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REVISITING THE RIGHT TO SELF-REPRESENTATION IN CIVIL PROCEEDINGS

RABEEA ASSY*

ABSTRACT

In common law jurisdictions litigants are free to represent themselves in person. A right to self-representation in civil proceedings has been taken for granted as an obvious expression of the right of access to court. Consequently, no attempt has been made to investigate the theoretical justification of self-representation, and mandatory legal representation has never been contemplated. This article identifies three possible reasons for the conflation of the right to litigate in person with the right of access to court: (1) the long history of self-representation, (2) the conceptual perception of procedural rights as necessarily personal, and (3) the empirical belief that litigants in person are typically poor. The article challenges the capacity of these reasons to justify vesting litigants with an unfettered power to decide whether to represent themselves in person or to instruct counsel. It argues that as a matter of principle the right of access to court does not entail a right to self-representation in all circumstances. When a litigant in person lacks the skills and expertise to conduct his or her case competently and imposes a disproportionate strain on court resources, the court should be entitled to require the litigant to obtain legal representation as a prerequisite for proceeding with the case.

KEYWORDS: Civil proceedings; litigants in person (pro se litigants), right of access to court

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INTRODUCTION

An unqualified right to self-representation is guaranteed in several common law jurisdictions, including England and Wales¹ and the United States.² However, much criticism has been levelled in the literature at the way that litigants in person (LIPs) fare in civil litigation. It is said that the system is not impartial where LIPs are concerned because they fare worse than represented litigants. It is widely believed that LIPs tend, due to a lack of legal knowledge and skills, to be unable to represent themselves effectively, and a number of studies have shown that they are more likely than represented litigants to be subject to an adverse decision, irrespective of the merits of their cases.³

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

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

³ A significant study on this point is C Seron, G Ryzin and M Frankel, 'The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment' (2001) 35 (2) Law and Society Review 419. It examined 268 landlord-tenant cases in the New York Housing Court, all of which were estimated to have reasonable prospects of success. The judges who dealt with these cases had 'a particularly strong reputation as equitable and fair decision-makers who are willing to assist pro se defendants'. Only 22% of the represented tenants in this study received an adverse final judgment, compared with 51% of the self-represented tenants. Other similar studies are mentioned in: C Cameron and E Kelly, 'Litigants in Person in Civil Proceedings: Part I' (2002) 32 Hong Kong Law Journal 313, 317; D Swank, 'In Defense of Rules and Roles: the Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation' (2005) 54 American University Law Review 1537, 1539;

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

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

These assumptions have gone unchallenged for too long. A right to self-representation has been regarded as a natural expression of the right of access to court and, as such, has been

Australian Institute of Judicial Administration, *Litigants in Person: Issues for Courts and Tribunals* (Victoria, 2001) 5 (<http://www.aija.org.au/online/LIPREP1.pdf>) (last visited 12.9.2011) (AIJA). Concerning England and Wales, see Moorhead and Sefton's empirical study of four first instance courts in civil and family cases (excluding small claims): R Moorhead and M Sefton, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (Department for Constitutional Affairs, 2005) 221–44.

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

1. LIPS AND ADVERSARIAL ADJUDICATION

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

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

This passage encapsulates three fundamental conditions that characterise an adversarial system: parties' freedom and responsibility for the presentation of evidence and arguments, judicial passivity and neutrality, and a highly structured forensic setting for the presentation of evidence and argument (including the rules of evidence and procedure, and the rules of ethics). A flaw in any one of these conditions is likely to undermine the functioning of such a system.

