4. Observed Realities of Participation

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Observed Realities of Participation

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Introduction

The preceding chapters of this volume have discussed policy and practitioner perspectives on the legal principle that lay people should participate effectively in the judicial proceedings that concern them. This chapter is concerned with participation in practice, as observed by the research team across the range of courts and tribunals that are the focus of the study. After a short methodological note on the conduct of the observations, the chapter reports on differences between the variety of judicial settings, in terms of the institutional parameters of lay participation. This is followed by consideration of the commonalities across the settings. Here, it is argued that at the heart of almost every case observed by the researchers was a story of conflict, loss and disadvantage; and each lay court user’s ‘participation’ in the case could be understood as a process by which they told, or had told on their behalf, their own version of that story. The final part of the chapter describes how judicial proceedings did not simply entail the telling of the court users’ stories, but also their translation into legal questions and legal answers – and
how this was a process which often had the effect of silencing and marginalising court users.

Observing court proceedings

The research team conducted a total of 316 hours’ observation over the course of 90 visits to 17 venues covering the Crown Court, magistrates’ courts, Family Court Employment Tribunal (ET) and First-tier Tribunal (Immigration and Asylum Chamber) (IAC). The venues were located across the three cities – one in Wales, two in England – and surrounding areas which had been selected as the main fieldwork sites (see Chapter One). During the visits, the researchers observed a total of 339 hearings in full or part, at which a total of 430 lay court users (witnesses or parties) were in attendance (see Box 4.1 for more details).

Box 4.1: Observations and court users

Crown Court

- 70 hours’ observations over 20 visits to three centres;
- 69 hearings observed with 77 lay court users attending: 72 defendants (three unrepresented); five witnesses;
- characteristics of the 77 court users, as recorded by observers:
  - 70 male; seven female;
  - 62 white; thirteen BAME; two ethnicity unknown;
  - 58 British nationality; six non-British nationality; 13 nationality unknown.

Magistrates’ courts

- 97 hours’ observations over 24 visits to three courts;
- 180 hearings observed with 187 lay court users attending: 184 defendants (24 unrepresented); three witnesses;
- characteristics of the 187 court users, as recorded by observers:
  - 152 male; 32 female;
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- 147 white; 39 BAME; one ethnicity unknown;
- 160 British nationality; 18 non-British nationality; nine nationality unknown.

Family Court

- 59 hours’ observations over 18 visits to three hearing centres;
- 34 hearings (12 public law; 22 private law) observed with 64 lay court users attending: 59 parties (24 unrepresented); five witnesses/intervenors;
- characteristics of the 64 court users, as recorded by observers:*
  - 29 male; 35 female;
  - 52 white; 11 BAME; one ethnicity unknown;
  - 52 British nationality; four non-British nationality; eight nationality unknown.

Employment Tribunal

- 49 hours’ observations over 13 visits to four hearing centres;
- 17 hearings observed with 35 lay court users attending: 17 claimants (14 unrepresented); three respondents (one unrepresented); 15 witnesses;
- characteristics of the 35 court users, as recorded by observers:*
  - 23 male; 12 female;
  - 30 white; four BAME; one ethnicity unknown;
  - 31 British nationality; four non-British nationality.

Immigration and Asylum Tribunal

- 41 hours’ observations over 13 visits to four hearing centres;
- 39 hearings observed with 67 lay court users attending: 42 appellants (five unrepresented); four sponsors; 21 witnesses;
- characteristics of the 67 court users, as recorded by observers:*
  - 34 male; 33 female;
  - Nationalities: Afghani (eight), Indian (eight), Nigerian (six), British (five), Iraqi (four), Nepali (three), Rwandan (three), Bangladeshi (two), Chinese (two), Ghanaian (two), Ukrainian (two), US (two), Burundi (one), Dominican Republic (1), Iranian (1), Irish (1), Kenyan (1), Pakistani (1), Somali (1), Sri Lankan (1), Venezuelan (1), unknown (11).

* Gender, ethnicity and nationality were assessed on the basis of observed characteristics when they were not explicitly referred to in court.
In conducting the observations, the researchers usually sat in the public gallery of the court or tribunal room, or were sometimes directed by court staff to sit in sections designated for press or officials. Specific types of case or hearing were not targeted, but the researchers sought to attend a range of proceedings while concentrating as far as possible on those at which lay people were present and – where applicable – likely to give evidence. The researchers took detailed contemporaneous notes of proceedings (mostly by hand and subsequently typed up), guided by a template. The template prompted the recording of lay participants’ backgrounds, characteristics, demeanour and interaction with the court during proceedings. Also recorded were substantive issues addressed in the hearing; the courtroom’s physical lay-out and environment; the way practitioners presented and expressed themselves; presence or absence of legal representation, interpreters and supporters of the parties; and features of the case, such as adjustments for vulnerability.

The reported observations are necessarily subjective. They comprise a series of snapshots of proceedings, based on what was said in open court during the observations, and the researchers’ interpretation of the behaviours of the (lay and professional) participants. Participants’ views or background information on the cases were not collected (although occasionally practitioners provided unsolicited information\(^1\)), and the researchers were very often unaware of the case outcomes. Nevertheless, the advantage of observation as a research method lies in the richness of the data which derive from an activity that ‘goes beyond just seeing’ to include also ‘hearing and listening to, not just talk, but soundscapes’, and maintains ‘a sensitivity to physical environments and material things’ (Atkinson, 2015: 40). Further, the researchers’ use of a detailed template ensured that the observations were conducted as consistently and systematically as possible.\(^2\)

As noted in Chapter One, this volume is being completed at a time of rapid expansion in the use of remote methods for court attendance, in response to the COVID-19 pandemic. The
observational research provided only limited insight into the implications for participation of remote court attendance, since this was a feature of very few of the observed cases: just 15 of the defendants, and one witness, appeared by video-link in the observed criminal cases, while one party in the Family Court was meant to appear by video-link, but withdrew at the start of the hearing. However, brief consideration is given to this issue in the final section of the chapter, on ‘Translation and disconnection’.

Institutional parameters of participation

It was immediately clear to the observers that the role of the lay court user in judicial proceedings varies greatly according to the jurisdiction to which the case belongs, the type of hearing within that jurisdiction and the court user’s role or legal status. These intersect with a number of other factors setting the parameters of court users’ participation, including:

- the kinds of parties (for example, individuals, corporate entities, the state) involved;
- the extent to which court users have elected to take part (such as ET claimants) or have no choice (as with defendants in criminal proceedings);
- the stake court users have in the outcome (which could be as significant as their liberty, access to their children or right to stay in the country; or could be minimal, as for witnesses with no sense of personal involvement in the case);
- whether parties are legally represented;
- rules of evidence;
- the degree of adversarialism of the process;³
- size, elaborateness and physical lay-out of venue in which the hearing is held.

