice: to represent herself when she lacked the ability to do so, or to refuse to cooperate when there was no good reason to do so. Situation A should not be distinguished from situation B, for example by saying that in situation A the defendant actively participated in the process whereas in situation B she did not; such a proposition would distort and debase the value of 'participation': in those complex cases where legal representation is required, self-representation would come so close to non-

[39] At some point in the decision in *Croissant v Germany* the ECtHR seemed to imply an argument of this sort, albeit remotely and in passing. Towards the end of the decision, it recounted with approval the reasons that had led the German trial court to appoint the third lawyer over Croissant's objection. One was that Croissant's objection to the appointment of the third lawyer on the grounds of political differences was 'invalid' (n 13, [30]). Even though the ECtHR did not give full consideration to this point, its general approval implies that the trial court was entitled to pass a judgment on the reasonableness of Croissant's refusal to cooperate with the third lawyer. It is less important for our purpose whether the ECtHR or the German trial court were right in thinking that the political disagreements between the lawyer and the defendant were not a valid reason for refusing to cooperate in a case like *Croissant*, which had some political dimension to it. What is to be noted here is that defendants have to present 'valid' reasons to refuse to cooperate; clearly, some degree of controversy over what qualifies as reasonable in the circumstances is unavoidable.

participation as to cast doubt on whether we could still describe self-representation as a form of 'participation'.

To reiterate the main point, the problem of confidence and cooperation is not inherent in the requirement to be legally represented, and a defendant can choose to comply with the requirement, however disappointing that might be for her, and hire a lawyer in whom she confides or confide in one appointed for her.[40]

3.3 The boundaries of the defendant's control over his defence

The use of the passive tense in the ECtHR's and EComHR's frequent observation that Article 6(3)(c) 'does not give an accused person the right to decide himself in what manner his defence *should be assured*' could be misleading. A defence should not merely *be made* for the defendant by a stranger who acts without involving the defendant. The defendant should be allowed to make her own defence and to this end she should have the opportunity to play a significant role in shaping her own defence. This role, however, is not in conflict with mandatory representation; the appointment of a lawyer does not proceed from a dubious assumption that the defendant must become merely an observer and that she is not entitled to participate in the decisions relating to her own defence. On the contrary, legal representation has the effect of providing the defendant with better tools to make her own defence within the boundaries of law and reason. This is the underlying idea of a defence lawyer, to act as a partisan player rather than as a neutral official. The lawyer is duty bound to deploy her professional skills to facilitate the defendant's right to be heard, which entails a high degree of respect for her instructions. In performing this role a lawyer would be considered negligent if she overlooked the defendant's instruction, especially given that the defendant is an

[40] This is particularly justified when the public bears the costs of the defence. As the ECtHR indicated in *Mayzit v Russia* (n 25) [66], the right to be represented by counsel of one's own choosing 'is necessarily subject to certain limitations where free legal aid is concerned'.

important source of information and evidence.[41] The lawyer has to transform the defendant's version of the events into a legal defence by making the appropriate applications, raising the relevant objections, choosing the appropriate witnesses, challenging the appropriate facts, etc. This is a valuable role because it is likely to help the court spend its resources on promoting a fair trial. (See chapters 4 and 5)

It should be admitted that the above description of the client-lawyer relationship is somewhat dogmatic because lawyers and clients do not always work together in complete harmony. In certain situations, they may well disagree on the defence strategies and tactics and fail to reach common grounds. However, this in itself does not undermine the right to be heard because a defendant who finds herself in a fundamental disagreement with her lawyer could retain another who shares her views concerning the course of litigation or whose advice on the matter seems more reliable and trustworthy to the defendant.[42] Even when the defendant's representation is publicly funded, she should still be allowed to request to have her lawyer replaced in cases of fundamental and genuine disagreement; it would be unjust to force a defendant to yield to her lawyer's advice in all circumstances because the lawyer allocated to her happened to think that her approach was, for whatever reason, not worth pursuing.

There might also be circumstances in which a defendant cannot find a lawyer who would agree to pursue the defendant's desired defence. It seems that if a defendant cannot persuade any lawyer to follow her instructions, then they may be precisely those that the justice system will be justified in filtering out by imposing legal representation.

