



Can Litigants in Person participate in court proceedings?

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“Tribunals for users”

- Leggatt’s reform of UK-wide tribunals
- Users to be able to participate by being able to “prepare and present their own cases effectively”
- Empirical understanding of legal participation

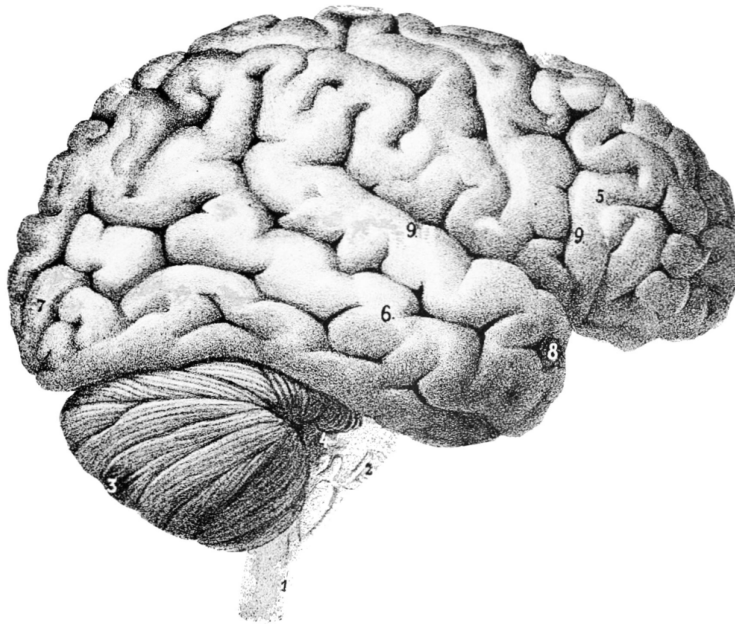
Barriers

From beginning to
end of process:

1. Intellectual
2. Practical
3. Emotional



Intellectual



- How dispute resolution process works, what is required and how to progress disputes
- What information decision makers require
- Understanding the decisions
- Awareness of legal issue under dispute

Practical



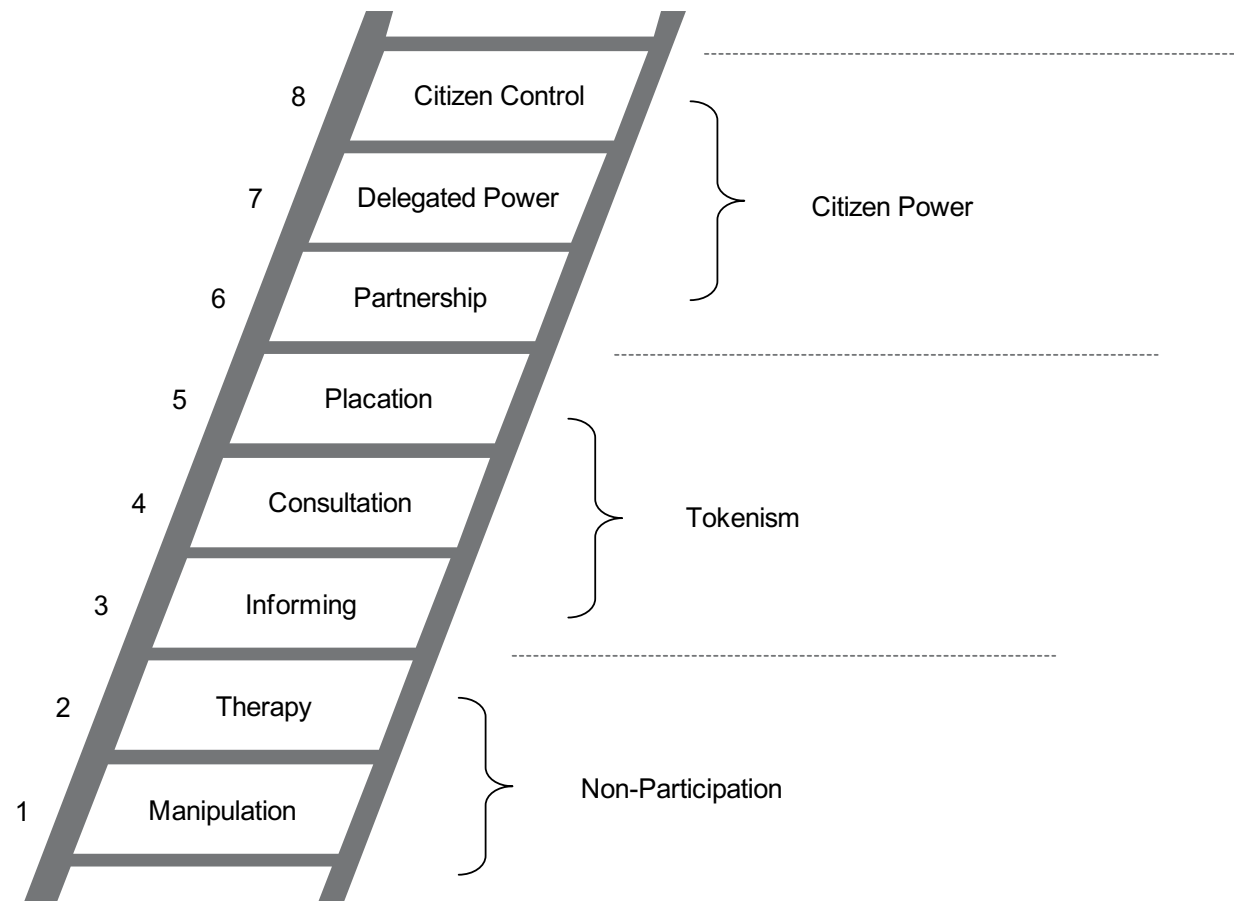
- Knowing where to get help and advice
- Securing independent evidence
- Accessing legal/ specialist support – inequality of arms