The accounts in Box 4.2 illustrate the range of institutional factors which can shape a court user’s participation. Each of
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these six hearings involved a lay party who had a different formal status and role: a bailed defendant on trial; a detained defendant pleading guilty and being sentenced; a parent in a contact dispute with his ex-partner; a parent in contested care proceedings; a migrant appealing against a refused asylum claim; and an ex-employee claiming unfair dismissal. Some of the cases additionally involved laypeople as witnesses, such as the two company employees who attended the ET hearing. The summaries also give some sense of the varied personal and social circumstances in relation to which the individuals found themselves caught up in judicial proceedings, and with which the court had to grapple in determining the outcome.

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**Box 4.2: Summaries of observed hearings**

**Case 1: Defendant giving evidence in sexual offence trial in Crown Court**

Having been charged with sexually assaulting a much younger, female relative-by-marriage, the 58-year-old (bailed) defendant was appearing for trial in the Crown Court. The courtroom was ornate and imposing, with extensive wooden panelling, purple drapes, arched windows and a domed ceiling; it was one of many such courtrooms in a vast, Grade I-listed courthouse.

The defendant responded in a confident manner when taken through his evidence-in-chief by his defence counsel, and then during cross-examination when repeatedly pressed about his relationship with the complainant and the language he used (such as “Hello, Sexy”) in exchanges with her on social media: “… None whatsoever … I would never do that … A complete fabrication …” At the end of the day, with the trial due to continue the next, he left the courtroom with two family members who had been sitting in the public gallery.

**Case 2: Defendant sentenced for theft in magistrates’ court**

The defendant was brought to the magistrates’ court from police custody, charged with five counts of theft of clothing, food and some other items from various shops. He sat quietly in the glass-screened dock in the large, modern courtroom, as his defence solicitor agreed
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with the prosecution that, due to his severe drug habit, he had “an awful criminal record; I’d go so far as to say horrendous”. The defendant spoke from the dock at the outset of proceedings to give his guilty plea, and at the end to confirm he understood his sentence (five short, concurrent custodial terms) and the arrangements for paying compensation. During a break in proceedings, he shared a joke with the two dock officers, at which all three laughed.

Case 3: Applicant father at interim hearing in the Family Court

A father had applied for contact with his 6-year-old daughter; she was living with his ex-partner, who did not attend the hearing. It took place in a small room that had the appearance of a personal office more than a courtroom, in which the District Judge (DJ) sat at a slightly raised, long desk, facing two advocates’ benches. The room looked newly refurbished, in contrast to other parts of the court building: a civil justice centre situated in a side street, the shabby entrance to which could be easily overlooked from the outside.

The father, representing himself, spoke emotionally but eloquently about his daughter. At the end of the hearing, the DJ said that although she was currently unable to reach a decision – while another case involving the applicant and a different child and ex-partner was pending – she was pleased that the hearing had gone ahead as it had been “helpful … to discuss it with everyone able to contribute”. The father said “thank you”, gathered up his papers into a plastic folder and left the courtroom.

Case 4: Respondent mother in contested care proceedings in the Family Court

In a large, modern courtroom, brightly lit through a floor-to-ceiling window taking up most of one wall, three long advocates’ benches were populated by eight professionals: all women, all formally dressed. They included Cafcass (Children and Family Court Advisory and Support Service) officers, a local authority social worker and lawyers for all parties. The mother sat on her own on a fourth bench, until – some way into the hearing – the judge asked her to move forward.

A ‘surveillance operative’ was sworn in as a witness for the local authority and gave minutely detailed evidence about his and two colleagues’ observations of the mother’s movements on a day on which she had had permitted contact with her toddler son (currently in foster care). At issue was whether she had taken her son to visit her ex-partner who was believed to pose a risk to the boy. She later gave evidence herself
and was cross-examined by the local authority lawyer who repeatedly accused her of lying. After the judge then ruled against her – stating the threshold was met for a care order – she continued to sit in silence for a few minutes, before abruptly getting up and leaving the courtroom without speaking to anyone.

Case 5: Appellant in asylum case in the IAC

An Iraqi Kurd who had been in the UK for the past ten years was appealing against a Home Office decision to refuse his protection claim. The hearing centre in which the case was heard was a characterless office block in a business park on the outskirts of a small provincial city.

In the small courtroom, the discussion between the Home Office Presenting Officer (HOPO), the appellant (through an interpreter), his lawyer and the judge covered various contested issues, including the appellant’s lack of contact with family in Iraq; whether and how he might access identity documents from the Iraqi authorities; and his hand-to-mouth existence in the UK, dependent on the charity of a friend and the local Kurdish community. At the end of the hearing, after the judge said he was reserving his decision, the appellant anxiously pressed into his lawyer’s hands a bundle of photocopied news reports on the deaths of people returned to Iraq, but both the lawyer and judge told him these were not relevant to the case.

Case 6: Claimant in unfair dismissal hearing in the ET

The unrepresented claimant was arguing that she had been unfairly dismissed by the large company for which she had worked for 26 years, latterly in a supervisory role. The hearing was held in a narrow, L-shaped courtroom on the second floor of a purpose-built, recently opened civil justice centre.

On day one of what was scheduled to be a two-day hearing, the claimant gave evidence and was cross-examined by the respondent company’s barrister. The claimant then cross-examined two ex-colleagues appearing as witnesses for the company. Saying to the claimant that he “wanted to be fair because you are unrepresented”, the judge offered explanations for technical terms that were being used; reworded as questions some comments she made to the witnesses (“I’m being [the claimant] for a minute,” the judge said, before posing the questions); and checked with her that she had covered everything she needed to.
The diversity of modes and circumstances of participation reflected in the Box 4.2 summaries – which, across the full sample of observed cases, was multiplied many times over – does not render meaningless a generic concept of participation. Cross-cutting the jurisdictional and other divides, many commonalities to the hearings, and to the part played by laypeople within them, were noted. In line with the qualitative approach taken to the study as a whole, common features of the observed cases were not quantified. However, the snapshots of proceedings can be combined to create an overall picture of court user participation – to be presented over the remainder of this chapter.

**Observed commonalities: stories of conflict, loss and disadvantage**

Formal court and tribunal proceedings – including those in all the settings examined for this study – generally have as their immediate function the adjudication of disputes; albeit the performance of this function can be understood as of a much broader, ‘symbolic’ process whereby the ‘rules’ of wider society are stated, considered and refined (Steele, 1984: 202). The hearings observed by the researchers variously involved the adjudication of disputes between individuals, individuals and the state, or individuals and corporate entities. The stage of the adjudication process likewise varied widely – with many cases being at early, preparatory stages; others at a core decision-making stage; and others in a post-adjudication phase. But at issue in every case was a set of claims, and usually counter-claims, about harmful, unlawful, unfair or otherwise inappropriate behaviours or practices by one or more of the parties. Thus, what all hearings had in common was that they addressed situations in which the law had entered people’s lives because ‘the fabric of ordinary interactions [was] ruptured’ (Ewick and Silbey, 1998: 77); or, to put it another way, they concerned circumstances and events gone wrong. It was also clear that the
vast majority of cases involved individuals who were in need or disadvantaged in some way. Accordingly, almost every case had at its heart a story of conflict, loss and disadvantage; and each lay court user’s ‘participation’ in the case could be understood as a process by which they told, or had told on their behalf, their own version of that story.

