Revisiting the Right to Self-Representation in Civil Proceedings

Rabeea Assy
University of Oxford

Civil proceedings; Litigants in person; Right of access to court

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.

Introduction

Much criticism has been levelled in the literature of 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. Adversarial rules of evidence and procedure are designed by and for lawyers and judges, and therefore LIPs are unable to use them properly 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 to redress the balance between them and represented litigants. Consequently, it is often suggested that judges should actively assist LIPs present their cases effectively and that the rules of procedure should be simplified.

* I would like to thank Janice Tavern for revision and comments. I am greatly indebted to the Oxford University Clarendon Fund and the Modern Law Review Scholarships Scheme for their very generous support.
This article discusses this literature in an attempt to reveal and assess the assumptions that underlie it regarding the status of the right to self-representation in civil proceedings. It suggests that behind the common view that the legal system fails LIPs lie two assumptions that have gone unchallenged for too long. The first is that litigants should retain the power to decide whether to represent themselves in person or through counsel, no matter how complex their case is and irrespective of their ability to present their case and of the negative consequences they could impose on other litigants or on the administration of justice. The idea of mandatory representation has not been debated, and legal representation has never been posed as a prerequisite for conducting civil proceedings. The second assumption is that it is not enough to permit litigants to represent themselves but that they should also 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 would not place litigants at a disadvantage compared with represented litigants.

These assumptions have gone unchallenged because a right to self-representation has been perceived as a natural expression of the right of access to court. This article suggests three possible reasons why this conflation of self-representation with access to court has been so seductive as to go unchallenged. One is the long history of self-representation and the special role it assumed in criminal proceedings. The second concerns the conceptual conflation of the right of access to court with the right to self-representation, and the third is an empirical belief that LIPs are indigent and therefore self-representation is their only chance to obtain access to justice. This article challenges the potential of these reasons to justify a claim for an unqualified and effective right to self-representation, concluding that the possibility of mandatory representation under certain circumstances must not be ruled out.

1. The right to self-representation in the literature

An unqualified right to self-representation is guaranteed in several common law jurisdictions, including in England and Wales. Nevertheless, it is widely believed that LIPs are often unable to represent themselves effectively due to their lack of legal skills and knowledge. A number of studies have shown that LIPs are more likely to be subject to an adverse decision compared with represented litigants, irrespective of the merits of their cases. Commentators have argued that this failure

---

1 See the Legal Services Act 2007 Sch.3, paras 1 and 2 (replacing ss.27 and 28 of the Courts and Legal Services Act 1990). Children and other protected parties must have a litigation friend to conduct proceedings on their behalf: CPR Pt 21. In Hong Kong, a right to self-representation is guaranteed by the Rules of the High Court O.5, r.6. In the United States, a right to self-representation is guaranteed in 28 USC s.1654. For a historical review of the right to self-representation in civil proceedings, see Iannaccone v Law 142 F.3d 553 (2d Cir. 1998) 556–558. In Farettav California 422 U.S. 806 (1975) 812–814 the United States Supreme Court recognised a constitutional right to self-representation in criminal proceedings. So did the Canadian Supreme Court in R. v Swain [1991] 1 S.C.R. 933 and the International Criminal Tribunal for the former Yugoslavia in Prosecutor v Milosevic Case No.IT-02-54-AR73.7 (Appeals Chamber) (November 1, 2004).

2 A significant American study on this point is C. Seron, G.V. 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 before whom these cases were directed 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. See also Moorhead and Sefton’s empirical study of four English first instance courts in civil
results from certain premises of the adversarial system. This section outlines three fundamental aspects of an adversarial system that have been criticised as creating particular difficulties for LIPs.

1.1 The adversarial system: fundamentals

Stephen Landsman provides the following description of an adversarial system:

“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.”

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.

Judicial passivity has traditionally been considered indispensable for judicial impartiality. Lord Denning famously described the role of a judge in an adversarial system as holding “the balance between the contending parties without himself taking part in their disputations”.

