3. Conceptualising Participation: Practitioner Accounts

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Introduction

This chapter and the one that follows present the findings of the empirical component of the study. This chapter focuses on the interviews conducted with 159 practitioners working in and around a number of court and tribunal settings: predominantly the criminal courts (both Crown and magistrates’), Family Court, Employment Tribunal (ET) and Immigration and Asylum Chamber (IAC). As will be discussed, the interview findings point to a range of ways in which the practitioners understood the meaning and functions of participation by lay witnesses and parties – henceforth ‘court users’ – in oral hearings held as part of judicial proceedings. From these accounts, it is possible to discern ten overlapping and interlinked conceptualisations of what participation entails and why it matters. The discussion here thus reflects practitioners’ own definitions and understandings of participation rather than those presented in the wider policy and academic literature, which are described elsewhere in this volume.
Practitioner accounts provide insight into the meanings and functions of participation from the perspectives of those immersed in the day-to-day realities of the courts, and generate knowledge about how participation is mediated by those who directly interact with court users. This is an important undertaking as it has a bearing on how, and the extent to which, participation is achieved in practice. The final part of the chapter examines what practitioners had to say about barriers to and facilitators of participation, which advances thinking about how participation can be better supported in future.

**Interviews with practitioners: rationale and methodological approach**

The practitioners interviewed for the study included judges, lawyers, magistrates, court staff and others who regularly attend court and tribunal hearings in a professional capacity, or provide support to witnesses or parties attending court. The introduction to this volume briefly set out some of the ways in which participation as a legal principle is articulated in law and procedural and practice guidance. The aim of the interviews was to examine how participation, and the part it plays in the delivery of justice, is conceptualised by those who have regular contact with court users, or – in various ways – have some part to play in shaping the court environment.

Following selection of the judicial settings and three geographic sites (one Welsh and two English cities and their surrounding areas) in which the research was to be conducted (see Chapter One), formal approval for the interviews with practitioners was obtained from national bodies where required: the Judicial Office with regard to judges and magistrates; HM Courts and Tribunals Service for court staff; Cafcass (the Children and Family Court Advisory and Support Service) and Cafcass Cymru for Cafcass officers; and HM Prisons and Probation Service for probation officers.
Research access was additionally negotiated nationally and locally with relevant agencies and services. The research team adopted a purposive, convenience approach to sampling (see Bryman, 2016), whereby target numbers of respondents within each practitioner category were agreed, and recruitment was undertaken through local professional contacts and networks.¹

In total, 159 practitioners were interviewed, the large majority of whom worked in the fields of criminal, family, employment and immigration law. A small number worked in the coronial jurisdiction, in other areas of justice or cross-jurisdictionally. The practitioners were drawn from various backgrounds, which are categorised as follows:

- **Judiciary**: circuit judges, district judges, magistrates, employment and tribunal judges and one coroner.
- **Lawyers**: solicitors and barristers across all the specified jurisdictions, some of whom were involved in pro bono services.
- **Court staff**: legal advisors to magistrates (in both the criminal and family jurisdictions) and ushers.
- **Voluntary sector practitioners**: paid staff and volunteers from a range of services working with court users, including the Witness Service, Personal Support Unit,² Coroner’s Courts Support Service and Trade Unions.³ Intermediaries are also included in this category.⁴
- **Statutory sector practitioners**: this is a broad category encompassing professionals who attend court as part of their role with statutory services such as probation, social services, Cafcass, and criminal justice liaison and diversion services. A small number of Home Office Presentation Officers (HOPOs), who represent the Home Office in IAC hearings, are included in this category.

The breakdown of respondents by jurisdiction and role is set out in Table 3.1. The interviews with this diverse range of practitioners enabled the research team to examine how participation is understood from multiple vantage points, including
those of practitioners with varying levels of interaction with, and relations to, court users. The table shows that some jurisdictions and roles were overrepresented in the sample. For example, two fifths of respondents were from the criminal jurisdiction; however, this should be seen in the context of the criminal courts having the highest volume of cases of the jurisdictions under study (see Figure 1.1 in Chapter One). The small number of respondents from the coronial jurisdiction reflects the exploratory nature of this part of the study. Members of the judiciary accounted for over one third of the sample, which can be seen as a strength of the study given that scant existing research has incorporated such a cross-section (in terms of both jurisdiction and status) of judicial perspectives on court users and participation. While the following discussion of findings draws some comparisons between jurisdictions and roles, the varying levels of representation pose limits on the extent to which this can be done.

The practitioner interviews lasted around 45 minutes on average and were conducted face-to-face or via telephone in accordance with respondents’ preferences. A small number of group interviews were held, to suit the respondents’ convenience, but most were one-to-one. The interviews were semi-structured and guided

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<td>Voluntary sector</td>
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<td>Total</td>
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* This group comprises those who had no primary jurisdiction or worked in other parts of the justice system.
by an interview schedule which was oriented around three main themes: what respondents considered to be ‘effective participation’; whether and on what grounds they believed participation by court users to be important; and what they perceived to be the main barriers to and (actual and potential) facilitators of participation. With respondents’ permission, interviews were audio-recorded and transcribed by an external transcription company. A thematic approach to analysis of the transcripts was adopted, involving the iterative development and refinement of a coding framework structured around respondents’ conceptualisations of participation and key barriers and facilitators.

What is participation?

Respondents across all jurisdictions and roles tended to speak of court users’ participation in judicial proceedings as essential to the delivery of justice. In so doing, they did not draw upon ready-made or precise definitions of participation, but rather articulated the concept in a wide range of ways. Through close analysis of the interview transcripts, the research team identified several contrasting conceptualisations of what court user participation entails, and the functions of participation, as set out in Box 3.1.