**Conflict**

In the court hearings observed for this study, the researchers saw the law being ‘performed’ so as to ‘represent and replay social conflict and violence, turning history into dramatic narrative, fictionalizing social trauma, transforming it into the system of social representations, exchanges, surrogacies that make up the law’ (Peters, 2008: 185). The final section of this chapter discusses the implications of this ‘transformation’ – or what is referred to here as ‘translation’ – of conflict, and associated violence and trauma, into legal questions and answers. But what is the nature of the conflict itself?

In the observed cases, the conflict underlying the claims and counter-claims being tested in court tended to be complex, multifaceted and entrenched. The ET’s formal description of itself as ‘an independent tribunal which makes decisions in legal disputes around employment law’ gives little sense of the scope of human drama and trauma that the disputes here frequently incorporate. One claimant, on day 11 of what was scheduled as a 15-day hearing of her claim of unfair dismissal as a school head, gave evidence about what she described as an ‘agenda’ among many of the school’s governors and staff to force her out of her post. This, she said, followed disputes among staff, governors and the local authority about how the school was run, and child protection concerns she herself had raised. For their part, two witnesses appearing on behalf of the local authority described a long-running process involving disciplinary proceedings against the claimant, suspension and two appeals. Elsewhere,
at a preliminary hearing, an ET judge argued that judicial mediation ‘behind kind, closed doors’ – a form of alternative dispute resolution – was the best option for addressing a claim of race discrimination. Both sides ultimately agreed to this, but not before the self-represented claimant, a Polish national, had insistently set out his case. When asked by the judge what he wanted, he said: “I want someone like you to listen to my story about what happened; I want them to apologise; I want justice.” He described his former employment as a garage technician in which, he said, he had been subjected to racist comments (repeatedly dismissed as “banter”), accusations that his Polish qualification was fake and more general poor treatment – after several months of which he quit the job. The employer had thereafter instituted civil proceedings, claiming he had been overpaid and had taken annual leave without entitlement.

Many of the observed IAC hearings were appeals against Home Office decisions to refuse protection (or asylum) claims. In such cases, appellants’ arguments typically centred on their experiences of actual or threatened extreme violence and persecution, often in the context of globalised conflicts and civil strife. For the observer, there was a marked incongruity between the usually muted ambience and anonymous setting of the tribunal and the discussion of places and unfolding humanitarian disasters that are otherwise familiar from international news reports. These hearings included that of a young Kurdish Iraqi man who, speaking through an interpreter, spoke of his father having been killed fighting for the Peshmerga (Kurdish militia), the demolition of his hometown by militant groups and threats he had personally received from ISIS. He had travelled to the UK, he said, in “a sealed vehicle, like a lorry, no windows; we couldn’t see anything” and another vehicle “like a fridge-freezer lorry”. The Home Office disputed his claim that his father had been a Peshmerga, and proposed his relocation to an area of Iraqi Kurdistan reported to be ‘stable’ and ‘virtually
violence free’.

Another IAC appellant was a member of Afghanistan’s marginalised Hazara community; he said he had been persecuted and imprisoned by the Afghan authorities following a legal dispute, and his brother had been killed. A woman from Rwanda told the IAC that her prior political activities would put her at risk if she was to return to the country. Through an interpreter, she said: “There’s no peace in my country. My husband is in jail, one of my children is in jail … I don’t have a job; they’ve taken my business; they’ve frozen my accounts.” The Home Office argued, in response, that she was fleeing tax evasion charges, not persecution, in her home country.

The non-asylum hearings that were observed in the IAC did not address the kinds of extreme circumstances that were at the heart of asylum claims, but most nevertheless brought complex personal struggles and conflicts into view. Cases revolved around evidence put forward by appellants about family pressures and tensions, severe financial needs and health problems of many kinds. (As will be discussed later under the heading ‘Loss and disadvantage’, these were recurring themes across all the judicial settings visited.) At issue in several cases were Home Office allegations of sham marriages for immigration purposes, and of cheating (for example, through use of proxies) in the English language test required for visa extensions5 – allegations strenuously denied by the appellants.

In the Family Court, the playing out of especially bitter and protracted conflicts was observed. In private law cases, these were typically disputes between estranged parents over contact or residence arrangements for their children. Allegations of serious domestic violence frequently formed part of these cases – demonstrating also the close interconnectedness between different parts of the justice system. Not only in family cases, but also in the course of ET and IAC hearings, references to criminal convictions or allegations
were noted; and some of the observed defendants in the criminal courts were simultaneously embroiled in immigration or family proceedings.

**Loss and disadvantage**

The researchers found that the disputes adjudicated in courts and tribunals usually had their roots in, or at least had emerged in the context of, circumstances of loss and disadvantage. These circumstances encompassed very much more than the individual-level ‘vulnerabilities’ that are the main focus of special measures and other such provision for court users (discussed elsewhere in this volume). Among the wide array of court users’ individual, socio-cultural and structural needs were those arising from: mental health problems; learning and behavioural difficulties; substance misuse; physical illness and disability; family and relationship breakdown; childhood trauma; bereavement; poverty; homelessness; prior offending or imprisonment; and prior experiences of discrimination, persecution and other forms of victimisation. For the most part, different forms of need and loss converged in individuals’ lives, producing ‘multiple layers of disadvantage’ as have else-where been documented with regard to children in custody (Jacobson et al, 2010).

Multi-layered disadvantage was especially apparent with regard to the defendants appearing in many of the observed criminal cases. In case after case in the magistrates’ courts, defendants charged with offences such as assault, theft and criminal damage were said to have profound, intersecting needs, including mental health and drug or alcohol problems, and chaotic and disorderly ways of living. In many cases of interpersonal offending, particularly violence, it was apparent that the contexts of the (alleged) offending encompassed victims and witnesses with comparable needs to those of the defendants.
Cases in which defendants were already in custody or another form of detention when charged with the offence provide a vivid illustration of the emergence of criminal proceedings from circumstances of loss and disadvantage. In these instances, the current case originated at a point at which the defendants had already lost their liberty. Among defendants observed in this situation was a woman being sentenced for assaulting a nurse in the psychiatric hospital where she was detained. In the same magistrates’ court, a man pleaded not guilty over video-link from the prison where he was serving a prior sentence; he was charged with assaulting a prison officer whom he was said to have spat at. Elsewhere, another serving prisoner faced a charge of common assault on a prison officer – the offence having allegedly occurred when the officer entered his cell after he had failed a drugs test. He had originally been sentenced to imprisonment for public protection (IPP), and at the time of his court appearance had been in prison for more than ten years beyond the original 27-month minimum term he had received. While at court, he initially refused to leave the cells in the basement of the building or to talk to his solicitor. In the courtroom, the district judge and defence advocate discussed the case: “He’s a very difficult person as you’ve probably picked up this morning,” the lawyer commented, adding: “I’ve failed to establish any rapport with this gentleman, which is unusual for me.” The judge sympathised with the lawyer and observed that the defendant “knows he’s playing the system … Game-playing: that’s all it is.”