This quality is thought to yield several benefits. To begin with, it expresses equal treatment of the parties, and that is neutrality in the formal sense. Moreover, it is believed to shield the decision-maker from developing a premature judgment, and that is a cognitive advantage. The conceptualisation of impartiality as passivity has as its main patrons Lon Fuller and John Randall, who argue that it would be impossible for a judge to be impartial towards the presentation of a case in which he himself had taken part. They prescribe the adversarial setting as the only way to combat a natural human tendency to judge “too swiftly”; a judge who presumes to present evidence and form arguments on behalf of litigants would decide what is relevant too soon and so inhibit the flow of information. A premature standard of relevance starts as a tentative model, one necessary in order to bring the hearing into order and coherence but, as Fuller and Randall argue,

“what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.”


4 Jones v National Coal Board [1957] 2 Q.B. 55 CA.

Fuller and Randall further argue that judicial involvement in the proceedings may also create a sense of “sympathetic identification sufficiently intense to draw from [the judge’s] mind all that is capable of giving, in analysis, patience and creative power”. 6 Thibaut and Walker advocate a similar view based on their empirical work. For them, an active judge

“will bias contextual information about a dispute by asking questions and developing information that conforms to a model formed by [his] own [experience], rather than the experience of the participants in the dispute.”7

Judicial passivity has also a political dimension. It is said to reinforce the legitimacy of and the public confidence in the judiciary by maintaining the appearance of objectivity, professionalism, fairness and integrity. Parties’ control over the evidence and arguments, which is the flip side of judicial passivity, is also said to enhance their subjective satisfaction with the process and their acceptance of its outcome.8

Finally, judicial passivity is said to be more efficient and more productive. Parties stand in a better position to know what is relevant to their case than a judge who has no prior knowledge of the dispute and therefore needs to launch an enquiry “from scratch”. Parties motivated by self-interest are also likely to be most diligent in bringing the relevant information.9

1.2 LIPs in the adversarial system

It is a widely shared view that the aforementioned features of the adversarial system bear all the responsibility for the poor performance of LIPs. This is because when LIPs are involved the adversarial system simply does not work. Its basic assumption, that the parties would bring all the relevant evidence and make all the pertinent points of law, is not met. 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

6 Fuller and Randall, “Professional Responsibility” (1958) 44 American Bar Association Journal 1159, 1180. Other commentators have compared an active judge to a chess player playing against himself or advising each of the players on the best available move: see P. Murray and R. Sturmer, German Civil Justice (Carolina Academic Press, 2004), pp. 176–177.
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.”

It is important to notice that such views do not merely hold that as a matter of fact LIPs fall short of protecting their rights in adversarial settings because of the complexity of the procedural and evidentiary rules. There exists a normative dimension embedded in the notion that the complexity of procedural and evidentiary rules provides represented litigants with an unfair advantage. 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” is to say more than that LIPs do not fare well within adversarial settings as a matter of fact. It is also to say that the system is responsible for their poor performance and that it 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 use of legal rules—is premised on the assumption that self-representation is a right that places demands on the system to adjust and facilitate it. Lord Woolf’s following observation in his Interim Report on Access to Justice 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.”

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 when the litigant is clearly unable to conduct his or 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 self-represented litigants and render their representation more effective.

Several commentators have offered a number of ways in which the legal system could redress the balance between self-represented and legally represented litigants. One is to simplify procedural rules to render them workable by the uninitiated,

---

11 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 Fam. Ct Rev. 36, 51–53, arguing that legal representation provides an “unfair advantage” which 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: “Our 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 in Goldschmidt, fn.60. However, the suggestion that to be represented when the opponent is not is to behave unfairly is an untenable position because it underestimates the important role of legal representation which is often indispensable. Furthermore, the complexity of the rules is often unavoidable. I discuss this aspect elaborately at R. Assy, “Can the Law Speak Directly to its Subjects? The Limitations of Plain Language” (2011) 38(3) Journal of Law and Society 376 (forthcoming).
such as by requesting courts to provide them with adequate facilities, written information and explanations about procedural law by means of booklets, leaflets, offline CDs, on-line websites, computer kiosks, illustrative video-tapes, etc.\(^{14}\)

Another way to redress the balance focuses on the judicial role. The proponents of this suggestion criticise the traditional notion of judicial impartiality-as-passivity, arguing that tying impartiality to judicial passivity operates not as a safeguard for judicial impartiality but 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 admission of evidence by LIPs.\(^{15}\)