I will now examine each of the six perspectives on ‘what participation entails’ that emerged from the data, with discussion of practitioners’ perspectives on ‘functions’ to follow in the next section of this chapter. In advance of that, it is important to note three general points. First, what are described here as practitioners’ contrasting perspectives on participation and why it matters are not clear-cut or discrete. They are, rather, closely overlapping ways of talking about participation from which the research team have identified certain key features. Secondly, respondents varied widely in terms of which, and how many, of the conceptualisations they tended to articulate in their answers to the interview questions. Thirdly, there were salient areas of both difference and similarity in these articulations between
jurisdictions and roles – demonstrating that while participation must be understood as a multifaceted phenomenon, it can be usefully examined and applied cross-jurisdictionally.\textsuperscript{5}

\begin{quote}
\textbf{Box 3.1: Conceptualisations of participation}
Practitioners variously described \textit{what participation entails} in terms of:
\begin{itemize}
  \item the provision and/or elicitation of information for the court;
  \item being informed about proceedings;
  \item having legal representation;
  \item protection of well-being;
  \item the management of the court user, such that disruption to proceedings is avoided;
  \item presence at proceedings.
\end{itemize}

Practitioners variously described the \textit{functions of participation} in terms of:
\begin{itemize}
  \item the exercise of legal rights;
  \item enabling court decision making;
  \item legitimization of court processes and outcomes;
  \item potential therapeutic benefits.
\end{itemize}
\end{quote}

\textbf{Participation entails: providing and eliciting information}

A large majority of practitioners described participation by court users as a matter of \textit{providing information}, by giving evidence or submitting statements to the court; or \textit{eliciting information}, for example, by asking questions of other parties or witnesses. The ‘information-provider’ (see Edwards, 2004) or ‘information-elicitor’ role of lay participation was articulated by respondents in each practitioner group and across all the five jurisdictions. \textbf{Box 3.2} provides some short examples of the numerous comments on this theme.
Some respondents spoke of participation only in terms of – and thus as equating to – provision of information. For example, when asked to describe what participation means, a Witness Service volunteer replied: “I assume you mean participating in the fact of giving evidence, because that’s the only time they [witnesses/complainants] are participating.” However, many others spoke of the provision and elicitation of information as one of several aspects of participation; for example, in most of the Box 3.2 quotations the respondents also referred to participation as a matter of being informed.6

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**Box 3.2: Providing and eliciting information**

‘They’ve got to be able to express themselves, I mean, they’ve got to be able to say what they want to say in a court setting. They’ve got to know what … they should be saying and what documents they either should be producing, or are ‘allowed’ to produce.’ (Judge; immigration)

‘It is making sure that they can give the best evidence that they can. Because it seems to me that they need to understand, obviously, what’s happening in the courtroom. But I think the main thrust is towards making sure that whatever they’re there to do as a witness of fact, they can communicate that.’ (Barrister; family)

‘At a simple level, if someone has been involved in a road traffic accident, and they’re also an important eyewitness to what occurred, the judge needs to ensure that that person gives a coherent account of what occurred. Not feeling under pressure. Not feeling obliged to answer at 100 miles an hour, etcetera.’ (Judge; other)

‘For a witness to be able to participate, they just need to listen and answer the questions that they’re asked.’ (Barrister; coroners)

‘Well, to be able to participate, really, you need to be well enough to read documents, take it all in, work out how to structure your arguments and take part in asking questions of witnesses, work out who to call as witnesses and which documents to ask for.’ (Judge; employment)
**Participation entails: being informed**

Indeed, references to court users *being informed* as a core component of participation were commonplace, and cross-cut professional and jurisdictional boundaries. While more than half of all respondents spoke in these terms, the lawyers were the most inclined to do so (maybe because they regard keeping clients informed as an essential aspect of their professional role). Respondents emphasised the importance of court users understanding the judicial process and outcomes – as neatly summarised by an intermediary who practised in the criminal courts:  

> ‘The most important part of effective participation is having an understanding. That’s having an understanding of the case that’s against them. Having an understanding of what everybody is saying about them and what the whole trial process is. I don’t feel that anybody can participate effectively if they don’t have a full understanding.’

Practitioners spoke of court users’ need to be informed about a number of interlinking matters, including the essential functions and nature of the justice system, and specific legal conventions and procedures:

> ‘For me, [participation] really means being able to understand what’s going on. I don’t mean that in the most basic sense. I think in Coroners’ Courts with inquests, you’re talking about an inquisitorial process. There are lots of rules in the Coroner’s court that lay people are not going to understand and appreciate.’ (Solicitor; coroners)

Some said that fundamental to being informed is an understanding of courtroom language, which can pose particular difficulties for laypeople (as has been widely documented elsewhere and will be considered also in Chapter Four):
‘For a court user, they need to have a basic understanding of what’s going to happen, which most people don’t. They’ve got to be able to understand the language that’s used. Basically, what’s happening and how it impacts upon them, whether that’s as a defendant or a witness or whoever. Because, I think, going into a court for someone who’s never been in a court, is probably like going somewhere where they speak a foreign language and you don’t speak that language … It is very alien.’ (Solicitor; crime)

Another necessary feature of informed participation was said to be that court users understand their own role within the judicial process, including what is expected of them and any limits to this:

‘Lay clients won’t always understand necessarily what they should do. For example, simple things like evidential matters. They won’t necessarily know what documents or what evidence they should be collecting if they don’t have a lawyer to advise them on that. Then, although they may actually in practice go to court and be in the hearing, they’re not really participating effectively if they aren’t aware of what they should be putting before the court.’ (Barrister; immigration)

**Participation entails: being represented**

A sizeable minority of respondents – more than one quarter – closely associated court user participation with *legal representation*. For example, when asked to describe what participation means, an usher in the criminal courts responded: “I think, a lot of the time, especially with criminal cases, [participation] will be through the representative, rather than through the defendant.” For these respondents, participation is problematic only where a party is unrepresented (or, perhaps, represented
poorly); conversely, a party who is represented is, by definition, deemed to participate, even if they are doing so indirectly via their lawyer.9