Emotional

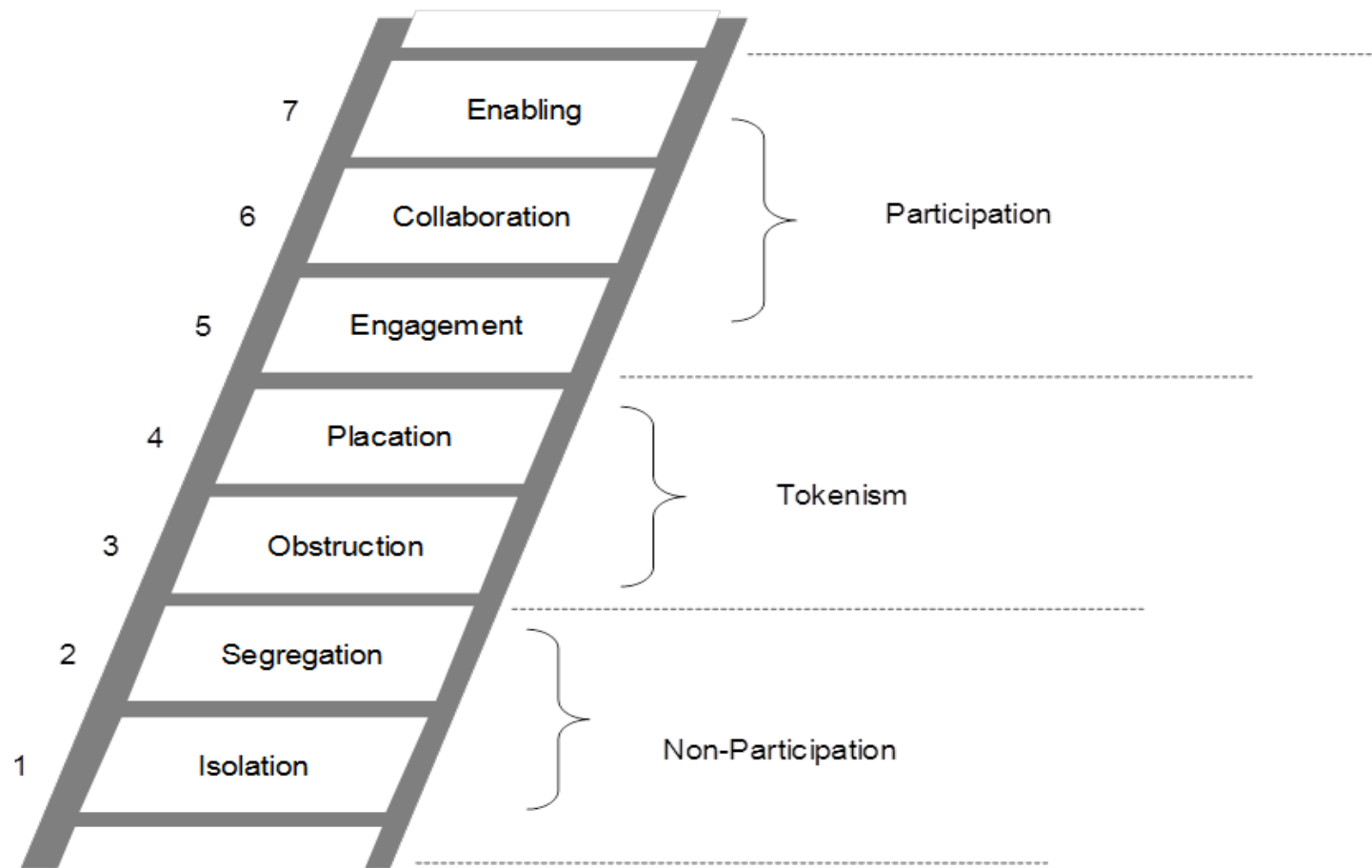
- Critical issue at stake
- Disputes generate significant (negative) emotions
- Support can alleviate anxieties and instill confidence