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

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

The extent to which adversarial adjudication delivers on its promises to minimise bias on the part of decision-makers, render justice on the merits, and promote public confidence has been the subject of considerable literature. Many have questioned these proclaimed advantages; a great deal of criticism has been levelled at the high cost of litigation in Anglo-American countries, which undermines access to the courts, and at the significant imbalance that excessive partisanship could produce, especially in situations of serious inequality between the parties. The classic target of such criticism is the situation in which one litigant is a large corporation represented by first-rate lawyers, with no expense spared, and the other is an individual who lacks those advantages.⁶

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

⁶ See in particular R Pound, 'The Causes for Popular Dissatisfaction with the Administration of Justice' (1956) 8 Baylor Law Review 1; J Langbein, 'The German Advantage in Civil Procedure' (1985) 52 The University of Chicago Law Review 823; M Damaska, 'Presentation of Evidence and Factfinding Precision' (1975) 123 University of Pennsylvania Law Review 1083; S

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

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

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

Such commentators do not hold merely *as a matter of fact* that LIPs fall short of protecting their rights in adversarial settings because of the complexity of the procedural and evidentiary rules. They advance a further, normative dimension, namely that the complexity of procedural

Landsman, 'The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts' [1980] 29 Buffalo Law Review 487.

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

⁸ Cameron and Kelly (n 3) 318.

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

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

Indeed, a longstanding Anglo-American tradition takes for granted the right to self-representation, considering it a natural and fundamental expression of the right of access to court. Not only has it been unthinkable to allow courts to require a litigant to hire a lawyer even

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

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

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

when the litigant is clearly unable to conduct her own case in a meaningful way, but the legal literature has also been heavily preoccupied with finding ways to adjust the legal system to accommodate the needs of LIPs and render their representation more effective. This literature has never critically asked whether there should always be a right to appear in person, to what extent such a right requires the legal system to be adjusted to accommodate the needs of LIPs, and at what cost.

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

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

admission of evidence by LIPs.¹³ The proposal to assist the self-represented navigate the legal process has been extended to court staff, mediators, and opposing lawyers, which would call for rethinking the prohibitions against unauthorised practice of law, mediators’ ethical duties, and lawyers’ obligations towards their clients.¹⁴

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

The need to explore the theoretical basis of a right to self-representation has been overlooked because self-representation has been considered traditionally as a natural expression of the right of access to court;¹⁵ as such, self-representation is thought not to need any independent justification.¹⁶ This section offers three factors—historical, conceptual and empirical—that seem

¹³ R Zorza, ‘The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications’ (2004) 17 *Georgetown Journal of Legal Ethics* 423, 428; Engler (n 10) 2028–31; Goldschmidt (n 9) 46 (arguing that citizens in a constitutional democracy have a legitimate expectation of assistance by administrative agencies, including the courts); Moorhead (n 7) 422 (arguing for relaxing the standard of relevance to facilitate better communication among the various participants in court).

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

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

¹⁶ The right of access to court is considered a constitutional right at common law: *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909, 977, [1981] 2

to have contributed to the conflation of self-representation with access to court. While these factors may explain why self-representation has been taken for granted, they fall short of justifying a near absolute right that is immune from balancing against other legitimate interests and considerations.

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

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

WLR 141 (Lord Diplock) (*Bremer*). It also has deep roots in the English constitutional tradition that can be traced back as far as the Magna Carta (ch 40). Furthermore, the ECtHR has recognised the right of effective access as essential to a fair trial under Article 6 of the ECHR; see *Goldier v UK* (1975) 1 EHRR 524, 531–8.

¹⁷ *Iannaccone v Law* (n 15) 557.

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

History alone, however, does not obviate the need for normative analysis. The 'is', as we all know, does not dictate the 'ought'. That self-representation has been taken for granted for so long is not enough to justify an absolute right to self-representation. In fact, a more nuanced examination of legal history reveals that the entrenchment of self-representation derives more from its having been a matter of accepted practice—now a forgotten question—than from any deliberate recognition of its normative value as a right. While self-representation had been the common practice in litigation in early English legal history, for example in such primitive conflict-resolution methods as trial by battle, wager of law and trial by ordeal, around the middle of the thirteenth century lawyers started to appear in civil cases and began to gain power.¹⁹ The law became so complicated that litigants could no longer conduct their own cases effectively. As self-representation became less effective, it lost its appeal and gave way to legal representation, which would gradually become the dominant form in which litigation was conducted.²⁰

To understand the taboo on compulsory legal representation it may be useful to recall the only occasion in the long history of common law when legal representation was compulsory. This occurred during the Star Chamber which functioned as an instrument of political persecution through charges of libel and treason. The discredited practices of the Star Chamber led to a tendency to treat the denial of self-representation as synonymous with unfair

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

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

proceedings and persecution of individuals by the state and, conversely, to consider the right to self-representation as signifying a minimal and elementary protection of liberty and autonomy.