As discussed in Chapter Two, access to publicly funded legal representation varies widely depending on the type of case and lay party concerned. In line with this, it was possible to discern notable differences between jurisdictions in the extent to which practitioners associated participation with representation. Most notably, those practising in the ET – where legal representation is relatively uncommon – were less inclined to speak in these terms than practitioners from other jurisdictions:

‘Well it’s still the case that the vast majority of defendants are represented … Principally, you are relying upon their representative to have explained procedures, processes … As I say, because most people are represented, you are really focusing on their representative rather than on the defendant themselves.’ (Judge; crime)

‘[Court users] have to tell me their story. And, it is my job to make sure they can … It’s much easier if they’ve got legal representation.’ (Judge; immigration)

‘Without the benefit of having a legal advocate, I see parents floundering in court proceedings, not understanding the very basics of even attending at court.’ (Cafcass officer; family)

That the relationship between representation and participation is not entirely straightforward was alluded to by several practitioners, who pointed to the possibility that an advocate (or supporter) can get in the way of a party’s active engagement with proceedings. A probation officer commented: “[Defendants] don’t really get much to participate in actual court unless they’re not represented. Everything that they do at court tends to be via the intermediary or a solicitor.”
**Participation entails: being protected**

Around a quarter of respondents, including representatives from all jurisdictions, spoke of participation as being dependent upon the *protection of the court user’s well-being*. From this perspective, court users can participate effectively only if they feel safe and reasonably comfortable within the court environment and are protected from intimidation or excessive fear or distress. A legal advisor in the criminal courts described participation in the following terms:

‘getting the best quality evidence and experience from that particular witness, to present their best before the court, unhindered by, maybe, being too stressed, for example … I think the court should do its utmost to try and make it more palatable for people to come to court and give off their best.’

Some respondents were concerned with the impact on court users of the formalities of the court environment or the (usually) adversarial nature of proceedings. Others, speaking mostly about victims and witnesses in the criminal courts, or parties in the Family Court, spoke more about court users’ needs for protection from fear or intimidation. Also under the general theme of ‘protection’ were comments made about the importance of understanding and addressing court users’ physical, intellectual or mental health needs which have a bearing on their participation. In light of this, practitioners spoke frequently about adjustments to the court process (see Chapter Two for more detail on these) which can help lay users to participate in a protected manner:

‘We, as a bench … [need to] make sure that [witnesses] aren’t put under pressure with the questioning from either the defence advocate, or, indeed, the defendant put [under] undue pressure by repeated questioning from the prosecution.’ (Magistrate; crime)
'It’s important that [lay parties] do participate, and it’s important that the court makes whatever arrangements are necessary in order to enable them to do so. That goes for people with mental health difficulties, as well as the ordinary man in the street.’ (Judge; family)

Importantly, a number of practitioners argued that ‘being protected’ in some instances requires that the party or other individual does not participate in proceedings, particularly when it comes to children who are the subject of Family Court proceedings. Such children may sometimes meet the judge presiding over their case in chambers, but direct participation in proceedings was said to be rare, on the grounds that it is potentially harmful. Speaking about the potential role of the child where there are allegations of abuse, a Cafcass officer said:

‘By and large, it’d be emotionally quite damaging for the child to give evidence … It depends what other evidence the judge has against the potential perpetrator, and the after effect, the impact, that it would have on the child in terms of family relations; whether the child can emotionally deal with the magnitude of giving evidence against the perpetrator. So yes, there is an option there, but it’s carefully considered.’

**Participation entails: being managed**

Some respondents conceived participation as something to be managed by practitioners so as to avoid disruption of the court process or otherwise inappropriate behaviour. Participation was spoken of in these terms by around one fifth of respondents – largely court staff and members of the judiciary, perhaps reflecting the fact that they hold primary responsibility for ensuring the smooth running of proceedings. Underlying the notion that lay participation necessitates management were
some concerns about possible ‘over-participation’ by court
users who may be inclined to provide too much, or inappro-
priate, information:

‘I think it’s then more about how lay people are handled.
For instance, to be told in advance that they should
answer the questions put to them, and even though they
might have other things that they know, to be told that
[these things] aren’t necessarily relevant, would help.’
(Magistrate; crime)

‘I do feel [that participation is] very important, but
I think the court users’ understanding of participating is
not necessarily the same as the tribunal’s understanding,
because they’re not legally trained. They don’t neces-
sarily focus on relevant issues, they simply want to tell
you everything. Sometimes, it’s not necessary.’ (Judge;
immigration)

As the preceding quotations illustrate, ‘over-participation’
was often deemed to be borne out of a lack of understanding
of the court process. Accordingly, the need for ‘managed’
participation was sometimes referred to in discussions of
litigants in person (LiPs). Management of court users for
the sake of saving court time was another issue raised, as
by a magistrate in the criminal courts: ‘There’s always this
balance between people feeling they’ve had a fair hearing
and it needing to be managed … especially because these
days we are generally quite short of time.’ Other practitioners
spoke of the need to contain the heightened emotions that
are often an inherent feature of involvement in judicial
proceedings:

‘They want to participate and sometimes the only diffi-
culty is to make sure to keep them on the point, because
they can get very emotional.’ (Judge; other)
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‘I’ve also sat in one [hearing] where people have been kicking off, and a coroner has actually had to say, “Look, I’ve got two police officers here, giving evidence. I’ve got no qualms in getting you removed from my court.” It’s a balance, I think.’ (Support service; coroners)

Understandings of participation as something to be managed were often expressed with reference to court users whose participation is ‘obligatory’ (see Owusu-Bempah, 2017) rather than voluntarily entered into, such as defendants in the criminal courts. This was also the case with regard to the final conceptualisation of what participation entails: namely, that it is about presence.