Various prescriptions have been offered concerning the scope and content of judicial intervention, ranging from an extensive explanatory role—e.g. explaining the procedural and evidentiary rules at every stage of the proceedings—to the more active role of calling witnesses, examining them, or even conducting independent investigations.\(^{16}\) Moreover, the proposal to assist the self-represented navigate their way through the legal process was extended to court staff, mediators and opposing lawyers, suggestions that call for modifications in the prohibitions against unauthorised practice of law, mediators’ ethical duties and lawyers’ obligations toward their clients.\(^{17}\)

### 2. The conflation of the right to self-representation with the right of access to court

The extent to which a right to self-representation is well-grounded is a question that demands to be addressed. The reason why commentators have constantly overlooked the need to explore the theoretical basis of a right to self-representation lies in the belief that it is a natural expression of the right of access to court and,


as such, requires no independent justification. This section challenges this belief and argues that a right to self-representation is not necessarily warranted by the right of access to court. It offers three possible reasons for conflating self-representation with access to court: historical, conceptual and empirical. As we shall presently see, while these reasons could explain why self-representation has been taken for granted, they fall short of justifying a near absolute right that is immune from being balanced with other legitimate interests and considerations.

2.1 The right to self-representation as a historical survivor and the influence of criminal procedures

One possible 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.

History alone, however, does not obviate the need for normative analysis. The “is”, as well 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 effective self-representation. In fact, a more nuanced examination of legal history reveals that self-representation has been more a matter of acceptable practice—now a forgotten question—than the product of deliberate recognition of its normative value as a right. While self-representation had been the common practice in litigation in early English legal history, around the middle of the 13th century lawyers started to appear in civil cases and began to gain power. Both procedural and substantive laws became so complicated that litigants could no longer conduct their own cases effectively. As self-representation became less and less effective, it lost its appeal and gave way to legal representation, which would gradually

---

18 The right of access to court is considered a constitutional right at common law: Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd [1981] 2 W.L.R. 141; [1981] A.C. 909 at 977 (Lord Diplock). It also has deep roots in the English constitutional tradition which can be traced back as far as the Magna Carta in 1215 (Ch.40). Furthermore, the ECtHR has recognised the right of effective access as essential to fair trial under art.6 of the ECHR: Gold v UK (A/18) (1979–80) 1 E.H.R.R. 524 ECtHR at 531–538. At the heart of the right of access lies the ideal of the rule of law, see: J. Raz, Authority of Law (Oxford: OUP, 1979), pp.214, 217; A. Zuckerman, Civil Procedure: Principles of Practice, 2nd edn (London: Sweet & Maxwell, 2006), pp.[2.24], [15.9]. Frank Michelman has argued that access to court is important for the protection of personal autonomy: F. Michelman, “Formal and Associational Aims in Procedural Due Process” in R. Pennock and J. Chapman (eds), Due Process (New York University Press, 1977), NOMOS 18, p.129.

become the dominant form through which litigation was conducted. 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. Arguably, colonists had suffered legal persecution in England and so had animosity toward a profession which had assisted their oppression. Furthermore, religious and political leaders refrained from sharing authority, whereas lawyers were perceived as interfering with social harmony and stirring up disputes. Moreover, merchants and planters wanted to govern their own affairs without incurring the costs of lawyers. See Note, “The Right to Counsel in Civil Litigation” (1966) 66 Colum. L. Rev. 1322, 1325–1329; Rhode, Access to Justice, 2004, pp.47–78, fn.14 above. Gradually overshadowed by legal representation, self-representation has now become merely a default option to conduct litigation without expressing any special value.

To understand the taboo on mandatory legal representation we must bring to bear the dreadful circumstances that characterised the one and only occasion in the long history of common law where legal representation was compulsory. This occurred during the infamous Star Chamber, which served as a political instrument for persecuting people through political charges of libel and treason. The controversial practices of the Star Chamber have led many to treat the denial of self-representation as a symbol of unfair proceedings and notorious persecution of individuals by the state, and at the same time to see the right to self-representation as signifying a minimal and elementary protection of liberty and autonomy. Indeed, the secret, arbitrary and swift practices adopted by the Star Chamber to execute royal power over a period of about 200 years (ending in 1641) serve as a reminder of the role self-representation plays in safeguarding individual freedom. The attempt to impose legal representation might be seen as a disguise for political persecution, abuse and tyranny. This line of thought is beautifully described by Eugene Cerruti in the following passage:

“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.”