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41 See e.g. *Grigoryevskikh v Russia* Application No 22/03 (9.4.2009) [78]: 'The right of an accused under Article 6 to effective participation in his or her criminal trial generally includes not only the right to be present, but also to hear and follow the proceedings. Such rights are implicit in the very notion of an adversarial procedure ... The defendant should be able, *inter alia*, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence'.

42 This is how the EComHR treated this matter in *X v Austria* Application No 7138/75 (5.7.1977) (EComHR): 'If the applicant in the present case failed to convince his lawyer that he should include certain arguments ... he was free to insist or change his lawyer'.

It would be a mistake to think that the effect of mandatory representation is to replace judges with lawyers or to deprive defendants of their right to be tried by judges. The gate-keeping role conferred upon lawyers as a result of mandatory representation is of a limited nature and of no serious consequence to defendants. If no lawyer agrees to pursue a certain strategy or defence it follows that such a strategy or defence is either clearly irrelevant or clearly illegal, and in both cases we can be assured that the defendant's right to be heard has not been impaired, at least not in a valuable or meaningful way. This is because the right to be heard does not amount to a right to insist on calling irrelevant witnesses, posing irrelevant or otherwise illegitimate questions, making frivolous arguments, and so on. These are general limitations on the right to be heard and they do not result from the requirement to be legally represented: all defendants, represented or not, are subject to the same duty to conduct their case according to law and reason. If lawyers are not allowed or expected to do certain things, there is no justification to permit or encourage self-represented defendants to do them in the name of the right to be heard. Other things being equal, being legally represented does not deprive the defendant of any procedural right that the defendant would have enjoyed were she to proceed in person. As long as the imposition of counsel filters out clearly illegal, irrelevant, unfounded or otherwise illegitimate allegations, the defendant's right to be heard remains intact.

To be sure, some defendants might be able to make an arguable defence, and some lawyers might not be able to present a much stronger defence than their clients. This concern need not bother us, because it pertains to the fringes of the principle against self-representation, not to its core. Borderline cases are bound to exist, but this thesis seeks only to establish a general principle that self-representation can be restricted in certain situations.

To all this we should add that mandatory representation is not as drastic a measure as it might appear. A represented defendant is not muzzled by her lawyer; she can participate in the legal process, albeit to a limited extent, by presenting her version of facts and testifying. There may be room for consideration of additional ways to enhance personal participation as a function of the circumstances of the parties and the case, without affording full self-representation. For instance, we might be willing to allow defendants in certain circumstances to pose a few questions to witnesses or to make applications or otherwise address the court directly whilst being represented. But the defendant's role must remain limited in order not to defeat the purpose of mandatory representation, namely the preservation of the court's integrity and resources. We need not develop these possible suggestions; the main point is that the right to be heard does not necessarily justify a right to proceed fully in person and refuse any form of legal representation whatever the circumstances.

Finally, it would not be unreasonable to argue that mandatory representation could sometimes be better than self-representation, even for a non-cooperative defendant. While it is true that the optimal utility of legal representation can be realised through a successful client-lawyer relationship to which confidence and cooperation are essential, it does not necessarily follow that a defendant is better off left unrepresented than represented by a lawyer with whom she may not cooperate. Sub-optimal legal representation might still be better than full self-representation; after all, the restriction of self-representation is defended in this thesis in those cases which are too complex for a layperson to be handled effectively and efficiently, which means that a less-than-ideal lawyer-client relationship is not necessarily completely ineffective or harmful to the defendant. A defence lawyer can still challenge the prosecution's case by cross-examining its witnesses and attempt to rebut evidence based on the material collected by the police in their investigation (which might sometimes include the defendant's statements and her version of the events). While cooperation is vital for optimising the utility of legal representation it is by no means always a necessary condition for its being more effective than self-representation.

All things considered, this analysis shows that despite the specific complications that mandatory legal representation presents in the criminal context, it is nevertheless a defensible requirement.

4. SELF-REPRESENTATION IN CIVIL CASES

We have seen that self-representation is not guaranteed for defendants in criminal proceedings even though Article 6(3)(c) makes mention of a right to 'proceed in person', and that this position is defensible notwithstanding the risk of non-cooperation. This section discusses the ECtHR's approval of mandatory representation in civil proceedings and defends it against possible objections that might be raised in this context.