This line of thought is beautifully described by Eugene Cerruti:

A certain unreconstructed mystique has unfortunately shielded the right of self-representation over the years. The iconic image it presents is one of a simple citizen, typically a social outcast or a proud political dissident, pleading for simple justice before a jury of his peers. It is a portrait of direct democracy at work, a self-represented individual throwing off the formal trappings of the state and its lawyers to present an unmediated narrative voice in the courtroom. It heralds the simple force of truth against the overly rationalized power of the state, the freedom to say 'no' to both the power and the process of the prosecution. It champions a nostalgic sense of the simple liberties due the common man even in an age of highly regulated complexity.²¹

This symbolisation of self-representation may have well contributed to the perception that self-representation is a matter of general importance. The special role that it has assumed in the criminal context may have lent it an instinctive appeal that extends to the civil context as well. Indeed, proponents of self-representation often point out that it was not until 1696 that an accused in criminal cases had the right to be represented by a lawyer, and even then the right was limited to treason cases; legal representation was not allowed in felony trials until 1836.²²

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

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

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

to entitle her to special treatment, and a right to self-representation is seen as part of this special treatment.

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

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

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

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

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

Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff's choice ...²⁴

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

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

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

²⁴ The *Bremer* case (n 16) 977.

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

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

may preclude the view that legal representation could well be an *exercise* of the right of access to court.

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

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

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

2.3 Self-representation as a minimal protection for the poor

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

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

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

2.3.1 The empirical aspect

The belief that LIPs are poor is problematic because it implies an overly simplistic division between affluent, represented litigants and poor, self-represented-litigants; clearly not all

²⁷ Zorza (n 13) 424–5. See also Engler (n 10) 2027 (noting that LIPs at least in certain courts must be assumed as compulsorily rather than voluntarily self-represented); McLaughlin (n 15) 1132 (arguing that 'most pro se litigants represent themselves because of an economic inability to procure counsel'); J Bradlow, 'Procedural Due Process Rights of Pro Se Civil Litigants' (1988) 55 *The University of Chicago Law Review* 659, 669–70 (indicating that most LIPs are involuntarily unrepresented); Cameron and Kelly (n 3) 318 (indicating that 'Orthodox thinking has it that a [LIP] is someone who cannot afford to hire a lawyer'); R Pearce, 'Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help' 73 *Fordham Law Review* 969, 973 (arguing that millions of Americans lack access to justice by virtue of low or middle income); Lord Woolf (n 11) ch 17; Bloom and Hershkoff (n 12) at 512 fn 185 and accompanying text.

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

represented litigants are well off and not all the self-represented are poor. It is not even clear to what extent one could safely presume that LIPs tend to be poor. There is not sufficient empirical information to establish a general claim that LIPs choose to represent themselves out of financial necessity; financial considerations may be among the reasons for that choice, but financial considerations are not always tantamount to financial necessity. Nor may one presume that litigants do not opt for self-representation unless they are unable to afford legal representation. Litigants may be moved to proceed in person by a variety of reasons that have nothing to do with financial capability, such as enhanced self-confidence or self-reliance, greater civic or political literacy,²⁹ individualism, a sense of consumerism, failure to find a lawyer who sees prospects of the case's success,³⁰ the hope of more indulgent treatment by the court,³¹ a lack of confidence in lawyers or an inflated sense of confidence in the legal system expressed in the belief that justice will prevail with or without representation.³² In Hazel Genn's comprehensive and wide-ranging empirical study, the most common reason for which the litigants surveyed in this study attended court or tribunal hearings in person was the belief that legal representation