**Participation entails: being present**

Participation was described by a minority of practitioners as essentially a matter of *being present* at the court or tribunal hearing:

‘If they don’t [participate the case] will be heard in their absence and it would more likely go against them than for them. It’s in their benefit to participate with the court.’ (Court usher; crime)

‘To actually be able to get there in terms of actually being able to access the building for whatever reasons, and also being able to get there in terms of that their needs are being met … So it’s actually being able to be there and be part of it.’ (Intermediary; family)

‘It’s still important for them to physically be in court and see what is happening, and understand what is happening … In fact, you participate by turning up.’ (Barrister; immigration)
If not made explicit (as in the last of the previous quotations), most comments about presence implied that this should be physical rather than via remote means such as video-link. Some respondents conceived of a court user’s presence as having an active dimension – on the basis that attendance at a hearing enables the individual to provide information to the court or be otherwise directly involved in proceedings. There is thus an overlap with the other understandings of participation as discussed earlier. For example, when describing what participation means, a family solicitor commented:

‘[If] they’re not present at the hearing, they don’t participate effectively … If they’re there, you can always gain instructions from them … The problem arises when they don’t engage with you before the hearing or after the hearing, because then that puts you on the back foot at the hearing. Or, if they’ve completely disengaged with you and they don’t turn up at the hearing, they can’t participate at all.’

Other comments focused on passive or minimal participation through presence, with reference to circumstances in which a court user is legally obliged to attend proceedings:

‘Defendants don’t have any choice than to engage in the judicial role because they are the people on trial for alleged criminal offences. So when you say to what extent they should engage, if they plead guilty then they’ve engaged to the extent that they’re going to be sentenced.’ (Legal advisor; crime)

‘Participation is almost a strange term to use because … the legal process is not about, if you like, bringing people together in some form of communicative exercise … To some extent the participants, many of them, may be unwilling participants, but they are essential and some
of them have no choice. For example, the defendant has no choice … He’s compelled. Witnesses are summoned.’ (Witness Service; crime)

In comments such as those just quoted, the meaning of participation was articulated in a weak sense: in terms of mere presence or legal obligation. Notions of the ‘managed’ court user likewise tend to imply a weaker form of participation than most perceptions of the participating court user as one who provides or elicits information, or is informed, represented or protected. This highlights how practitioners’ conceptions of participation may influence the extent to which participation is achieved in practice.

**Why does participation matter?**

This section of the chapter focuses on respondents’ understandings of the *functions* of participation. As noted earlier, there were four main aspects to this. First, respondents spoke of participation as being, in and of itself, the exercise of one’s legal rights; secondly, they described it as that which enables the court to make its decisions; thirdly, participation was said to have the function of legitimating the judicial process and outcomes; and, finally, there were references to the potential therapeutic value of participation. While the first of these understandings is of participation as an end in itself, the other three conceive of participation as having an instrumental value: that it is the means to achieving certain ends. These ends were understood to be, respectively, decision making, legitimacy and therapeutic benefits to the court user.

*Participation is the exercise of legal rights*

More than half of the respondents across jurisdictions and professional groups spoke of the act of participation in terms of the exercise of legal rights, including the right to a fair trial:
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‘[Participation] is a fundamental principle of our justice, isn’t it? I know we’ve got human rights legislation in place, but I think that any person who is facing a crime has their absolute right to be heard and participate in that hearing.’ (Legal advisor; crime)

Correspondingly, participation was said to imbue the court process with what some described as ‘fairness’:

‘[Participation] is essential, absolutely essential, yes. It goes to the basic tenet of justice must be seen to be done. If you’re made aware that someone doesn’t have the ability to follow the proceedings, whether it be because they don’t speak the language, whether they have some disability, whether they have a lack of ability to concentrate on matters or understand matters, then all those factors need to be taken into consideration in order to ensure that they have a fair trial … under Article 6 of the European Convention of Human Rights.’ (Judge; family)

As this quotation indicates, the notion that participation ensures a fair hearing also encompasses ideas about ‘equality of arms’. This was frequently commented upon with reference to the disadvantages faced by court users arising from such factors as language difficulties, emotional or mental health needs, or absence of legal representation. This was seen as especially pertinent in the context of the IAC, where appellants are challenging the state (and with potentially life or death consequences):

‘Where you have court proceedings where one side is always the government, the government comes to proceedings fully armed, or is capable of coming to the proceedings fully armed … So we have to do our best to make sure that there’s an equality of arms within court proceedings. Where one side has that built in advantage, it does mean that it is the other side that you’re looking
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after, but doing so in a neutral way … It’s very important they’re able to participate because without the participa-
tion, they don’t have the chance to present their [case].’
(Judge; immigration)

Although respondents often spoke passionately of participation as the exercise of legal rights, several also referred to the need to manage the lay user’s expectations of what this entails. For example, they referred to the problems that can arise when a court user equates exercising their legal rights with achieving their desired outcome:

‘The British justice system is not a search for the truth. That’s not what it is, that’s never been what it’s about … It’s, “Have we got enough evidence to convict this person?” That’s what it is and that’s a very different thing. People generally think it’s a search for the truth. They come and say that. I think they’re disappointed by that.’
(Solicitor; crime)

‘The old phrase: “I want my day in court.” Why? was always my question. Why? What do you think you’re really going to achieve? From your point of view, from anybody else’s point of view, do you really want to put yourself through that? And how will you feel if it doesn’t go the way you want it to?’
(Support service; family)

Participation enables decision making

Many respondents spoke of participation as having the essential function of allowing the judicial process to reach an outcome:

‘The whole system will not work unless all the parties are participating and fulfilling their role properly … I don’t think you’re going to get justice if they’re not. Quite simply. Because if you can’t get witnesses into court and
get them understanding what’s going on, you’ve got nobody to give evidence; if a defendant isn’t participating, he may, for example, plead not guilty when he should be pleading guilty … or the person may plead guilty when he’s not guilty.’ (Judge; crime)