4.1 The question of proportionality

Several civil law countries require legal representation in civil proceedings,[43] and none of them have been faulted for breaching Article 6. For example, in the recent case of *Larin v Russia*[44] the ECtHR held that 'the questions of personal presence [and] legal representation ... should be analysed in the broader context of the "fair trial" guarantee of Article 6'.[45] It further indicated that Article 6 does not 'guarantee the right to personal presence before a civil court but rather a more general right to present one's case effectively before the court ... Article 6(1) leaves to the State a free choice of the means

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[43] For a list of such countries see n 45 in chapter 1.

[44] *Larin v Russia* Application No 15034/02 (20.5.2010) (ECtHR).

[45] ibid [36].

to be used in guaranteeing litigants these rights'.[46] It follows that Article 6 does not protect *Faretta*-style autonomy with regard to the question of representation.[47]

Leaving aside the question of financial means for a moment, we may conclude that litigants who are able to afford legal representation but insist on proceeding in person can be prevented from doing so, without violating Article 6. This can be done when legal representation is necessary to preserve the integrity of court proceedings and prevent disproportionate cost and delay. Mandatory representation could be imposed by either imposing counsel on such litigants or staying the proceedings until they obtain legal representation.

This conclusion is consistent with the terms of Article 6, which do not mention a right to 'proceed in person' in relation to civil proceedings, as they do in relation to criminal proceedings. Moreover, mandatory representation is unlikely to create practical difficulties for the court because in civil proceedings courts have the power to strike out cases for non-compliance with the rules. Civil cases need not be concluded on the merits; if a litigant does not cooperate or otherwise fails to abide by rules and court orders, her statement of case could simply be struck out. This 'exit option' is not available in criminal cases. The court cannot terminate the process or simply choose to convict a defendant on the grounds that she is abusing the process or not complying with procedural rules and court orders. At most, it could attempt to control her conduct, but the proceedings must progress and be concluded on the merits.

This difference between civil and criminal proceedings may give rise to a possible objection on the grounds that restricting self-representation is a disproportional measure to achieve the purpose of saving resources. Arguably, there is no need to

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[46] ibid [35].

[47] For additional decisions that approve of mandatory representation, see: *Wieczorek v Poland* Application No 18176/05 (8.12.2009) (ECtHR) [38]; *Bakowska v Poland* Application No 33539/02 (12.1.2010) (ECtHR) [45]. See also *X v Germany* Application No 4430/70 (EComHR).

prevent litigants from proceeding in person if the court can simply strike out their claims when they fail to comply with procedural rules or to present their case adequately. Moreover, unlike criminal courts, civil courts have the power to order costs and therefore compensate opponents for the unnecessary work produced by LIPs.

Let us start with the first objection of proportionality. This objection is unpersuasive on both conceptual and practical grounds. Conceptually speaking, the requirement of proportionality comes into play only when a value that deserves protection is sought to be infringed or restricted. Since this thesis argues that self-representation does not serve any significant value—be that autonomy, satisfaction or the outcome of the process—there is no need to engage in a proportionality analysis; for example, a rule excluding evidence that has no significant probative value may not be criticised as disproportional. Furthermore, as argued in chapter 6, a rule requiring legal representation is not a restrictive measure or a rule that infringes upon one's freedom. As a matter of principle, a rule requiring legal representation does not exclude litigants from the legal system; rather, it poses a condition that is *necessary* for the legal process to fulfil its function. In circumstances where legal representation is de facto a necessary condition for obtaining justice, requiring it de jure is a reasonable and proportionate measure.

On a practical level, there is no rational justification for allowing litigants to proceed in person with a high likelihood of failure. Furthermore, as we have seen in chapter 5.2, some judges are reluctant to frequently strike out claims on procedural grounds; judges may prefer to tolerate procedural non-compliance by LIPs and to assist them in the presentation of their cases, a measure that is unlikely to help LIPs in complex cases and also wastes resources.

As for the other part of the objection, the ability of courts to control the wasteful conduct of LIPs through making costs orders should not be exaggerated because, even if a LIP has the means to pay costs orders, such orders do not compensate for the general adverse impact of self-representation on the administration of justice. Furthermore, delayed justice has a non-pecuniary dimension and a potentially detrimental impact on the quality of evidence, factors which are not compensated for in costs orders. Moreover, it might not be wise or even fair to permit a situation in which LIPs can enter litigation with a high likelihood of non-compliance with the rules and, therefore, with a high likelihood of costs liability.