This symbolisation of self-representation could well have contributed to the perception that self-representation is of general importance that extends to the civil context as well. The special role that self-representation has assumed in the criminal context might have lent an instinctive appeal to self-representation in general. Indeed, proponents of self-representation often highlight the fact that it was not...
until 1696 that an accused in criminal cases had the right by statute to be represented by a lawyer, and even then the right was limited to treason cases; legal representation remained prohibited in felonies until 1836.  

However, self-representation in the criminal context must not shape our attitude to self-representation in the civil context. It is submitted that self-representation in the criminal context should be understood as part of a specific philosophy of stripping the government of as much power as possible in the light of the peculiar nature of the criminal process as an imbalanced process initiated by a “mighty” state with the aim of depriving the individual of his or her physical liberty. The threat posed by the criminal process to individual liberty creates a significant risk of abuse of state power, and the imposition of legal representation by the same prosecuting state would increase this risk. The defendant’s vulnerable position entitles him or her to special treatment, manifesting, for example, in a procedural structure that is systematically skewed in favour of defendants. A right to self-representation in criminal proceedings can only be understood as the product of this special treatment.

By contrast, the described risk of abuse of state power is largely irrelevant in civil proceedings because such proceedings are voluntary and controlled by private individuals. The parties alone, not the state, have the exclusive control over the scope and content of their cases. The subject matter of typical civil cases and the remedies sought by the parties do not involve any threat to the litigants’ liberty. Furthermore, the state has no particular interest in the outcome of civil proceedings; it only plays the minimal role of an arbiter between two parties who enjoy the same rights and are subject to the same obligations. 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 contribute 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 can be exercised by their possessors directly, not necessarily by proxy. Because procedural rights, including the right of access and the right to be heard, 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

---

24 This was justified on several grounds, partly based on the perceived neutral position of the judge and his ability to protect the defendant better than lawyers, coupled with the fear that counsel would hinder the court’s ability to do justice. See J. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: OUP, 2003), pp.26–40; Faretra v California 422 U.S. 806 (1975) 824–826.

representative”. Therefore, the procedural system is designed in terms of litigants as persons; claimants and defendants in these rules are those who possess the procedural rights.

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

“One 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 …”

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 FarettavCalifornia 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’ …”

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”. The right of access is distinguished from legal representation; the latter is identified as an additional right to the right of access to court, and not as the right of access itself. It follows that the right of access to court is taken as literally meaning self-representation.

This perception of legal representation as additional to the right of access to court may create a conceptual bias that precludes the view that legal representation could well be an exercise of the right of access to court. It is submitted that the conceptual 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

---

26 CPR 2.3 defines parties as “persons” who bring claims or against whom claims are made, while distinguishing them from their legal representative: “‘legal representative’ means a barrister or a solicitor … who has been instructed to act for a party in relation to a claim”. See for example R. v Board of Visitors of the Maze Prison, Exp. Hone [1988] A.C. 379 HL at 391–395, where 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 US Supreme Court in FarettavCalifornia 422 U.S. 806 (1975) 830, fn.39.


28 FarettavCalifornia 422 U.S. 806 (1975) 819; the court further explained (at 819–820) that: “The counsel provision … speaks of the ‘assistance’ of counsel, and an assistant, however expert, is still an assistant”.

is self-representation conceptually warranted from the right of access to court. Access to court can be fully (and most frequently 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 still be 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 automatically requires an unqualified right to self-representation without allowing some room for mandatory 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 into account the widespread belief that LIPs are typically unrepresented because they cannot afford legal representation. This perception underlies the many suggestions made in the literature to improve their chances. 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.”

In the light of such a belief, commentators consider self-representation as a minimal protection for the vulnerable, any restriction of which would amount to an act of cruelty 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 LIPs and the extra resources required to facilitate self-representation and make it effective would seem a necessary evil. 31