As described in the previous section, most practitioners conceived of participation in terms of (among other things) the provision and elicitation of information. Comments on this theme often included references to the court’s need for the information in order to do its essential work of decision making:

‘The question, I suppose, you pose to yourself, as a judge, in any particular case is, “What’s going to help these parties give their best evidence so that you can reach the best decision and they can leave more confident that what they’ve experienced is justice?”’ (Judge; employment)

‘I think it’s important that [lay participants] are as engaged as they can be. As the professionals … We want to hear what they’ve got to say. We want them to give their best evidence. Particularly with family cases, we want to make sure that we’ve got all of the available information, so that the right decisions are being made in relation to the child who’s at the centre of it.’ (Legal advisor; family)

Decision making was said to be facilitated through participation by which court users were able to demonstrate their credibility or individuality. In this sense, participation was understood to have a ‘humanising’ quality. This was said to involve, for example, a jury being able to see and hear the testimony of witnesses before determining the verdict, a judge being able to directly interact with a litigant or defendant before reaching a decision or a legal practitioner meeting a child subject to
Family Court proceedings before representing their interests. Direct interaction with court users was said to be central to this:

‘I’m always surprised and taken aback by the number of cases that I will read on paper, and then when I actually get people into court and I hear them give evidence, my impression of them, my view of the case, can completely change. You need oral evidence and you need to put people in the best position to give it. If there is any view that this can become a paper exercise, that we can get rid of the adversarial system, I’m afraid I’m completely against that. My experience is that you’ve got to hear the evidence.’ (Judge; family)

‘[Early in my judicial career], I sat with a judge, and one of the first things he told me about sentencing was: “Never send anybody to prison unless you can look them in the eye when you do it.” It was a salutary lesson, and of course it’s not very easy to look someone in the eye on a video link. I understand all the cost pressures, and all the rest of it, but in my view he or she should be in court, where you see them and they see you.’ (Judge; other)

The last respondent quoted was not alone in raising concerns about the implications for participation (and thereby for court decision making) of the use of video-link technology; others, however, had contrasting views on remote attendance, as will be further discussed later.

**Participation legitimates the judicial process and outcomes**

Legitimacy is a complex and contested concept; however, broadly speaking, prominent scholars on the subject\(^\text{10}\) argue that in order for institutions to make and maintain a ‘valid’ claim to hold authority (see Bottoms and Tankebe, 2012), they need to be perceived as legitimate in the eyes of the citizens that
they serve. This is conceived both in terms of the presence of shared normative standards, or beliefs, between the authority and individual citizen and the extent to which the individual expresses consent for the authority – for example, by cooperating with it. Although they did not speak explicitly in these terms, almost half the respondents – and particularly members of the judiciary and court staff – indicated that they associated participation by court users with the users’ perceptions of the court’s authority as legitimate:

‘[Participation] makes all the difference in the world. You have court users participating, walking away from the court believing the case has been heard fairly whether they’re the defendant or whether they’re the participants in family cases. It’s very, very necessary that people have an understanding and a belief they’ve had their chance in court to either present the case, to defend the case or to simply explain why the situation has arisen.’ (Magistrate; crime)

Many respondents loosely articulated the principles of procedural justice theory, whereby ‘procedurally just’ treatment of court users helps to secure legitimacy. Tyler (2007) identified four aspects to procedural justice in a court setting: having a voice in the process; neutrality in decision making; respectful treatment; and trust. In particular, the importance of the court user’s voice within (the legal constraints of) the system was emphasised by a number of respondents, including a criminal solicitor: “Being able to participate is what makes it inherently fair because you’ve had your turn, you’ve had your voice heard, you’ve had fair play.” Crucially, it was also said that what matters to court users is not simply that they have a voice, but that their voice is listened to by those administering justice:

‘I think participation means being able to participate in every sense of the word and feel that you’ve had the
opportunity to do that as well … Everybody needs to have the opportunity to feel that they’ve been listened to. That’s the fairness of it, and because the decisions that are made are so important to people’s lives and the children’s lives.’ (Solicitor; family)

Some respondents placed special weight on respectful treatment, such as an employment judge who referred to: “A bit of dialogue, a calmness of manner, measured tone, courtesy, offering breaks, that’s all part of fairness. It’s a process.” This he described as “procedural fairness”, which he distinguished from “just a substantive fairness”. Others emphasised the importance of fair and equal treatment and, in line with procedural justice theory, suggested that perceptions of a fair process can even outweigh considerations of outcome:

‘Issues like equal treatment should be as important if not more important, frankly, than getting it right because that really deals with how, when somebody leaves the courtroom, they should feel that they’ve had a fair hearing. There should be no doubt in their mind that everything they wanted to say has been said. They shouldn’t have been cut off. They shouldn’t feel as though their evidence has been curtailed unfairly, that they’ve been bullied or cajoled.’ (Judge; immigration)

‘I think in the employment tribunals, to show that people have participated effectively, we want the two people walking away to feel like … they’ve been heard, and that whatever the outcome, they can accept it because they were able to fully participate in that process.’ (Solicitor; employment)

Where the process is not perceived as fair, it was also suggested, an individual might be less inclined to comply or engage with the legal system in future:
‘If [court users] didn’t feel that their contribution was listened to and welcomed, they wouldn’t be willing to repeat the experience if they were involved in another case … If somebody has something that they feel is relevant and might make a difference to the final outcome but their voice isn’t heard or their thoughts are not represented in any way, then that again could lead to frustration and, perhaps more importantly, a lack of faith in the court system.’ (Magistrate; crime)

The impact that perceptions of legitimacy can have on future cooperation and compliance with authorities has been a central concern of legitimacy scholars, who argue that those with a strong belief in the legitimacy of authorities and institutions are more likely to cooperate or comply with authorities in any future interactions (Tyler, 2007).