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

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

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

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

was unnecessary.³³ Likewise, Moorhead and Sefton's study of four first-instance English courts found that a significant portion of LIPs deliberately chose not to be represented due to believing in their ability to manage their cases alone or relying on the court's lenient treatment of LIPs. In this study, even those who mentioned legal fees as a consideration in their decision usually mentioned additional reasons, such as distrust of lawyers or self-reliance.³⁴

2.3.2 *The need for a principled attitude to self-representation*

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

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

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

³⁴ Moorhead and Sefton (n 3) 252–3.

to hire counsel but nevertheless decides to proceed in person should also benefit from the proposals urging judges to actively assist LIPs.

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

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

Litigants in person strain courts resources. As often observed, '[t]he increase in pro se litigation has disrupted the efficiency of the courts, causing courtroom delays and overburdening judges, attorneys, and court staff'.³⁶ Because of their lack of legal knowledge, LIPs 'are likely to neglect time limits, miss court deadlines, and have problems understanding and applying the procedural and substantive law pertaining to their claim'.³⁷ The problems this creates go beyond the cases in

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

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

³⁷ T Buxton, 'Foreign Solutions to the U.S. *Pro Se* Phenomenon' (2002) 34 Case Western Reserve Journal of International Law 103, 114. In *Tombstone Limited v Raja* (n 31), which dealt with procedural irregularities in obtaining an order to amend a writ of sequestration, it was noted at 1149–50 that: 'Mr van Hoogstraten gave notice of his intention to act in person. This was a

which LIPs are involved; due to their large numbers, LIPs obstruct the general administration of justice and impact on other cases in which they are not involved.³⁸ Judges, court staff and the opponent's lawyer are likely to expend extra resources on dealing with LIPs' non-compliance with procedures or with unnecessary applications made by them. They may not be able to take for granted matters that could have been taken for granted had all the litigants been represented.³⁹ Although judges often stress that LIPs are entitled to no special allowances and should expect to be held to the same rules as lawyers, putting this principle into practice has proved too difficult for many of them. Understandably, judges tend to apply a more lenient

decision that he made at various crucial stages in the civil proceedings. While accepting that he was entitled to do this for his own reasons, Lightman J commented ... that the decision "played a large part in giving rise to the difficulties, confusion and mistakes which later arose". The result was that Peter Smith J, who made the orders that have led to these claims, did not have at critical stages of the litigation the assistance of counsel on behalf of Mr van Hoogstraten'.

³⁸ See Snukals and Sturtevant (n 36) 93: 'The clogged dockets of general district courts are a testament to the prevalence of pro se litigation in Virginia'; Moorhead and Sefton (n 3) finding that there were high rates of LIPs in four English courts; Moorhead (n 10) arguing that in the UK there has been an apparent increase in the numbers of LIPs and that the phenomenon is an international concern (citing other studies at fns 2 and 3); Zorza (n 13) concluding that their numbers are 'hugely increased' in the United States, based on the empirical data cited at fn 1; Engler (n 10) 1987 estimating that 'unrepresented litigants are flooding [American] courts'; Swank (n 3) fns 6–18 and the accompanying text citing empirical data showing the large numbers of LIPs and recent increase in US State and Federal courts; Cameron and Kelly (n 3) 313 estimating that the numbers of LIPs in Hong Kong as in other common law countries have increased significantly in recent years.