It is worth noting that, although this thesis defends mandatory representation based on its potential to prevent the waste of resources in the conduct of litigation, mandatory representation produces a collateral benefit by filtering out unmeritorious, frivolous or vexatious claims. Mandatory representation exempts the court from having to evaluate such claims with a view to strike them out; it shifts the cost of investigating such claims from the system to the litigants themselves.[48]

However, mandatory representation also increases the litigant's cost of representation, which may in turn increase the number of those meritorious cases whose cost outweighs their value. Admittedly, this consequence may be unavoidable collateral damage. Nevertheless, it should be stressed that, in complex cases, self-representation may not necessarily be a cheaper or better alternative. A litigant might still feel deterred from going to court in person due to her lack of competence, the complexity of the case and the risk of having to pay the other side's costs. Or, if she went to court, she would

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[48] Moorhead presents some empirical support for the proposition that self-representation could be utilised to bring frivolous claims: 'We did find evidence [of] clients acting without lawyers so they could raise issues which they thought a lawyer would deem to be irrelevant': R Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' (2007) 16 Social and Legal Studies 405421. See also *Sharma v Soon* [2006] EWCA Civ 1480 where a represented defendant withdrew instructions from counsel, who had cross-examined the claimant at length, in order to cross-examine the claimant on points which were of no relevance or importance; the trial judge refused to allow the defendant to cross-examine the claimant, a decision that was upheld on appeal.

be more likely to lose and therefore to have to pay the other side's cost. At any rate, it would be an empirical question whether the benefit from mandatory representation in terms of savings is higher or lower than the damage in terms of the cases excluded from court.

4.2 Litigants who cannot afford legal representation

Another relevant difference between civil and criminal proceedings pertains to the availability of legal aid. Criminal defendants have a more comprehensive entitlement to legal aid than civil litigants, which means that a formal requirement to be legally represented would have the practical effect of preventing litigants who do not qualify for legal aid from litigating their cases and, accordingly, seriously impair their right of access to court.

On a number of occasions, the ECtHR discussed the status of those who do not object to legal representation but lack the financial means to afford it. Interestingly, the ECtHR has approached this question through the lens of legal aid: rather than faulting the very requirement to be legally represented, the ECtHR has examined whether the state in question has established a reasonable legal aid scheme. It has held that a state is not obliged under the ECHR to make legal aid available for all litigants; whether or not a litigant has a justifiable claim under Article 6 on the grounds that she was refused legal aid depends on the extent to which the refusal to grant legal aid is reasonable. In making specific decisions about how to allocate legal aid, the ECtHR says, a state can take into account such factors as the prospects of success, the complexity of the case, and its value. Furthermore, according to the ECtHR, the institutional framework of a legal aid scheme must contain safeguards against arbitrariness, for example by ensuring that the court itself makes the decision whether to grant legal aid or by creating a procedure for reviewing or appealing such decisions.[49]

Moreover, not only does the ECtHR approve of mandatory representation, but it also considers it to be a factor which a state should take into account when allocating legal aid. It follows that a state that requires legal representation might violate Article 6 not because it prohibits self-representation—when cases are complex self-representation does not provide an effective access to court[50]—but rather because it fails to provide legal aid. As the ECtHR indicated in *Gnahoré v France*:

> Whilst Article 6(1) guarantees to litigants an effective right to access to the courts for the determination of their 'civil rights and obligations', it leaves to the State a free choice of the means to be used towards this end and only compels the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court *either because legal representation is rendered compulsory* or by reason of the complexity of the procedure or of the case.[51]

This means that where the case is too complex for a LIP the failure to provide legal aid would violate Article 6, a violation that would not have been rectified had self-representation been permitted. In fact, the case of *Aerts v Belgium* shows that mandatory representation could strengthen the poor's case for legal aid even when the prospects of success are not particularly promising. In this case a person was not granted legal aid before the Court of Cassation, even though the Court of Cassation required mandatory