In the course of care proceedings in the Family Court, as in criminal cases, concentrations of deep-seated needs and disadvantage in individual lives were laid bare. A circuit judge in one hearing centre dealt in quick succession with two such cases. In each case, the mother opposed the local authority’s application for a care order with regard to a baby; in each case, also, many older siblings of the baby had already been removed from the mother’s care. The local authorities had brought to the
court’s attention wide-ranging concerns about each mother’s drug abuse and poor mental health, as well as domestic violence, emotional abuse and neglect of the children, and other problems (including a past allegation of sexual abuse) in the respective extended families.

Whether in criminal or family courts or in tribunals, the researchers found that court users’ backgrounds of loss and disadvantage were usually integral to the substantive matter being considered in the proceedings: forming part of, for example, pleas in mitigation in the criminal courts that pointed to defendants’ reduced culpability on grounds of mental ill health; arguments in the Family Court that parents lacked the ability to care properly for their children; claims of disability discrimination in the ET; and appeals against deportation to life-threatening situations in the IAC. Beyond this, the court process itself often had the effect of throwing court users’ losses and disadvantages into ever sharper relief. It was apparent across the fieldwork settings that social, psychological, cognitive, emotional and other needs and vulnerabilities not only impeded court users’ capacity to engage effectively with court proceedings, but were also heightened or exacerbated by the fact and nature of the individuals’ involvement in those proceedings. (Discussion on ‘Translation and disconnection’, later, returns to this theme.) Thus, as has been previously suggested with regard specifically to the criminal courts, ‘the courtroom is host not only to “vulnerable people”, but also “vulnerable moments”’ (Jacobson, 2018: 225).

If the disputes adjudicated in court had often arisen in circumstances of loss and disadvantage, it was also clear that the outcomes of the cases could consolidate or give rise to further disadvantage. Of course, the court and tribunal cases also offered the hope – and sometimes the reality – of redress for harms experienced and losses already incurred. For example, claimants in the ET could secure financial compensation or get their old jobs back; victims in the criminal courts could see
offenders held to account for wrong-doing; and some parents in the Family Court stood to renew contact with or care for their children. Often, however, prospective losses were likely to outweigh any prospective gains.

For most of the court users (excluding those appearing as witnesses with little or no personal interest in the case), what was at stake in the proceedings was of great significance in their lives. In the criminal courts, many defendants faced losing their liberty, should they be remanded or sentenced to custody. (Or, in the case of the defendant on an IPP sentence referred to earlier, a conviction would even further diminish the likelihood of release on parole at an undefined point in the future.) Defendants also faced other potential losses: restrictions on their freedom resulting from community penalties; financial loss if they were fined; and reputational damage. The last of these was of particular relevance in one hearing in which – in sharp contrast to the other observed court users – the defendant was exceptionally privileged: this was the high profile Crown Court trial of a celebrity charged with assault. In the Family Court, the stakes could be higher still: a life with or without one’s children. A mother who was appealing against a previous decision by magistrates that she could have no direct contact with her two teenage sons – currently living with their father and his new wife – pleaded with the judge: “Give us a chance to be a family. Give me a chance to be with my children.” But despite her claims as to the cruel behaviour of her ex-husband (“an imbecile” who had done “a hatchet job to get me and my family out of his life”), she lost the case: the judge determined that the existing (no contact) arrangements should continue, and passed an order preventing her from making further applications without permission from the court “because I am satisfied that both parties need a break from litigation”.

In the IAC, it was their lives in the UK (and associated family ties and relative stability or safety) that appellants were striving to hold on to. This was a life which, one young woman from
India explained in appealing a Home Office decision to refuse her leave to remain, encompassed her marriage, house, recent birth of her baby and job for a clothing company. A Ukrainian husband and wife, who had been detained following their failure to comply with previous removal orders, applied for bail and appealed against the deportation. The wife became distressed and started crying when giving evidence and talking about the practical, domestic matters she needed to deal with – including arranging care for her cat, which had been left alone in their flat since their detention. Her husband responded scornfully when asked if he would appeal the removal decision when he was back in Ukraine, asserting that this would be like ‘appealing to God when dead’. In an out-of-country appeal against refusal of leave to remain, by an elderly woman in Venezuela, the appellant’s daughter acted as her ‘sponsor’ and gave evidence at the tribunal. She sobbed as she described her mother’s deteriorating health following a series of strokes, and spoke of the inadequacies of the available health care in Venezuela. When asked how she would care for her mother in the UK, she replied: “Physical, emotional – I will look after her in every sense.”

**Telling the stories of conflict, loss and disadvantage**

Thus far, this chapter has highlighted the commonalities across the cases observed in a wide range of judicial settings. It has been argued that these cases – whatever their diverse origins, nature and functions – concerned circumstances and events gone wrong; and that accordingly all cases had at their heart a story of conflict, loss and disadvantage. Most proceedings entailed the telling of competing versions of the story by the parties to the case and the assessment by the court or tribunal of which of the versions had the greater credibility or pertinence to the matters at hand. It was on this basis that the outcome of the case could be determined: whether this
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was a decision to continue or cease proceedings; to grant or dismiss a claim, appeal or application; to convict or acquit a defendant; or to pass one sentence or another on a convicted offender. The essence of a court user’s participation can thus be understood to be the telling of their story – whether directly or through a representative – and the challenging of the other party’s version of the story. This chapter now moves on to examine the scope of, and limits to, participation in this sense. The focus here is on the ways in which practitioners in the courtroom were observed to support and facilitate court users’ participation.

**Supporting and facilitating participation**

Courts and tribunals operate in a highly pressured environment. It was evident during the observations that court lists were overloaded, paperwork was often missing and failures in technical equipment were common. Thus, it appears that the ‘structured mayhem’ observed some years before in research on the Crown Court (Jacobson et al, 2015) remains a feature of the courts and tribunals system. This is notwithstanding the endeavours by HMCTS, in the intervening period, to improve efficiency through the courts modernisation programme (discussed in Chapter Two of this volume). The findings of the observations and practitioner interviews (see Chapter Three) point to a range of factors relating to the reforms and accompanying austerity measures which undermine the effective operation of the courts – including court closures and the resultant increased workload of remaining courts and staff cutbacks. The increasing numbers of litigants-in-person (LiPs) in the courts, largely reflecting reduced availability of legal aid, pose their own challenges to the smooth and timely running of court business, on account of their particular needs for support and assistance during the court process.

