

Litigants in person in Northern Ireland: barriers to legal participation

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Briefing Paper 1:
Litigants in person and access to justice

LIPNI study overview

The Litigants in Person in Northern Ireland study looked at people who were involved in civil or family proceedings without representation by a lawyer. They are known as litigants in person (LIPs). The study was interested in people who had taken a legal route to solve an issue, and not those who were involved in mediation or other types of dispute resolution.

Civil and family law in Northern Ireland is similar to that of England and Wales; Scotland has a different legal system. Legal Aid is available in all parts of the United Kingdom, but is more limited in England and Wales than in Northern Ireland or Scotland. The similarities between the Northern Ireland legal system and other legal systems like England and Wales mean that this research will be relevant to all of these legal systems. The difficulty for LIPs in Northern Ireland is that there are still some differences in the law in Northern Ireland that LIPs may need to know about.

The study investigated the experiences of litigants in person (LIPs) to assess their access to justice rights. This examined the right of LIPs to a fair trial. It also tested a model of providing advice on legal procedures to LIPs to see whether it was effective. From September 2016 to August 2017, data from people who took part in the research study were collected in civil and family courts in Northern Ireland.

The participants included:

- 179 LIPs: 49 women, 126 men; 3 couples and 1 group counted as one LIP each.
- 13 members of the judiciary
- 7 legal representatives
- 11 members of Northern Ireland Courts and Tribunals Service
- 5 Court Children's Officers
- 3 people who act as McKenzie Friends

The data were interviews from all participants and court room observations. LIPs also completed a questionnaire about their experiences of self-representing and their demographic background. These qualitative and quantitative data were analysed and the results are presented in the main report and the summary report, available at:

www.ulster.ac.uk/litigantsinperson

There are five briefing papers which summarise the research study :

1. Litigants in person and access to justice

2. What's it like to go to court without a lawyer?

3. Can litigants in person participate in court proceedings?

4. A model of procedural advice

5. Improving the experience of going to court without a lawyer

Litigants in person and access to justice

Introduction

LIPNI Briefing Paper 1 explains access to justice, the right to a fair trial and how they apply to litigants in person (LIPs) in civil and family court cases. In our study, we wanted to understand whether LIPs can access their right to a fair trial and how they participate in their legal proceedings. We started by defining what we mean by the right to a fair trial. The law on the right to a fair trial is set out in detail in Appendix 1 of our main report, which is available at www.ulster.ac.uk/litigantsinperson.

Human rights are the basic rights and freedoms that belong to everyone, from birth until death. The right to a fair trial is a human right which has been agreed as a universal standard that all people can expect their government (or the State) to provide. It is made up of a number of different parts including being able to participate effectively in your own legal proceedings. Legal participation is a concept that describes not just whether people take part in their legal proceedings but how they do it. It depends on their desire, willingness and ability and on the court system to enable their participation.¹ This briefing paper outlines how we defined participation in legal proceedings.

The right to a fair trial and LIPs

What is access to justice?

Access to justice is a term that describes how individuals should be able to use the law and legal processes to protect their rights. It applies where individuals want to defend themselves against a criminal prosecution, challenge a civil matter they believe is wrong, protect their rights or hold people in power accountable. In our study, the people we met were using the courts as a route for access to justice in many different matters: for example, arranging their divorce settlement, defending themselves against a claim from someone who said they owed money, establishing arrangements to see their children, applying to become bankrupt or answering a claim that they had been violent.

Access to justice is a guarantee that the State is obliged to ensure for everyone. It

is a fundamental guarantee because, when it is working properly, it helps people to protect all of their other rights. The State is obliged to guarantee that any person with a legal claim can access a court (or another way of resolving a dispute) and obtain a just remedy or decision from the court.

At the centre of access to justice are the individuals who make or respond to a legal claim. Access to justice and the obligations of the State aim at protecting individuals' efforts to seek justice. The system that is established to enable this to happen exists to protect the individual litigants.

What is the right to a fair trial?