Arnstein's ladder



Legal ladder





From tribunals to courts?



Which courts?

Lower courts

County Court level, civil cases:

- Small claims court – traditionally regarded as ‘tribunal like’ in its investigatory, informal approach
- Civil Bills – N/Irish device not requiring carefully worded pleadings in the same way as a petition to the High Court
- Hire Purchase & Ejectment – debt and repossession cases, low levels of attendance & representation and less formal than Civil Bills

The data set

- 20 litigants, observed at hearing and interviewed after hearing, over 4 week period (Jan-Feb 2016)
 - 10 small claims – all litigants in person
 - 8 civil bills – 7 litigants represented (barrister & solicitor) and 1 litigant in person
 - 2 HP & ejectment – both represented by duty solicitor from Housing Rights
- Observation & interview schedules developed from tribunal studies

Tribunal v Court barriers

Similarities

- Intellectual: not understanding the role/relevance of documentary (corroborative) evidence, or how to prepare for questions, or the language/terminology; the formality
- Practical: not knowing where to go or what to expect, time commitments involved in the prep/process; good advice/representation breaking down the barriers
- Emotional: Lots of anxiety about the hearing and the outcome; relief at the end; desire for reassurance ('a wee bit of support')

Tribunal v Court barriers

Differences

- Intellectual: much more game-playing evident from barristers – more blatant (and tolerated) as advocacy techniques, either to fluster the witness or to engender judicial sympathy, which generated intellectual barriers
- Practical: case listing and consequent delays, fewer opportunities to speak (for represented litigants)
- Emotional: levels of anxiety seemed lower – and connected to the process rather than the issue
- Representation: sometimes enables/facilitates it, sometimes masks/blocks participation

Do litigants fit the tribunal participation categories?

Model of tribunal participation reflected the participative experiences of court litigants, but some differences created by role of legal representatives

Role of representation acted as either **placation** (poor quality advice that masks the barriers) or **to enable** (ensures the user's voice within the legal process)

- **'obstruction'** evidenced by advocacy technique of haranguing witnesses
- **'collaboration'** with litigants working collaboratively with representatives in giving evidence – but these litigants had to work out for themselves what was happening during hearing

How do Litigants in Person participate in court proceedings?