[49] See e.g. *Eckardt v Germany* (2007) 45 EHRR SE7, 52, 56–7; *Steel and Morris v UK* Application No 68416/01 (15.2.2005) (ECtHR); *Airey v Ireland* (1979) 2 EHRR 305; *Ganhore v France* Application No 40031/98 (17.1.2001) (ECtHR). In Germany, for example, the conditions for legal aid are laid down in section 114 of the Code of Civil Procedure, according to which a party who cannot afford the costs of the proceedings is eligible for legal aid if the intended legal action offers sufficient prospects of success and does not appear 'wanton'; according to section 127(1), the court that has jurisdiction to deal with the intended action is the one that has the power to decide on motions for legal aid; section 127(2) provides a right to appeal against a decision refusing legal aid; see review in *Eckardt v Germany* 5; P Murray and R Sturner, *German Civil Justice* (Carolina Academic Press, 2004) 6, 162, 175.

[50] This was the case in *Steel and Morris v UK* (n 49) [64]–[72], where the ECtHR was of the view that the defendants in a defamation case which was high in stakes and complexity should have been granted legal aid despite their remarkable performance as litigants in person.

[51] *Gnahoré v France* (n 49) [38]. See also *Eckardt v Germany* (n 49) 56: 'The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case. It will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure, *the question of whether legal representation is compulsory* and the applicant's capacity to represent himself effectively'.

representation. Legal aid was refused on the grounds that the appeal was not 'well-founded'.[52] Nevertheless, the requirement of mandatory representation prompted the ECtHR to declare this refusal incompliant with Article 6. It is therefore possible to conclude that mandatory representation is doubly justifiable because it protects the administration of justice and advances the entitlement of the poor to legal aid.

4.3 The question of legal aid

One might express concern that, in the light of the ECtHR's case law, mandatory representation could have the effect of forcing the government to increase levels of legal aid that it can ill afford. Three responses are possible. One is that, as a more efficient alternative to self-representation, increased legal aid might reduce the overall costs of litigation; this is an empirical possibility that is worthy of consideration.

Furthermore, rather than allocating more government resources to legal aid, a better solution may be to reduce legal expenses by making legal services cheaper and more accessible, which would also enable more people to benefit from access to court without legal aid. The costs of litigation in England and Wales are excessively high and unpredictable, a state of affairs that demands to be addressed on its own account, irrespective of its implications for LIPs. Access to legal representation might also be enhanced by developing such devices as legal insurance or contingent fees; of course, each of these devices has its advantages and disadvantages, which cannot be discussed here, but the central point is that a right to self-representation is not the way to solve the disadvantages faced by impecunious litigants.

Finally, in circumstances where self-representation is likely to inflict disproportionate costs on the administration of justice without enhancing litigants' chances of obtaining justice, it should be restricted independent of the availability of

[52] (2009) 29 EHRR 50, 88 [60].

legal aid. Such litigants are not afforded minimum access to court by being allowed to proceed in person with a high likelihood of failure. On the contrary, in many complex cases self-representation may give the false assurance that litigants are gaining some benefit, when in fact they are gaining none. A formal requirement of legal representation as a condition of court access only makes de jure what is already de facto—namely, that litigants must have such representation in order to have a reasonable chance of success.

4.4 Possible applications of mandatory representation

This thesis began with the disclaimer that it was seeking merely to establish a general principle that mandatory representation is justifiable. At this stage, it is possible to outline a few remarks on the practical implications of mandatory representation, if only to illustrate the flexibility of the principle and the various applications that might be considered.

Once we have accepted the general principle proposed herein, there are various ways to administer its application and avoid individual injustice. In civil law countries, legal representation is usually required as a general rule in certain categories of cases, such as cases before a certain court or exceeding a certain value. Such a rule ensures consistent and predictable application of mandatory representation, and avoids the cost of a case-by-case examination of whether legal representation should be required. On the other hand, an indiscriminate rule might have an unjust effect in some situations—when, for example, a litigant is able to conduct litigation effectively even though she is not formally qualified as a lawyer, or when other special considerations come to play, such as might occur in proceedings involving the state or a government agency, or cases involving sensitive matters.

One way to manage the application of mandatory representation could be to require the court to establish in each case whether the litigant in question can proceed in person or should be required to obtain legal representation. This may be more costly and less predictable, but is likely to secure individual justice. Alternatively, it is possible to set forth a general rule that prohibits self-representation but allows litigants to apply for permission to proceed in person on an ad hoc basis. Upon a party's application, the court would have to assess the competence of the litigant and her ability to conduct effective and efficient litigation in the light of the degree of complexity of the case, and any other special considerations that may be relevant.