The right to a fair trial is a human right. Human rights are for everyone equally and they set out a number of essential entitlements, which the State has agreed to and is obliged to guarantee. In Northern Ireland, many of our human rights are protected by law. The right to a fair trial is protected under an

international treaty called the European Convention of Human Rights. This international treaty applies to the whole of the UK because it is included within our domestic law under the Human Rights Act 1998. Other international conventions also protect the right to a fair trial, but they have not all been included in our domestic law.²

The right to a fair trial is one that protects our access to justice. It means the court system must operate to ensure a just decision can be delivered to all litigants, whether represented or not. It requires that legal procedures, administration, processes, systems and rules should be applied equally so that every person has equal access to justice and no person is discriminated against.

To help our understanding of the right to a fair trial for LIPs, the Northern Ireland Human Rights Commission analysed the right to a fair trial in civil matters under Article 6 of the European Convention on Human Rights. The analysis looked at cases involving LIPs that were decided by the European Court of Human Rights, which examined whether the LIPs' right to a fair trial under Article 6 had been breached.



The right to a fair trial covers many different aspects of the legal process. We looked at LIPs' experience of them but focused on two aspects of the right that are of most relevance to LIPs:

1. Litigants should be able to participate effectively in the proceedings.

This means that litigants should be able to influence the proceedings, and so allow the court to reach a just decision. The aim of the court is to provide a fair decision (known as 'substantive justice') using a fair process (known as 'procedural justice') and so it has to rely on the LIP to be able to present his or her case effectively. This in turn requires the LIP to be informed, capable, supported and emotionally objective.

2. There should be an equality of arms between the parties in the case.

Equality of arms is making sure there is a fair balance between the two sides in the case. It means that one side is not given more opportunities to present its case which would give it an advantage over the other side. It does not necessarily mean that both sides have the same level of representation but that the court is diligent to ensure both sides are given sufficient opportunities to present their side of the case. This may require the judge to engage LIPs more than represented parties to ensure all of the facts of the case are presented. The judge may give more leeway to the LIPs by asking them more questions or making suggestions, but he or she must remain impartial.

Legal Participation

An important aspect of the right to a fair trial is ensuring that the litigant is able to participate effectively in the court processes. Our study examined how LIPs participate in legal proceedings. We looked for what we called 'legal participation' which describes different ways in which people participate in legal proceedings. Research by one of the authors, Gráinne McKeever, has identified that there are seven different types of legal participation. These range from low levels of participation (non-participatory experiences), to minimum levels (tokenistic experiences), to higher levels (participatory experiences):



Non-participatory experiences:

Isolation – this is where someone feels excluded from the legal process and is unable or unwilling to engage with legal proceedings.

Segregation – this is where someone feels separate from the legal process or secondary within it. The difficulties in participating in the proceedings are not taken into account by the court.

Tokenistic experiences:

Obstruction – this is where the individual's journey through legal proceedings is obstructed. Obstruction can include delays in proceedings, inadequate information or fatigue caused by having to search for assistance.

Placation – this is where support that is provided, or referred to, is ineffective in assisting the individual.

Participatory experiences:

Engagement – this is where individuals are able to find their way through the legal process and communicate with the other participants to understand everyone's role in the process.

Collaboration – this is where individuals are supported in their journey through the process. Their understanding of the process is assessed by the court and is used as the starting point to take them through the process and deal with difficulties as they arise.

Being enabled – this is where individuals are in the position where they are supported and equipped to engage in the process as equals and reach some degree of autonomy.

The form of participation an individual experiences depends on how willing or able the individual is to participate, how complex or demanding their legal proceedings are, and how much help or support is available from those who understand the legal process. People may experience several different types of legal participation during the course of the case or even from one day to the next.

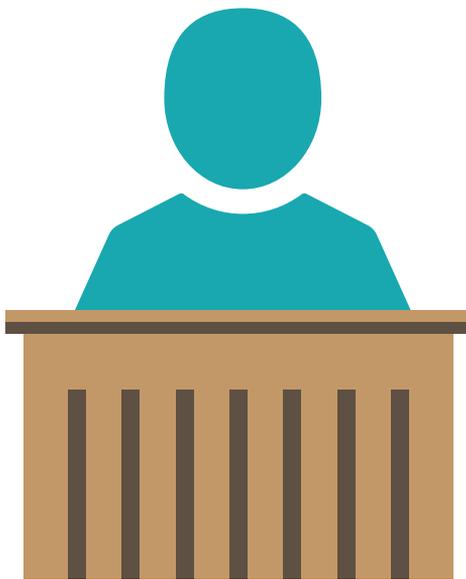
The types of legal participation described as ‘participatory’ – engagement, collaboration and being enabled – are the ones that will increase the chances of a LIP participating effectively in his or her case, as required by the right to a fair trial. All of the others types are unlikely to result in effective participation.