Against this backdrop, the researchers repeatedly noted immense efforts made by practitioners in the courtroom – including
judges, magistrates, lawyers, legal advisors and others – to help court users to participate in proceedings. As noted in Chapter Three, practitioners frequently spoke about the facilitation of court user participation as a significant part of their own and their peers’ roles; and the observations of hearings provided ample evidence that this task of facilitation was indeed taken seriously and effectively carried out. This encompassed the assistance and support that practitioners proffered to the most obviously vulnerable or needy court users and to those who were LiPs; and, more generally, practitioners’ humanising, sympathetic responses to the difficulties and pain revealed by the stories recounted in the courtroom.

A note of caution should, however, be added to this positive account of practitioner efforts to facilitate participation. It is possible that there was some degree of ‘observer effect’ which encouraged practitioners to treat court users with special care during the observed hearings. The visibility of the research team varied between settings and locations: in the criminal courts, there tended to be little interest in its presence, whereas court staff, the judiciary and sometimes lawyers were more aware of the researchers and the nature of their work in the tribunals and Family Court, where observers (unconnected to cases) are uncommon. In one IAC hearing, the judge was so positively disposed towards the research that she asked the researchers, in a follow-up email, if they could provide “any feedback from the perspective of the appellant/witnesses”.

**Responsiveness to vulnerabilities and need**

Use of formal ‘special measures’ or other adjustments to help vulnerable court users to give evidence was extremely rare in the observed family and criminal cases – and did not feature in any of the observed tribunal hearings. In three of the observed family hearings, a screen was put in place to separate victims of domestic violence from the perpetrators.
In the criminal hearings, one defendant had an intermediary, while another was accompanied by a support worker who sat with her in the dock, and a vulnerable witness in one case appeared by video-link. In two Crown Court cases, a judge expressed scepticism about applications for an intermediary. In one of these, the judge said with some obvious reluctance that he would accept a CPS request for an intermediary for a 13-year-old complainant, adding that many such applications were unnecessary and undermining of advocates’ skills in questioning vulnerable witnesses. He commented also that he found many intermediary reports to be “a cut and paste job”.

Overall, however, it is likely that the observed limited recourse to formal adjustments in the criminal courts was largely a function of the type of hearings that the researchers attended – very predominantly plea hearings and sentencing proceedings, rather than trials – and did not reflect a general reluctance on the part of the courts to make use of the available provisions. Across the courts and tribunals, the researchers found that judges and others displayed awareness of court users’ needs, a willingness to make ad hoc accommodations and a general sensitivity to what are referred to earlier as ‘vulnerable moments’, when court users displayed heightened distress, anxiety or anger.

This may be indicative of a generalised shift in judicial proceedings towards greater responsiveness to vulnerability. The researchers noted, for example, encouragement of defendants, witnesses and parties to sit down and take breaks where they appeared to be under particular physical or mental strain; the dimming of lights in an ET hearing to help a claimant feel more at ease; a judge’s calm reasoning with and securing of an apology from (rather than pursuit of a contempt of court charge against) a defendant who had lost his temper and told him to “go fuck yourself”; and the provision of careful explanations of the court process to witnesses who were evidently discomfited – including a 16-year-old boy.
with mental health problems who was giving evidence to the IAC in support of his parents’ appeal. In a Crown Court trial, a defence barrister took the opportunity of a break in proceedings to tell the judge that his client had been having heart palpitations, at which the judge asked the defendant about his health and added: “giving evidence in the Crown Court, whatever the circumstances, is very stressful … If you feel unwell, please say so.” Also in the Crown Court, a 70-year-old woman pleaded guilty to charges of defrauding and stealing from a woman in her care. She sobbed loudly throughout, and received solicitous attention from both the court interpreter and a dock officer – the latter holding her by the arm to support her. After the judge passed a suspended custodial sentence, she continued to sob in obvious relief, while also – on leaving the courtroom – hugging and kissing two bemused-looking lawyers in attendance. In the IAC, judges were accommodating when appellants had young children with them – for example, permitting one woman to bring her baby into the courtroom.

**Assisting litigants-in-person**

As shown in Box 4.1, three out of the 72 defendants observed in the Crown Court were unrepresented, as were 24 of 184 defendants in magistrates’ courts, 24 of 49 parties in the Family Court, five of 42 IAC appellants, and 14 of 17 claimants and one of three respondents in the ET. LiPs were occasionally accompanied by representatives of voluntary organisations or personal acquaintances who provided support. Most obtained significant help in the courtroom from judges and legal advisors, sometimes including encouragement to obtain legal representation or, if that was not possible, advice from local pro bono or voluntary legal services.

Many judges took considerable care to explain procedures to LiPs. Some offered encouragement, like a Family Court judge who said to a father about the medical records he
had supplied to the court: “You’ve assisted yourself greatly by doing that so promptly.” They also offered reassurance (“Don’t worry about that; we’re taking it from square one,” one ET judge told a claimant who had apologetically said he had never been in a court before) and practical guidance (another ET judge lent her own highlighters to a claimant, saying that the best way of preparing for his questioning of the respondent was to read through the latter’s statement closely, and mark up those passages he disagreed with). Some judges, in an apparent effort to ensure equality of arms between represented and unrepresented parties, provided assistance that arguably amounted to a departure from the traditional judicial role of a neutral arbiter: like the ET judge quoted in Case 6 in Box 4.2, who reworded some of the claimant’s questions and posed them to witnesses himself. The judge who lent the claimant her highlighters also, similarly, rephrased some of his questions: “This is the thing: you’re not really asking questions – you’re making statements. The question that should be asked there is: ‘Do you remember him asking you …?’”

A Crown Court case in which there was notable judicial intervention – in the form of strong encouragement to negotiate the basis for a guilty plea – concerned an unrepresented defendant charged with cultivation of cannabis in his home. Having heard the defendant’s plea of not guilty, and inquired about the basis of his defence and his personal circumstances, the judge referred to the sentencing options and suggested the defendant discuss his plea with the prosecution advocate, who “will be fair”. After a short adjournment, the defendant pleaded guilty and the judge sentenced him to a low-level community order, with some personal guidance (“It’s not my role to give you lifestyle advice, but heed this. Cannabis is not good …”) into the bargain.

In a private law family case in which both mother and father were unrepresented, the legal advisor explained to them how the proceedings would run and said: “If you feel lost, do ask
me.” The father was serving a community order for violence against the mother, who had a restraining order against him; he was seeking to extend the limited contact he currently had with his sons. When it was time for him to question the Cafcass officer, the legal advisor stated some ground rules, including that he should allow her to finish answering one question before asking the next. Following this guidance, the father proceeded to challenge the evidence that had been presented by Cafcass in a careful and serious manner. In discussing the detail of contact arrangements, he said, “It works out now that I see them for about 3 hours per month after living with them for five years. This is very hard.”