**Participation provides (potential) therapeutic benefits**

It has been shown that some respondents deemed participation to have a legitimating function, in that they assumed that the effectively participating court user was more likely to view the court process and outcome as fair. Closely overlapping with this perspective is the assumption that the court user who participates effectively (also) stands to benefit as an individual: that, in other words, participation potentially has therapeutic benefits. In the context of the legal system, ‘therapeutic’ can be understood to mean interactions that contribute to the court user’s well-being or are rehabilitative. As with ‘legitimacy’, respondents did not explicitly talk of ‘therapeutic’ functions, but a small number did speak in broad terms about individuals feeling ‘empowered’ or otherwise benefiting from participation:

‘[Lay users] have to participate because otherwise it’s very disempowering. They have to be part of it, they can’t be, sort of, dished out things.’ (Judge; immigration)
PARTICIPATION IN COURTS AND TRIBUNALS

‘It’s not the pieces of paper that make this scenario work, it’s the users themselves. So we are only providers of the tools, or the supports, to try and make that happen in as amicable a way as possible, but we are not the final resolution of the matter, because we will end; they will go on and they’d have to keep dealing with that issue.’

(Legal advisor; family)

Such perspectives accord with ‘therapeutic jurisprudence’ models of justice, which are concerned with the consequences for well-being of involvement in formal legal processes (see, for example, Wexler, 2000). Reflecting, in part, an emphasis in both on the importance of the individual’s ‘voice’ in judicial proceedings, there is a clear complementarity between procedural justice theory and therapeutic justice approaches (Kaiser and Holtfreter, 2016). The latter, however, are often focused on particular types of court or groups of court users.12 In this study, the therapeutic benefits of participation were sometimes discussed in general terms, regardless of jurisdiction or the nature of the individual’s role in proceedings; at other times, they were spoken of in relation to specific lay users or types of hearing. For example, it was suggested that a sentencing court’s consideration of a Victim Personal Statement13 provides for a form of participation that is therapeutic for victims of crime:

‘For the complainant it’s a step towards feeling, “I’m in charge on this occasion. I’ve been able to do it” … Especially if they’ve been the subject [of] sexual abuse, it gives them some closure, it gives them a sense of empowerment that they’ve actually been able to tell the [defendant] to their face what it’s meant to them. I think it’s very important from their point of view.’

(Judge; crime)

The potentially therapeutic benefits of participation were also described with reference to convicted offenders who,
post-sentence, are required to report back periodically to the court on their progress on drug treatment:

‘It’s really good to see how the magistrates – and they enjoy it – interact with the defendant at the same level. Some of the defendants will say “It’s the first time I’ve ever been given any positive feedback, ever.” To receive it from an authority figure is quite powerful, so encouraging participation in that way, I think, is really good.’ (Legal advisor; crime)

**Barriers to and facilitators of participation**

In addition to exploring practitioners’ understandings of participation as a concept, the research interviews probed respondents’ views on barriers to, and facilitators of, participation. The respondents often spoke at length and in detail about the range of intersecting factors that can limit participation, several of which were alluded to in the quotations set out in the preceding discussion. Many of the barriers identified by respondents have been examined in prior research (see Chapter Two), and were noted also through the observational research (to be reported in Chapter Four) – and will therefore not be examined in detail here.

In brief, however, the barriers to participation described by practitioners fell into three broad categories. The first of these were barriers said to arise from court users’ needs and vulnerabilities – including mental health problems, learning disabilities and communication needs, language barriers – and other associated forms of social disadvantage or cultural difference. Secondly, respondents spoke about what might be termed the ‘old’ barriers to participation: long-standing structural and cultural features of the justice system which impede court users’ engagement with it – such as its intimidating formality and architectural design, the complexities of legal language and processes, legal constraints on participation and limits
to ‘story-telling’, and endemic delays and inefficiencies. Thirdly, respondents referenced what can be characterised as ‘new’ barriers to participation: that is, factors impacting court users which arise from recent policy developments. As described in detail in Chapter Two, these include reduced public funding for legal representation, which has led to increased numbers of LiPs across much of the justice system, and reforms introduced under the HMCTS courts modernisation programme. In relation to the latter, many respondents had particular concerns about LiPs and some spoke at length about the large-scale court closures which have been seen in recent years. A related development under the courts modernisation programme is the expansion in use of remote methods of court attendance, particularly video-link. Since the time that the interviews took place, the COVID-19 pandemic has vastly (and unexpectedly) accelerated this development – in light of which, it is interesting to look in a little more depth at respondents’ comments on this theme.

**Remote court attendance**

Respondents had mixed and often nuanced views on the value and limits of virtual or remote participation. Their reservations tended to centre around two main issues. First, there were concerns about the perceived loss of interaction and the potential impact on participation. Some referred to the absence of body language, non-verbal cues or “human cues” (judge; employment) in video-enabled or telephone hearings; others commented that remote hearings prevented practitioners appreciating the “full picture” (magistrate; crime) of the case or individual concerned. Some alluded to the risk that court users may not be able to understand or fully engage with hearings attended remotely, which was said to be a particular issue for individuals with additional needs, such as those lacking literacy or technological skills, unrepresented parties, or those receiving the assistance of an interpreter. Court
user participation via video-link was sometimes described as highly constrained – such as in circumstances when the audio is muted because the court user is perceived to be disruptive (a clear illustration of ‘managed’ participation), or when the court user appearing by video-link is “present in the hearing but not [participating]” (barrister; crime).

A second set of reservations concerned the practical difficulties involved in video-enabled or other forms of remote participation. Those with experience of using video technology described a number of “glitches” (magistrate; crime), such as difficulties connecting, problems with sound quality and not all parties being present at the allotted time. Others raised concerns about maintaining a secure connection or the potential impact on confidentiality, such as when video consultations between defendants in custody and lawyers take place while a prison officer is sitting in the video-link room.