Legal participation can therefore be prevented from being effective by barriers, which we described as intellectual, practical and emotional barriers. We also identified a further barrier that LIPs face which we have called an attitudinal barrier. We describe these barriers in Briefing Paper 3: ‘Can litigants in person participate in court proceedings?’

We used the identification of these barriers as a way to understand what is meant by ‘effective participation’ under Article 6 of the European Convention on Human Rights. Where these barriers exist, effective participation is compromised. Where the barriers are removed individuals can participate more effectively, and so exercise their right to a fair trial.

The different types of legal participation therefore provide a way to measure whether a central part of the LIP’s right to a fair trial is breached.

Equality of arms



Judges have a very important role to play to protect the right to equality of arms which relies on judges helping LIPs overcome some of the barriers to participation that they face. The contribution judges make to removing some of these barriers provides another way to understand whether LIPs are given equal opportunities to present their case. Briefing Paper 2 on 'What's it like to go to court without a lawyer?' describes some of the difficulties in protecting the equality of arms for LIPs in the courtroom.

The right to self-representation

Access to justice does not require every litigant to be represented, even if every litigant wanted to be represented. There is no right to be represented and so the litigant can choose to instruct a solicitor, or not. This means that there is a right to self-representation. We know that there are limitations on the right to self-representation. This is recognised in the case law that examines the right to a fair trial under Article 6 of the European Convention on Human Rights. Limitations will include cases which are very complex or where the individual litigant does not have the legal capacity to act for themselves. It may also include cases where the individual does not have the funds to pay for a lawyer. However, this is balanced against the fact that litigants do not have an automatic right to a lawyer paid for by the State.

The human rights test is that self-representation should not be to the significant detriment of the LIP. Where the disadvantage is significant, it may be that the only way the disadvantage can be removed is by the State paying for legal representation for that litigant. However, there will be many other ways in which the disadvantage can be addressed. The right to a fair trial means that the State should also consider other ways to remove the disadvantages faced by LIPs, so that these disadvantages do not have a significant negative impact on access to justice. Ensuring the equality of arms between the represented and self-represented parties so that both sides have enough opportunities to present their side of the case requires diligence and attentiveness from the court.

Acceptance of the right to self-representation challenges the 'normal' situation of two represented parties, and places an obligation on the court system to take into consideration the needs of litigants who do not have a lawyer.

Conclusion

Everyone has the right to access justice. For those who go to court to resolve their legal problems, access to justice means that all litigants, whether represented or not, have the right to a fair trial. This means that litigants should be able to participate effectively in their court hearing, so they have the chance to influence the court's decision. It also means that all participants in the hearing should be given an equal opportunity to present their case. There are different ways in which litigants can participate in their legal proceedings. This study used the idea of 'legal participation' to understand how LIPs participate. It looked at the barriers to legal participation that exist for LIPs as a way to measure whether LIPs are able to participate effectively in their hearing. Briefing Paper 2 on 'What's it like to go to court without a lawyer?' summarises the experiences of the LIPs in the study and Briefing Paper 3 on 'Can litigants in person participate in court proceedings?' describes the barriers that blocked their right to a fair trial. Briefing Paper 5 on 'Improving the experience of going to court without a lawyer' sets out our recommendations on how these obstacles could be removed or reduced.

Further reading

LIPNI Appendix 1: 'An analysis of the right to a fair trial and litigants in person' by Northern Ireland Human Rights Commission.

European Union Agency for Fundamental Rights and Council of Europe (2016) Handbook on European law relating to access to justice. Available at:

https://www.echr.coe.int/Documents/Handbook_access_justice_ENG.pdf

¹ McKeever, G. (2013) 'A ladder of legal participation for tribunal users,' *Public Law*, July, pp575-598.

² International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; UN Convention on the Elimination of Discrimination against Women; UN Convention Against Torture; UN Convention on the Rights of the Child; UN Convention on the Rights of Persons with Disabilities; and the EU Charter for Fundamental Rights.

Full report available at :

www.ulster.ac.uk/litigantsinperson

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