**Humanising and sympathetic responses**

Courteous and respectful treatment of court users was the norm across the range of court and tribunal settings, suggestive of a broad orientation (albeit this was likely to be implicit rather than explicit) of professional culture around the values of procedural justice. Moreover, a great many practitioners dealt with court users in a manner that extended beyond courtesy and respect to kindness and sympathy, and an acknowledgment of the deeply personal and often highly emotive character of what was being addressed in the courtroom.

Humanising responses to court users’ ‘stories’ were especially evident in the Family Court, where many of the rawest accounts of individual failings and interpersonal conflict were heard – as illustrated by the examples in Box 4.3 from public law cases. Perhaps with the aim of making proceedings feel less daunting and more congenial, parents in the Family Court were often referred to by judges and other practitioners as “Mum” and “Dad”. This sometimes sounded incongruous in the context, and occasionally confusing – such as when one maternal grandmother was being questioned as a witness, and was asked with regard to her daughter: “How often do you see Mum?” “Did you see Mum in hospital?”
Box 4.3: Efforts to humanise care proceedings in the Family Court

Case 1
A mother was treated gently by lawyers, judge and Cafcass guardian throughout a final hearing in care proceedings concerning her daughter. The mother, whose health problems included schizophrenia, cried when the judge asked her towards the end of the hearing if she had anything further to say, and she replied that she knew she was not a “100 per cent” good mother. The judge – who had earlier commented that the child was “delightful”, which was a credit to the mother – told her in a kindly way that no mother is 100 per cent good.

Case 2
A social worker, while firmly making the case for a care order for a young child on the grounds of multiple, deep-seated problems in the home – referred to the “lovely baby … Beautiful smile.”

Case 3
In a complex case involving an application for an interim care order for a 14-year-old girl because her parents were unable to control her behaviour and she was putting herself at risk, the judge was at pains to express his sympathy for the father who was, the judge said, “as worried and upset as anybody I’ve seen in this court for a very long time”.

Case 4
The judge congratulated a father on the “brave decision” he had made not to oppose a care order, and said warmly to two grandmothers who were involved in the case: “I don’t know what we’d do without grandmothers like you.”

Case 5
After a hearing which had dealt with an interim care order for newborn twins, there was a discussion among the parents, social workers and other lawyers in the lobby outside the courtroom. The lawyer for the Cafcass guardian asked the parents if she could see a photo of the babies: “I like to see what my clients look like.” The father showed some pictures on his phone, and all the practitioners made appreciative comments: “Aww, so cute!”
Translation and disconnection

The findings set out in the previous section illustrate some of the ways in which practitioners help to ensure that court users’ stories of conflict, loss and disadvantage are told in the courtroom. But of course, the telling of the stories is not the main goal of the judicial process – even if many practitioners assert, in line with procedural justice theory, that having a ‘voice’ is critical to a lay person’s experience of justice (see Chapter Three). In the end, the court or tribunal must make a decision about the matters before it, and this must be a decision based in law; as legal philosopher Neil MacCormick states, ‘Whatever question or problem is in our mind, if we pose it as a legal question or problem, we seek a solution or answer in terms of a proposition that seems sound as a matter of law, at least arguably sound, though preferably conclusive’ (2005: 14). Posing a question or problem ‘as a legal question or problem’ necessarily entails a process of translation: during the legal proceedings, ‘the real-life problem must be first translated, or transposed, into the language the law recognizes; only then – recognized by law – it may be solved, with these solutions resulting in real-life consequences’ (Smejkalová, 2017: 65).

As the researchers observed court users’ stories being translated into legal questions and legal answers, it became apparent that this process of translation was also a process which marginalised the individuals. Court language, concepts and structures had the combined effect of silencing court users, underlining the disparities between their social worlds and the social world of the courtroom, and ultimately disconnecting them from their own proceedings.

Complexity

Although some judges, lawyers and others sought to explain terminology and processes to court users (and especially LiPs), there was a notable tendency among many practitioners to default to jargon and complex language. In the first case
described in Box 4.3, where the judge was sympathetic and supportive towards an evidently vulnerable and distressed mother, this did not prevent references by lawyers to the “threshold document” being “not agreed, not opposed”; the child being “avoidant”; and the need to “progress contact in a dynamic way”. In the second of the Box 4.3 cases, lawyers used traditional phrases such as “my learned friend” and (more than once, when turning away from the judicial bench to consult with their client), “I’ll just turn my back.” In this latter case, the maternal grandmother gave evidence; visibly shaking with nerves and tearful, she provided detailed responses to most questions, but occasionally struggled to understand: asking, for example, “What’s ‘abstinent’?” when being questioned about her daughter’s drug use.

Formal and elaborate styles of language were generally more common in the Crown Court than in the other venues in which observations were conducted, exemplified by the following exchange between judge and defence counsel following the defendant’s evidence-in-chief:

Defence counsel: “If I trespassed in that way, please forgive me.”
Judge: “You have my forgiveness … You are forgiven, you are forgiven … [It was] an excess of enthusiasm.”

Formality of language could combine with the complexity of issues or concepts under discussion to make it more difficult for lay parties to understand what was being said. Unusually, a Crown Court judge apologised to a defendant in a pre-trial hearing for the fact that much of what had been discussed would have been “quite incomprehensible”, and explained that the defence and prosecution had had to make various arrangements in preparation for the trial. After sentencing an unrepresented defendant for two driving offences, a magistrate asked him if he had understood everything that had happened, to which the defendant replied, “All me head’s
fuzzy.” The magistrate told him to see probation, who would explain everything.

Sentencing an offender with long-term addiction problems to a drug-related offence, a Crown Court judge spoke rapidly: “... totality ... cycle of addiction ... balancing aggravating and mitigating factors ... considerable licence period ...” The judge then asked the defendant if he had understood, who simply said “Yes.” When another Crown Court judge passed sentence on a woman in her early 30s who had pleaded guilty to a serious assault, there was an extended discussion between the judge, probation officer and defence advocate about the defendant’s accommodation, since both defendant and victim had been living in the same hostel. The judge eventually decided to make a restraining order (additional to the sentence) preventing the defendant from going within 100 yards of the hostel. It was agreed that she should present as homeless to the local authority and that her friend, who was at court, should collect her belongings from the hostel. When passing sentence, the judge spoke in a brisk but kindly way. He said that the defendant had “come to this court effectively a lady of good character” and the offence had been committed “out of your vulnerability and dependence on alcohol”; but it was clear she understood little of what was said. At the end, she twice asked from the dock: “Where will I stay? ... Can I go back to [the hostel]?” The judge could not hear the question; after it was relayed by the barrister, he reiterated that she was not to go within 100 yards of the hostel.