- 2+ year Nuffield Foundation study on LIPs in civil & family courts (w NIHRC)
- Article 6 ECHR (right to a fair trial): effective participation and equality of arms
- *Airey v Ireland* (1979): representation may be necessary when the case is too complex or the litigant's capacity to self-represent is insufficient.

But – doesn't say WHEN art.6 requires judges to address the LIP's capacity

- Using concept of legal participation to illuminate what is required by 'effective participation' under art.6

The data set

- Proceedings in divorce, ancillary relief, domestic violence, family proceedings, bankruptcy and civil bills
- 179 litigants in person – interview, observation, questionnaire
- 59 court actors interviewed: court staff, legal representatives, judiciary, CCOs and McKenzie Friends
- 25 LIPs in family and matrimonial proceedings attended procedural advice clinic at the Northern Ireland Human Rights Commission: Clinic adviser notes, interview with clinic adviser; and post-clinic interview, observation & questionnaire with LIPs following subsequent hearings

Requirements for the right to a fair trial

1. effective participation – where the LIP is able to participate effectively in the proceedings to a level where he or she is able to influence them so that the court can assure procedural and substantive justice; and
2. equality of arms – where there is a fair balance between the parties in the opportunities given to them to present their case in a manner that does not disadvantage them.

This study identifies the trigger points for participation – the intellectual, practical and emotional barriers to participating in court proceedings

Headline findings

Effective participation

Main barriers to participation were:

- the expectation that LIPs are lawyer-like and will fit into the system;
- difficulty for LIPs in obtaining information, advice and resources;
- the limits to their knowledge and understanding of legal issues, regardless of their efforts to prepare; and
- negative or debilitating emotions and high levels of anxiety.

Headline findings

Equality of arms

Main barriers to equality of arms were:

- inconsistencies in how the judge's role was discharged
- clear disparities where judge was not attentive to this duty (esp re: absent LIPs)
- judicial caution at generating advantages for LIPs over represented parties

Reasons for self-representation

Cost

- did not qualify for legal aid
- could not afford the cost of representation

Value for money

- Costs outweigh benefits
- Money could be spent better elsewhere

Negative experience of representation

- Being kept at arm's length from their own proceedings
- Not being able to communicate with legal rep.s

Can LIPs participate w/out representation?

Procedural advice clinic

- Family proceedings and ancillary relief
- 56 invited to attend; 25 attended; 15 post-clinic observation/interview/questionnaire
- Was not legal advice:
 - merits-based strategic advice, capable of actively influencing a client's decision.
- Procedural advice:
 - informing a client's decision by providing neutral information – framed passively in neutral language of legislation rather as pros/cons of different legal positions; how to prepare and conduct themselves in court.

“If you were a solicitor in private practice you ... probably wouldn't [have] the time to explain to your client what it is that you're actually doing for them.” (Clinic adviser)

Impact of advice

Positive outcomes

- Emotional support:
 - confidence boosting, peace of mind, reassuring, reducing their anxiety about their upcoming court appearances – “A wee bit of empathy, and a bit of sympathy “
- Practical support:
 - identifying the correct (NI) legislation; signposting to advice; feeling prepared
- Intellectual support:
 - how to organise and streamline arguments; rehearsing arguments/scenarios; coaching in key legal principles; getting feedback; shifts in mind-set; knowledge-based reassurance - “like when you’re going into an exam, and you find out what’s going to be in the exam”

Impact of advice

Limitations

Too late:

- would have benefited from advice far earlier in the course of their disputes; LIPs learned as they went how to navigate the system and manage hearings

Too little:

- support provided was too limited, or not of the right type; most would have preferred legal advice/representation; LIPs could struggle to apply the advice on the day;
- cannot equalise the arms between LIP and represented party - reforms of the civil justice system needed, including more inquisitorial approach and more systematic support mechanisms for LIPs

Can LIPs participate?

No assessment made on whether art.6 was breached, but some treatment of LIPs is a threat to art.6

Participative barriers unlikely to be removed fully but state obliged to ensure disadvantage doesn't result in unlawful discrimination

Starting & finishing point echoes Leggatt's review of the tribunal system: that system should be designed for its users, represented or not, to enable more effective participation