A range of participatory and practical considerations led one immigration judge to comment:

‘I spend a long time and put a lot of effort into making people be as at ease as they can … It can be small bits of your body language that helps them feel at ease. I take pride, I take professional pride in letting people give their best evidence. You cannot do that over a screen. You cannot. Humanity is required to let people give their best evidence and you cannot do that over the screen … Quite apart from the fact that I don’t believe it’ll ever work … I just don’t believe that the technology this side of five years is going to be good enough.’

However, positive comments were also made about remote hearings. Some respondents said that such hearings enable participation by court users who are otherwise unable, or would find it extremely difficult, to participate. There was support for the use of video-link as a special measure for vulnerable or intimidated court users, which facilitates ‘protected’
participation. An intermediary with experience of practising in the criminal courts described her experience of helping a defendant on the autism spectrum give evidence:

‘He struggled to speak in front of multiple people, and he also found it difficult to give eye contact … I supported the recommendation that he should leave the courtroom and go and give evidence via live link, because basically the difference was he [otherwise] couldn’t do it. He felt like he could not do it if he had to do it in a courtroom, sitting in the witness box, but he felt like he could do it if it was over video link and I was sat next to him.’

A small number of respondents commented that video-enabled participation helps to create a less formal environment in which direct interaction between practitioners and court users is made easier. The use of remote hearings was also spoken of positively in cases in which court users would have to travel very long distances, including from abroad, to give evidence or for those with medical conditions which make travel to court difficult. Remote attendance was said to be of value in “simple and straightforward” (judge; employment) cases, such as bail or case management hearings. For example, reference was made to regular use of telephone hearings for preliminary matters in the ET, and several criminal practitioners said that remote attendance from prison is useful when defendants might otherwise have to travel long distances to court in a prison van, or risk losing their current cell to another incoming prisoner.

Practitioners as facilitators

Perhaps one of the most salient findings from this study is that, when respondents were asked about how the participation of court users can be facilitated, they often spoke about the part that they themselves or other practitioners have to play in this. In other words, assisting or supporting participation – to
the extent that this is possible, within the various constraints referred to earlier – was seen by many to be central to the role of practitioners in the courtroom. (The other main source of support for participation was said to be the availability of special measures or adjustments for vulnerable court users, as discussed elsewhere in this volume, which were widely described in positive terms.)

This focus on facilitating participation was evident not only in comments from respondents in explicit support roles, such as intermediaries and representatives of agencies such as the Witness Service and Cafcass. Many other practitioners, including court staff and members of the judiciary, appeared to regard the provision of assistance with participation as integral to their work:

‘I will, if appropriate, give a little chat to a witness and say, ‘Look, this is what’s going to happen. This is what cross-examination is. It’s not going to be a punch-up. It’s not like TV.’ All of that, again, just to settle them down … There’s an awful lot that’s probably going on in the back of my brain thinking about, “How can I just ensure that this person has the best opportunity to do whatever they’re here to do?”’ (Judge; employment)

‘I always check what clients are aware of, and what they aren’t aware of. If there are any gaps in that information, I try and fill that gap, and to make them feel comfortable about that because if they’re unaware, or uncertain, or have difficulty understanding what’s going on, that clearly means that they don’t feel comfortable doing it.’ (Barrister; immigration)

There may have been an element of ‘interviewer effect’ (see Bryman, 2016) in respondents’ descriptions of their own endeavours to support court user participation. However, many spoke not only of the assistance they provide, but also
that offered by their peers, and of how practitioners work together to support participation:

‘Our clerks are very professional and friendly with the people that they encounter. We try and keep it as friendly as possible … We don’t always manage it, but we try and write [our judgments] in accessible English, not like a Chancery pleading out of Dickens … That level of courtesy, I would hope, is not unique to us by any stretch. I think that’s something you should do in all first-instance courts and tribunals.’ (Judge; employment)

‘I had a gentleman that was elderly and hard of hearing, so again, I would have addressed that with the solicitors, who then raised it with the bench, who then accepted that the individual wouldn’t have to stay standing and made sure that things were fully explained during that process. The solicitor was able to turn around and explain what was happening.’ (Liaison and diversion worker; crime)

Several respondents, including legal advisors themselves, said that providing help to LiPs was an important part of the legal advisor role, especially with the growth in numbers of unrepresented parties in the courts. This was described by one magistrate in the criminal courts as a “positive duty” of the role, and in the following manner by another respondent:

‘If they’re not offered the duty solicitor or it doesn’t fall within the ambit of the scheme, then the legal advisors will ultimately explain to them what the procedure is. I know that lots of legal advisors … will explain, “Well it’s not my job to tell you to plead guilty or not guilty, but if I explain the law and procedure to you, you can
make your own decision on it” … It’s changed our roles significantly, I think, because you’re more involved with [LiPs].’ (Legal advisor; family)

Some practitioners were said to go “over and above” (magistrate; crime) or “out of their way” (solicitor; employment) in their efforts to facilitate participation and to act as a bridge between an otherwise complex, intimidating system and the individual appearing within it:

‘I can spend as much time with [bereaved family members] as I like. That will be around explaining what the court is about, having advice sheets for them … meeting them, talking over what the purpose is, talking about their role in helping the coroner, so that they feel as comfortable as possible when it comes to actually being physically in the court. I think there’s a lot of information available, but there’s a lot of human contact as well.’ (Solicitor; coroners)

It was also suggested that the emphasis on inclusion and supporting court users is something of a recent trend. A judge in the criminal courts commented, “We’ve tended to have gone from the aloof, stuffy sort of judge approach to a more inclusive approach, a more sort of user-friendly approach, if you like,” while a trade union representative (with experience of the ET) said:

‘A few years back there would have been some judges who were a little old fashioned, is a polite way to put it, [laughter] and yes, maybe not quite as sensitive to diversity issues as they might have been. Genuinely, I think that’s changed. There’s been a lot of training put in for the tribunals, for judges and lay members, to make sure that people are aware.’
The efforts made to bridge the, sometimes substantial, gap between the system and individual court users are evidently not without personal cost to the practitioners. In interview, respondents were asked if their or their colleagues’ well-being was affected by their work. In response, many spoke of the impact on themselves or their peers of the most serious or distressing cases, and particularly of hearing evidence about physical or sexual abuse or other trauma:\(^{19}\)

‘I know that there is a fear, and there is some evidence, that some judges who have had a constant diet of very serious sexual offences cases have felt that it has affected them psychologically and have had to take time off work.’ (Judge; crime)

‘If you are dealing with and speaking to people who have been through significant trauma, I mean you’re speaking to people sometimes who are describing details of torture and it’s very severe … I’m not a psychologist, but I imagine it is going to affect people.’ (Barrister; immigration)

Respondents also spoke of the impact of other aspects of their role, and interactions with lay users, on their well-being. Some referred to the emotional or psychological repercussions – particularly for members of the judiciary – of making life-changing decisions about individuals. There was also discussion of difficult working conditions within the courts and tribunals, associated with high caseloads or regular interaction with highly distressed or agitated court users:

‘Particularly in care cases when you’ve had maybe a protracted hearing: you’ve had parents who’ve got their own vulnerabilities but that, sadly, aren’t able to provide good enough parenting. So you’re then looking at a decision to remove that child permanently from their care.'
That’s an enormous decision for magistrates and one which does affect them and does affect the legal advisor giving that advice, I think. It’s always countered by the fact that that is the job that you signed up for and the job that you have to do. I think it would be wrong to say that it has no effect on you.’ (Legal advisor; family)

‘In the cases I deal with, because of the pressure on funding, I very, very rarely have a solicitor with me at court … So, not only do I have to deal with the legal arguments and the court and everything else, but I’m also having to do all the hand-holding with the clients, which can be incredibly stressful. I had a case … where I found [my client] huddled in a corner, in enormous distress after he’d given evidence. I had to call a halt to proceedings, and I had to get someone from my solicitors’ office to come down and help take him to a psychiatric hospital … Obviously you go home from work, and you can’t just forget about that.’ (Barrister; employment)

**Conclusion**

This chapter has examined how court user participation is understood by practitioners immersed in the ‘social world’ (see Rock, 1993) of courts and tribunals. The study findings point to the multifaceted nature of participation. Participation was variously said to be a matter of providing and eliciting information for the court; being informed; being legally represented; being protected; being managed; and being present. Its functions were described in terms of the exercise of legal rights; enabling court decision making; legitimation of court processes and outcomes; and potential therapeutic benefits. Practitioners’ conceptualisations of what participation entails, and why it matters, are interlinked and overlapping. An important finding of this research is that participation was described in similar terms,
albeit to various degrees, by respondents in different professional groups and from different jurisdictions – demonstrating the value of adopting a cross-jurisdictional approach to researching this phenomenon and considering the policy implications. This chapter has highlighted the various barriers, both ‘old’ and ‘new’, to participation and has shown that its facilitation is widely regarded as integral to the role of practitioners in the courtroom. Nevertheless, as will be illustrated in the chapter that follows, there appears to be a gap between practitioners’ understandings of participation and its empirical realities.

Notes

1 Additional assistance with recruitment was provided by a steering group and judicial reference group established for the project, and – with regard to the fieldwork conducted in Wales – by the Commission on Justice in Wales, which was set up by the Welsh Government and was undertaking a review of the justice system in Wales (2019) which coincided with the fieldwork for this project.

2 Since the time of the research, the Personal Support Unit, which provides assistance to litigants-in-person, has been renamed Support Through Court.

3 Specifically, trade union officials with experience of supporting ET claimants.

4 Intermediaries facilitate communication in court, whether on a statutory basis (acting as Registered Intermediaries for witnesses in criminal cases) or as part of a non-statutory service (assisting defendants in criminal cases or parties or witnesses in the Family Court).

5 For an analysis of the conceptual distinction between courts and tribunals through the lens of participation, see McKeever (2020). In this article, McKeever argues that, contrary to the assumption that tribunals are more likely to be participatory than the courts, there exists a spectrum of adjudication whereby some courts and tribunals are more participatory than others.

6 This corresponds with Kirby’s (2019) conceptualisation of participation as concerning the degree to which a lay user understands and expresses themselves within proceedings.

7 In all instances where a respondent practised in more than one jurisdiction, as was the case for this interviewee, only the primary jurisdiction is referenced.
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8 See, for example, Jacobson et al (2015), JUSTICE (2019) and McKeever (2020).

9 For a critical analysis of the extent to which legal representation acts as a ‘proxy’ form of participation, see Owusu-Bempah (2018). Similarly, McKeever (2020) describes the ways in which representation can both facilitate, and act as a barrier to, participation.


11 And corresponding with McKeever’s assertion that ‘participation is an intrinsic part of procedural justice’ (2020).

12 For example, therapeutic jurisprudence has informed the development of specialist courts such as drug or domestic violence courts (Bowen and Whitehead, 2016), and has influenced developments in coroners’ courts in some jurisdictions (Freckelton, 2007).

13 A Victim Personal Statement is a victim’s account of how they have been affected by the offence; where the offender is convicted, the statement may be read out in court at the sentencing hearing – sometimes by the victim themselves (www.gov.uk/government/publications/victim-personal-statement).

14 See, for example, Carlen (1976), Mulcahy (2013), Kirby (2017) and Mulcahy and Rowden (2019).

15 See, for example, Jacobson et al (2015), JUSTICE (2019) and McKeever (2020).


19 For a recent review of the impact of ‘vicarious’ or ‘secondary trauma’ on practitioner well-being, see James (2020).

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