**Silencing of court users**

Most of the talking in the observed court hearings was done by the professionals in the room. Whether and to what extent lay court users communicated directly with the court or tribunal depended on a range of factors, including their role in proceedings, the type of hearing and case, and whether
or not they were represented. Paradoxically, while participation is often assumed to depend on, or even to take the form of, being represented (see, for example, discussion of this in Chapter Three), it appeared that legal representation could also have the effect of undermining or even silencing the lay party’s voice. While all court users were silent by the point at which the court made its adjudication, parties who were represented tended, by definition, to be silenced at an earlier stage in the court process than LiPs.15

In a private law case in the Family Court, magistrates considered a (represented) father’s application for contact with his young daughter at the same time as the mother’s application for a non-molestation order against the father. When the magistrate requested a Scott Schedule (setting out the issues under dispute), the mother’s lawyer responded: “Ma’am, I think that’s a sensible way forward – I can see the logic in your reasoning”, and the father interrupted: “A what? Sorry – can I talk?” The magistrate said to him: “Well, you’ve got your representative.” (Later, the magistrates decided to grant the mother’s request for a non-molestation order, and went on to discuss dates for further consideration of the contact application; but the father put his head in hands, then leaned back in his chair, and said: “Just leave it. I’m not going to bother anymore.”) A similar exchange took place in an IAC case – summarised as Case 5 in Box 4.2. After the judge stated that he was reserving his decision on the asylum appeal and the appellant would hear within two weeks, the appellant asked if he could speak, but was told by the judge to go through his lawyer. It was at this point that the appellant tried in vain to get both the judge and his lawyer to look at some news reports on the deaths of people returned to Iraq.

Represented parties could be silenced in other ways. In a different IAC hearing centre, another case involved a represented Iraqi appellant. Responding via an interpreter to questions from the HOPO, he spoke at length, with expressive tones and hand gestures. The HOPO complained to the judge
that he was providing very long answers to short questions, leading the judge to say: “You are giving very long answers … I already have that information … only answer the questions you are asked.” In a magistrates’ court, the mounting distress of a defendant who felt her lawyer was not making her voice heard was evident. She was being sentenced for shoplifting various items from a supermarket, and had appeared at court from the prison at which she was already serving a sentence for assault. Crying in the dock during a break in proceedings, she repeatedly told her lawyer that she was getting help at her current prison for her drug problem and wanted to go back there so she could continue with the programme; the lawyer said there was little he could do about this, and she should relax and not worry. The defendant continued to cry and said the lawyer was not listening to her; he said the same of her. When the magistrate passed sentence shortly afterwards, nothing further was said about whether she would be returning to the same prison.

While LiPs were necessarily required to be more actively involved in proceedings than represented parties (and, as discussed earlier, were often given significant assistance), some nevertheless struggled to communicate. Particular difficulties could arise when both parties were unrepresented and each vied with the other to be heard. In one chaotic ET hearing, the complainant and respondent kept speaking over each other, with the former in particular finding it difficult to express himself; it also emerged that he had not brought the relevant documents to the tribunal. The atmosphere in one private law family case became very heated, with the two parents – both unrepresented – repeatedly interrupting and making accusations towards each other; until the judge lost patience and shouted at them: “Quiet! Stop interrupting! It’s my turn!”

As noted at the outset of this chapter, there were too few observations of remote attendance to reach general conclusions about the implications for court users’ engagement with proceedings. Of those cases involving remote attendance that
were observed (in all but two of which defendants in prison or a police station were appearing in a criminal court by video-link), most proceeded without an obvious impact on participation, but some were problematic. The latter included a pre-trial hearing in the Crown Court, which provided an example of direct and literal silencing of a court user. The defendant, who was in prison, interrupted proceedings several times to assert that forensic evidence had been “planted” on him. Losing patience, the judge asked for the sound feed from the prison to be turned off. Similarly, the judge in another Crown Court pre-trial hearing threatened to turn off the sound as the defendant demanded over video-link: “Where’s the TV, where’s the jury? It’s all a load of shit, innit … I’m just stating the facts, d’you know what I mean?” After the threat was made, the defendant sat quietly for the rest of the hearing, just saying “OK, thank you,” at the end. In another Crown Court, a defendant was sentenced over video-link to a 16-month custodial term for robbery. As the judge delivered the sentence – using a certain amount of jargon: “commensurate with the nature of the offence”, “category range”, “position aggravated” and so on – the defendant sat entirely silent and motionless, giving no indication of whether he understood what was being said.

**Underlining the disparities**

The references mentioned earlier are to generally courteous and respectful treatment of court users by practitioners. While this was the norm, the researchers also noted some interactions which underlined the social divide between the professionals and laypeople in court. The representative of an appellant in an IAC case chuckled when making his closing comments about his client’s case, even while the appellant continued to cry openly about her children who – she had just told the tribunal – were living alone in Ghana. The researchers over-heard occasional disparaging or unsympathetic comments
among practitioners after court users had left the courtroom; as when lawyers joked with each other about the unusual name of a baby who was the subject of care proceedings (during the hearing, the judge had asked the mother to confirm the spelling of the name and said, in a kindly way, “lovely name”). In the magistrates’ court there was laughter at the end of a pre-trial hearing during which the defendant – a young woman charged with assaulting staff in her care home – had cried, shouted and sworn in the dock. Her lawyer said to the prosecutor and legal advisor: “I told you she was having a bad day!”

Not only were there apparent socio-economic, cultural and educational disparities between most court practitioners and most court users as individuals, but these disparities were embodied in court processes and procedures. It was clear that the language and styles of communication in court, along with the complexity, formality and ritualised nature of proceedings, and even court aesthetics (the grandeur of some courtrooms or court buildings, the formal dress of most practitioners), could all conspire to widen the gulf between the social world inhabited by court users and the social world of the courtroom.

The nature of this gulf between social worlds is illustrated by much of the observational data presented in the earlier discussions about court users’ stories of conflict, loss and disadvantage, and the ways in which these stories played out in the courtroom. The observations gave rise to many further examples – among which some of the most telling were from the criminal courts. Here, many defendants immersed in cycles of disadvantage and offending behaviour often appeared to be largely impervious to the interventions (whether punitive or supportive) of the justice system.

A female defendant was observed pleading guilty to having breached her community order because of her failure to carry out unpaid work. A long-term heroin user, her ability to comply with the various requirements of the order was questioned by her defence solicitor, who referred to her chaotic lifestyle: she was living in a hostel, appeared to be continuing
to use heroin – having dropped out of drug treatment, and had recently broken her foot. She had three children, of whom the eldest was about to be adopted. In the dock, the defendant admitted to having breached her order and gave a thumbs up to her partner – who was sitting, anxious and restless, in the public gallery – as the magistrates left the courtroom to confer. When the magistrates returned, the chair passed a sentence of 28 days’ custody for her “wilful refusal to comply” with the community order. As she was escorted out of the dock, she shouted: “Do I do half?” Her partner replied: “You’ll be out in 14,” and the two blew kisses to each other. In another magistrates’ court, there was discussion about the drug and alcohol use and mental health needs of a female defendant in her late teens said to pose “a high risk to known adults”. Reference was made in court to a number of agencies which were involved in her care, and a mental health worker was in attendance at the hearing. The defendant was sentenced to 14 weeks’ custody for an assault on her sister, having previously received a community order – with which she was not complying – for a similar offence against her parents. In the dock, she spent most of the hearing with her hood up and hand over her face. When passing sentence, the magistrate told her to stand up and look at him; she got to her feet, but closed her eyes. A male defendant in a plea hearing sat in the dock with his hands over his ears for much of the proceedings. As an interpreter tried in vain to communicate with him, the magistrates decided to remand him in custody pending his next appearance, scheduled for the Crown Court in several months’ time. Cases like these raise the question of whether an active choice not to engage, or ‘expressed rejection of the function of the courts’ (Kirby, 2019: 167), might itself be considered a form of participation, and represent the exercise of agency by court users whose scope for action is highly constrained.