Another alternative could be to provide the court with a case management power that would authorise it either to impose legal representation on a LIP or to stay the proceedings until the LIP obtained legal representation. The court might do so in situations where it concluded, based on the conduct of the LIP, that she was unable to present her case effectively and efficiently, or based on other reasons—if, for example, the case were brought against a 'protected party' (CPR 21.1) or might entail the need to cross-examine witnesses on sensitive matters. This proposal is advantageous because the rule would be invoked only when needed, thus reducing the costs of its application. However, self-representation is likely to be ineffective and inefficient in so many cases that there may still be a need for consistency and predictability in the determination whether representation should be required.

CONCLUSION

This chapter has established that a right to self-representation is not guaranteed by Article 6 and that the formal requirement that litigants in civil cases and defendants in criminal cases be legally represented is compliant with Article 6. Moreover, this chapter has shown that, according to the ECtHR, the specific procedural safeguards expressed in Article 6 are not ends in themselves and that their importance depends on their contribution to the litigant's or defendant's opportunity to present her case effectively and without undermining the administration of justice. With regard to criminal proceedings, this chapter has justified the ECtHR's approach notwithstanding the possible complications created by mandatory representation, namely the risk that the imposition of a lawyer might induce the defendant to refuse to cooperate with the lawyer and thus frustrate the purpose of mandatory representation. With regard to civil proceedings, this chapter has shown that mandatory representation is not only compliant with Article 6 but that it may also support a litigant's claim to legal aid.

CONCLUSION

This thesis has challenged the position prevalent in common law jurisdictions that courts should not impose legal representation on a litigant nor require him to obtain such representation as a condition for litigation. It has advanced the view that self-representation is not an essential form of access to court. The principal argument is that a litigant who lacks the professional knowledge and skills to present his case effectively cannot legitimately insist upon representing himself if in doing so he is likely to inflict disproportionate costs on his opponent and on the administration of justice.

The case for mandatory representation in civil proceedings has been advanced on three main fronts: a comparison with the criminal context, an assessment of the value of self-representation in terms of outcome and an examination of its possible intrinsic justifications. To this end, the thesis has discussed the case law of English and American courts and also that of the EComHR, the ECtHR, the ICTY and the HRC.

It may be useful to review the propositions made in this thesis, with a synopsis of the main points put forward to support them:

> Proposition I: the interest of a party to civil litigation in representing himself in person should be balanced against the potential adverse consequences of such exercise on the administration of justice.

Represented litigants have a legitimate interest in avoiding the disproportionate cost and delay that may be inflicted upon them by the self-represented opponent due to the latter's lack of legal training. They also have a legitimate interest in not having to absorb the costs that proposals for assistance to LIPs would effectively impose on them specifically rather than spreading them across society in general. These interests should not be automatically outweighed by the interests of LIPs as the current position holds.

In striking the correct balance we must consider the public interest in the efficient administration of justice, which impacts on litigants at large, and in the integrity of legal proceedings, which could be jeopardised by the inability of LIPs to comply with procedural rules.

> Proposition II: the available justifications for self-representation in the criminal context are weak, and unpersuasive when used in the civil context.

The considerations that have moved the USSC to recognise a fundamental right to self-representation are intimately related to the specific features of criminal proceedings. The intrusive nature of these proceedings and the threat they pose to the individual's liberty, combined with the risk of the state's abuse of its power in the conduct of such proceedings, have been understood to weigh against allowing the state the further power of assigning counsel to an unwilling defendant. The proceedings before the ICTY involved even more context-specific considerations due to its underlying political circumstances; in that setting, self-representation was a matter of particular importance to former political leaders who refused to accept the Tribunal's authority and legitimacy. None of these considerations apply to civil proceedings.

> Proposition III: the law cannot be made sufficiently simple and accessible to enable laypeople to litigate complex cases effectively and efficiently.

While some cases might be straightforward enough to be manageable without legal representation, there are cases whose features are too complex to be handled effectively and efficiently without comprehensive knowledge of the law. Various 'plain English' projects have not succeeded in making the law directly intelligible to litigants or sufficiently useable by them. The ability to conduct effective litigation requires comprehensive knowledge of the law and the ability to reason about it and interpret it.