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

approach to LIPs and tolerate their breaches of the rules, which in turn increases the inefficiency of the proceedings.⁴⁰

Although these inefficiencies are fully acknowledged in the literature, commentators urge the legal system, in essence, to compound them, by requiring judges, court staff and others to go out of their way to assist LIPs. Such an approach overlooks the potential difficulties created for other users of the legal system and their equally legitimate interests. To force represented litigants to bear the extra costs and delays resulting from actions taken to assist LIPs is to force them to subsidise the self-represented, which is arbitrary.⁴¹ There is no justification for imposing the costs of a right to self-representation, exercised by litigants who may or may not lack financial means, on represented litigants whose ability to afford their own lawyer is likewise indeterminate. Justice for the self-represented, if achievable, must not translate into injustice for others.⁴² Public confidence cannot be maintained without a balanced approach that acknowledges all the various competing interests, including that of represented litigants in protection against the cost of extra judicial activity which they are forced to incur merely because

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

⁴¹ For an interesting discussion of general questions concerning who should bear the costs of the implementation of social policy and the extent to which it is legitimate to impose such costs on specific members of the public rather than society at large, see M Kelman, *Strategy or Principle: The Choice between Regulation and Taxation* (The University of Michigan Press 1999); Samuel Issacharoff, 'Bearing the Costs' (2000) 53 Stanford Law Review 519 (discussing such examples as whether it is legitimate to preclude landlords from increasing rents should a tenant suffer an adverse financial event, such as illness or unemployment, or require stores to have significant alternations to their premises, at their own expense, to render them accessible to people with physical disabilities, or ask greengrocers to incur the costs of not charging customers who has lost their means of livelihood).

⁴² The capacity of costs order to alleviate this injustice is not self-evident. There is a non-pecuniary dimension of the delay that is not compensated by the rules of costs, expressed in belated justice and the impact of delay on the deterioration of evidence. Furthermore, litigants in other cases which do not involve LIPs may still suffer from the general harmful effect of LIPs on the system without being able to recover their costs. At any rate, LIPs may not always be able to meet the cost order.

they managed, in some instances with considerable difficulty, to afford counsel. Cost and time are important dimensions of justice that are no less important than justice on the merits.⁴³ The concern for the general efficiency of the administration of justice manifests in the overriding objective of having courts dispose of cases expeditiously, without incurring disproportionate costs, and taking into account 'the need to allot resources to other cases' (CPR 1.1). This entails a wider view of the phenomenon of self-representation, rendering unsustainable the position taken in the literature (and sometimes in case law) that the legitimate interests of other participants in more affordable and expeditious justice should always be overridden by the needs of LIPs. When a litigant in person lacks the skills and expertise to conduct her case competently, and when her self-representation threatens to impose a disproportionate burden on court resources, the court should be entitled to require the litigant to obtain legal representation as a prerequisite for proceeding with the case.

The need to abandon the notion that self-representation can never be denied is illustrated by the phenomenon of 'vexatious litigants'. These are litigants, normally LIPs, who abuse the process and inflict disproportionate costs on courts by habitually and persistently filing nuisance claims for the purpose of harassing, intimidating and wearing down others. The main way in which such vexatious litigants are dealt with is to require them to obtain judicial permission before initiating proceedings or making applications;⁴⁴ it might be a more efficient solution to require such litigants to

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

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

proceed only through counsel. While not all LIPs are vexatious litigants, this extreme form of litigation in person demonstrates the need to abandon the position that self-representation can never be denied.

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

3.1 The costs of self-representation versus legal representation

Concerning the claim that LIPs hinder the efficient administration of justice, a clarification is in order. This claim has not been adequately tested empirically and, presumably, empirical substantiation may be difficult to obtain. It is fully conceivable that, sometimes, it may be true that costs and delays increase most when litigants are represented. Due to their legal knowledge

2009 California Code of Civil Procedure s 391–391.7; 2010 Florida Statutes s 68.093; Hawaii Revised Statutes s 634J; Ohio Revised Code s 2323.52.

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

and experience lawyers are able to make more extensive use of the legal system than LIPs. In such cases, the sheer costs for the administration of justice may be higher with legal representation than otherwise.

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

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

evidence.⁴⁶ This type of error is typical of LIPs and is best prevented by restricting self-representation.

CONCLUSION

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

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