2.3.1 The empirical aspect

The belief that LIPs are poor is problematic on several grounds. For one thing, it implies a too simplistic division between well-off represented litigants and poor self-represented litigants; clearly not all 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 are typically poor. There is no sufficient empirical information to establish a general claim that LIPs choose to represent themselves because of financial necessity even when financial considerations are part of the reasons for that decision; financial considerations are not always equivalent to financial necessity. Neither could one safely presume that litigants would opt for self-representation only if they were unable to afford legal representation. Litigants may decide to proceed in person for a variety of reasons that have nothing to do with financial ability, such as greater literacy, individualism, a sense of consumerism, a hope to take advantage of a more tolerant approach by the court, a sense of lack of confidence in lawyers or a sense of over-confidence in the legal system expressed in the belief that justice would prevail with or without representation. 32 For instance, a study of four first-instance English courts found that a significant portion of LIPs deliberately chose not to be represented 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 to proceed in person usually mentioned additional reasons, such as distrust of lawyers or self-reliance. 33

2.3.2 The need for a principled attitude to self-representation

Be the empirical support of the perception of LIPs as poor as it may, such a perception seems to have hindered a more fruitful discussion of the scope of self-representation and its limitation. The literature completely overlooks the more

31 This perception of LIPs should be contrasted 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, “The Pro Se Litigant’s Struggle for Access to Justice” (2002) 40 Fam. Ct Rev. 36, 46 (and fnn.83–84); Swank, “In Defense of Rules and Roles” (2005) 54 Am. U. L. Rev. 1537, 1547–1548. 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, persistently with the aim of harassing others: see, e.g. Cameron and Kelly, “Litigants in Person in Civil Proceedings: Part I” (2002) 32 H.K.L.J. 313, 319; Moorhead, “Access or Aggravation?” (2003) 22 C.J.Q. 133, 133, 150. To obtain a principled attitude towards self-representation, we have to abandon these polarised perceptions of the personal profile of LIPs.

32 See the possible explanations recounted at Swank, “In Defense of Rules and Roles” (2005) 54 Am. U. L. Rev. 1537, 1572. Rhode cites one survey which shows that half of the self-represented litigants examined there thought the case simple enough to handle themselves, while only a third reported that they could not afford a lawyer. It is important to note that even this figure should be taken with care because the 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 ordinary financial 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, Access to Justice, 2004, p.82, fn.14 above.

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 ended up in general suggestions introducing an absolute entitlement to effective self-representation for all, not only for the poor. Indeed, the suggestions often made in the literature on facilitating self-representation have not been conditional upon a proof that the LIP could not afford a lawyer.

What remains an open question is whether courts could and should be accessible to lay litigants as a matter of principle, whether or not litigants could afford legal representation. One should wonder why a person with financial means should be allowed to represent himself or herself no matter how incapable he or she may be of presenting his or her case, and irrespective of the costs he or she may cause to his or her opponent and to the administration of justice as a result of failing to use the system properly. Likewise, one should wonder why a litigant who has the financial means 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 account, rather than accepting it out of pity for the poor. As matters currently stand, the interests of LIPs override the interests of all other litigants all the time, which is a clearly unsustainable position. A more balanced approach requires taking into account the legitimate interests of represented litigants who are equally entitled to protection against the extra delays and costs engendered by the self-represented or by actions taken to assist them.

In conclusion, the belief that LIPs are typically indigent must not prevent a principled debate over the theoretical basis of self-representation vis-à-vis the general question of whether we should afford every litigant an absolute and effective right to self-representation under any circumstances.

3. The impact of self-representation on the administration of justice

LIPs strain courts’ resources. As often observed, “the increase in pro se litigation has disrupted the efficiency of the courts, causing courtroom delays and overburdening judges, attorneys, and court staff”. 34 Because of their underdeveloped legal understanding, 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”. 35 The negative impact of self-representation goes beyond the cases in which they are involved; their large numbers indicate that LIPs obstruct the general administration of justice and impact on other cases in which they are

34 Swank, “In Defense of Rules and Roles” (2005) 54 Am. U. L. Rev. 1537, 1547 (footnote omitted). Moorhead observes 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” (Moorhead, “The Passive Arbiter” (2007) 16 Social and Legal Studies 405, 405).

not involved. Although judges often stress the principle 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 judges, professionally and emotionally. Understandably, judges tend to apply a relatively more lenient approach to LIPs and tolerate their breaches of the rules, which in turn increases the inefficiency of the proceedings.