> Proposition IV: in complex cases judicial assistance to LIPs cannot obviate the need for partisan activity.

Even in non-adversarial systems, effective litigation requires partisan engagement. In both adversarial and non-adversarial systems, neutral judicial activity is no substitute for partisan advocacy. Furthermore, 'judicial aid' is less cost-effective than legal aid. The adversarial mode of adjudication makes judicial assistance to LIPs even less cost-effective given that its procedural structure is designed around a paradigm of combat rather than one of official inquiry.

> Proposition V: respect for personal autonomy does not require an unqualified entitlement to self-representation.

What respect for autonomy requires is for the legal system to provide people with a reasonable opportunity to protect their life choices and enforce their rights. In this way, individuals are treated as worthy subjects who are capable of planning their lives and exercising their substantive rights. Thus, when a procedural tool does not advance the enforcement of rights, it cannot be defended as intrinsically valuable merely because it is a possible choice. It follows that mandatory representation does not infringe upon autonomy merely because it eliminates the option of self-representation. Procedural rules, rather than imposing restrictions on autonomy, offer options by which to facilitate it.

> Proposition VI: mandatory representation is consistent with the principle of allowing disputing parties to retain control of their own lawsuit.

Self-representation may actually undermine the litigant's ability to control the presentation of his case. Conversely, a represented litigant retains substantial control over the proceedings; he is free to choose his own lawyer, to provide her with specific instructions on the manner in which the case should proceed and to replace her in case of fundamental disagreements between them. A represented litigant is further able to participate in the decision-making process by preserving a productive relationship with his lawyer, cooperating with him and participating in preparations for the case, including the evidence-gathering process or in other activity that is not court-based.

> Proposition VII: mandatory representation is consistent with the right to be heard and to have a voice in the proceedings.

A represented litigant is not denied a voice in the proceedings. He can speak through counsel, or testify as a witness. There may be room for consideration of additional ways to enhance personal participation as a function of the circumstances of the parties and the case without affording full self-representation.

> Proposition VIII: the gate-keeping role assumed by lawyers under a mandatory-representation regime is limited.

An adversarial lawyer is expected to respect the instructions given to him by his client to the extent that they are reasonable and legal. The adversarial system is based on self-interest and partisanship; there is no good reason to believe that mandatory representation will place lawyers in the position of judges, at least not in a significant way. The lawyer's ethical obligations and his duties as an officer of the court impose legitimate limitations on the client's right to be heard. Rather than side effects, these limitations are desirable benefits of mandatory representation.

> Proposition IX: self-representation is unlikely to enhance the litigant's satisfaction with the process or his acceptance of its outcome, at least not in a desirable way.

Since self-representation is a poor tool for exercising control over the presentation of one's case, it is unlikely to produce a positive psychological effect. To the extent that it did, this would be undesirable because it would stem from the litigant having a false sense of having participated in the process and exercised influence on the outcome, when this is unlikely to have been the case.

> Proposition X: in complex cases mandatory representation does not necessarily make the situation of indigent litigants worse, as it only makes de jure what is already de facto.

Self-representation is not always a minimum guarantee. The disadvantage faced by indigent litigants is not ameliorated by allowing them to represent themselves in circumstances that make it unlikely that they will obtain justice on the merits. In order to provide access to justice to people who lack the financial means to procure legal representation, ways should be found to make litigation affordable and enhance access to legal services, including, but not only, through more generous legal aid schemes.

> Proposition XI: mandatory representation is compliant with Article 6 of the ECHR.

The ECtHR's case law supports the views defended in this thesis. It has declined to recognise any intrinsic value of self-representation, treating it as an ordinary procedural matter that falls within the state's margin of appreciate. Approving of mandatory representation in civil law countries, the ECtHR has stated that a requirement that litigants be represented is a consideration that a state should take into account in allocating legal aid. For the ECtHR, self-representation is a not a minimum guarantee for indigenous litigants; only adequate legal aid is defined as such.

These propositions have been defended against the background of typical private disputes between individuals. This work lays the ground for future examination of the circumstances in which mandatory representation may be introduced in specific situations.

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