Several of the criminal cases observed – including the three just mentioned – made clear the inherent limitations of formal criminal justice responses to the multiple social, psychological
and emotional problems with which much offending is associated. The proportionality of criminal justice responses to some of the offences observed coming before the courts could likewise be questioned. A defendant – said to have learning disabilities and to be “barely literate” – pleaded not guilty to a charge of breaching a restraining order because he had (possibly accidentally) sent his ex-partner a Skype contact request. The magistrates discussed arrangements for the forthcoming trial, and agreed to stand the case down in time for the defendant to make the coach for his 250-mile journey home. While questions as to the effectiveness and proportionality of judicial proceedings are outside the scope of the current study, the cases just cited point to the pertinence of the issue of court user participation to these much wider considerations.

**Disconnection**

In sum, it appeared that the process by which court users’ stories were translated in the courtroom was also – by virtue of the complexities of court language and procedures, the silencing of court users, and the manifestations of the disparities between the court users’ social worlds and that of the court – a process whereby individuals were gradually disconnected from proceedings and thereby marginalised. To deploy the theatrical analogy that is commonplace in discussion of the courts, court users can thus be said to move from centre stage to the periphery over the course of proceedings. This analogy is used by Smejkalová, who (as noted earlier) writes of real-life problems being translated ‘into the language the law recognizes’. She describes ‘the split role of the layperson’ who is:

at the same time a participant in a trial where a specialized, subjectively incomprehensible language is used, while being an outsider, a spectator of this drama, not fully capable of accessing what is actually happening. She is physically on the stage but not fully participating
in the discourse; she has not fully entered the enclosed space, which is capable of producing the result to her dispute. (2017: 72)

A different perspective on the marginalisation of laypeople in court is offered by Owusu-Bempah (2020), who argues with reference to the criminal courts that the existence of ‘barriers to meaningful communication between the defendant and the court’ result in the situation where ‘instead of being viewed as the subject and key stakeholder of the criminal process, the defendant is often treated as an object on which the criminal law is imposed’. McKeever makes a similar point about appellants in tribunals. She notes that although various structural features of the tribunal system, particularly its ‘relative informality’, are intended to facilitate participation, in practice, ‘legal decision makers adopt a legal perspective on what constitutes relevant information … The result is that the appellant becomes an object in his/her own case rather than a participant in it’ (2013: 579).

Conclusion

For scholars such as those just cited, the ‘appearance of participation’ (McKeever, 2013: 578; emphasis added) may thus mask a reality of highly constrained engagement in judicial proceedings. In Chapter One of this volume, it is noted that effective participation in the court process is deemed, in law, to be essential to justice; and the previous chapter demonstrated that court-based practitioners are aware and supportive of this legal principle, even if they have varied understandings of the precise meaning and functions of ‘participation’. What this chapter has shown is that, while many practitioners make considerable efforts to help court users participate in court, the forces militating against effective participation – arising from the very nature of the judicial process and the social and
power differentials it exposes – are significant. The following, concluding chapter will consider what kinds of policy and practical reforms, at both national and international levels, could help to meet the attendant challenges to the fair and effective delivery of justice.

Notes

1 Either in casual conversation or in the course of formal research interviews that coincided with observation visits.


3 While proceedings are generally adversarial, a semi-inquisitorial approach is sometimes followed; for example, for cases involving litigants-in-person (LIPs), the Equal Treatment Bench Book advises judges and magistrates to consider ‘adopting to the extent necessary an inquisitorial role to enable the LIP fully to present their case’ (Judicial College, 2020: 23).

4 [Website URL]

5 Several of the observed IAC cases were in the aftermath of an investigation into organised fraud at English language test centres, which resulted in the revocation of tens of thousands of visas. A Public Accounts Committee report on the scandal found that ‘the Home Office’s flawed reaction to a systemic failure by a private company has had a detrimental impact on the lives of over 50,000 overseas students the Home Office accused of cheating’ (Public Accounts Committee, 2019).

6 The much-criticised IPP sentence was abolished in 2012, but the abolition was not retrospectively applied. As of 31 December 2019, 2,134 IPP prisoners remained in custody, of whom 93 per cent were post-tariff (Ministry of Justice, 2019).

7 These are court users who, in Benesh and Howell’s terms, have ‘a very high personal stake in the outcome, but little control over it’ (among whom they include ‘criminal defendants, civil litigants, victims, and parties to domestic disputes’): a situation they found to be associated with low levels of confidence in (US) state and local courts (2001: 205).

8 The tribunal hearings, like those in the criminal courts, were open to the public; however, tribunal staff – while welcoming – tended to be curious about our presence, tended to confirm with the judge that the observation could proceed. Approval was obtained from HMCTS and
thereafter the judge or magistrates in each individual case (who sometimes additionally sought consent from the parties) to conduct the Family Court observations.

9 As discussed in Chapter Two, the Youth Justice and Criminal Evidence Act 1999 provided for a range of ‘special measures’ intended to assist vulnerable or intimidated witnesses to give evidence, including use of screens in the courtroom and live video-link, and intermediaries to facilitate communication.

10 Which has been noted elsewhere with regard to criminal advocates (Hunter et al, 2018); see also Kirby (2017) and Henderson (2015).

11 The disparities in proportions of LiPs between the different settings largely reflect the scope of legal aid provision. Publicly funded legal representation is available for most criminal defendants, parties in public law and some private law family cases, and appellants in asylum, but not (for the most part) immigration IAC cases. With very few exceptions, legal aid cannot be accessed for representation in ET cases.

12 As discussed in Chapter Three, procedural justice theorists argue that legal authority is most likely to be regarded as legitimate by members of the public if they experience the processes of justice as fair – with fairness incorporating respectful treatment, having a voice and neutral decision making (Tyler, 2006, 2007).

13 The guardian is appointed by Cafcass to represent the interests of the child in proceedings.

14 The need for clearer communication in the courtroom, and the provision of information in simple, accessible language, is a particular focus of a recent JUSTICE Working Party report on improving participation by court users (JUSTICE, 2019).

15 Owusu-Bempah has critiqued the general assumption, reflected in case law, that defendants’ right to effective participation in their trial ‘can be exercised by proxy through one’s lawyer’ (2018).

16 She uses the term ‘trial’ to refer to ‘any type of legal proceeding before a judge’ (2017: 62).

References