These inefficiencies are fully acknowledged in the literature. Instead of looking for ways to keep these inefficiencies to a minimum, however, commentators urge the legal system to incur even further inefficiencies by requiring judges, court staff and others to go out of their way to assist LIPs. Such suggestions overlook the potential difficulties created for other users of the legal system and their equally legitimate interests. To force represented litigants to suffer the negative consequences of self-representation as well as the extra costs and delays resulting from actions taken to assist LIPs is to force represented litigants to subsidise the self-represented. There is no justification to impose the costs of a right to self-representation, whether exercised by litigants with or without financial means, on represented litigants, many of whom are hardly able to afford their own lawyer.

...
Justice for the self-represented, if achievable, must not translate into injustice for others. Public confidence cannot be achieved without a balanced view which acknowledges all the competing interests, including those of represented litigants in equal protection against the cost of extra judicial activity which they are forced to incur merely because they managed, often with considerable difficulty, to afford counsel. If society wishes to assist poor litigants it should not do so by arbitrarily imposing their costs on a specific fraction of the public, i.e. represented litigants, merely because its members happen to be represented by counsel.

Cost and time are important dimensions of justice that are no less important than justice on the merits.\(^41\) The concern for the general efficiency of the administration of justice manifests in the overriding objective which requires courts to dispose of cases expeditiously, without incurring disproportionate costs and while 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 that the legitimate interests of other participants in cheaper and more expeditious justice could always be overridden by the needs of LIPs. 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.

Moreover, the interests of LIPs are not necessarily promoted by a right to self-representation. LIPs are unlikely to benefit from the legal process in complex cases and, furthermore, except in most straightforward and simple cases, judicial assistance to and tolerance of LIPs are unlikely to improve the LIPs’ position in the proceedings.\(^42\) This is precisely why many civil law countries (including Austria, Germany and the Netherlands), whose judges are already more active in conducting the proceedings than common law judges, have long restricted self-representation in both civil and criminal proceedings.\(^43\) If mandatory legal representation is appropriate in civil law countries, it should be even more appropriate in adversarial systems where the role of parties is much more demanding.

3.1 The costs of self-representation versus legal representation

It is important to put forward the following clarification concerning the claim that LIPs hinder the efficient administration of justice. This claim has not been adequately tested empirically; presumably, empirical substantiation of this kind may be difficult to obtain. In fact, sometimes it may even well be the case that it is when litigants are represented that the cost and delay increase. Due to their legal...

---

\(^41\) The concept of three-dimensional justice was emphasised in contemporary literature based on Bentham’s work in A. Zuckerman, “Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments” (1994) 14 O.J.L.S. 353.

\(^42\) An elaborate discussion of the complex aspects of litigation and why they cannot be made readily accessible to LIPs can be found in Assy, “Can the Law Speak Directly to its Subjects?” (2011) 38(3) Journal of Law and Society 376 (forthcoming).


(2011) 30 C.J.Q., Issue 3 © Thomson Reuters (Professional) UK Ltd
knowledge 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.

I think, however, that the correct standard for comparing the costs of cases involving lawyers and those involving LIPs is one that compares the nature rather than the sheer value of the costs of each set of cases. It is not legitimate to make a general criticism of lawyers for making more extensive use of the system than LIPs. To the extent that the costs were relevant and served the disposal of the case, it is exactly these kinds of costs that parties are entitled to incur, because they are incurred to enforce legal rights. That is what courts are for. And the other way around, if LIPs fail to use court resources as a direct result of their professional incompetence, it is these kinds of resources that we would not have wanted them to save, because such savings defeat the underlying purpose of the legal process.

While lawyers sometimes inflict unnecessary costs on the system, they cannot be fairly said to increase the risk of an inappropriate use of the legal system. Moreover, we need to distinguish making unsuccessful applications from failing to use the system. As long as a certain application was sensible or arguable, it was legitimate even if unsuccessful. For example, a lawyer might make an application for disclosure and the court might dismiss it on the ground that the information sought to be disclosed is not relevant to the disposal of the case. With LIPs, by contrast, the typical case is that of a fundamental and systematic failure to grasp the process, make arguable applications or present the case according to the law in a sensible and reasonable manner. For instance, a LIP may fail to consult an expert at an early stage, to nominate the correct defendants, to present admissible evidence, to serve pleadings correctly, etc. Worse still, a LIP may fail to grasp the substantive law pertinent to his or her case and accordingly fail to identify the relevant facts and items of evidence. This kind of error is more frequent, regular and typical of LIPs, and can be prevented only by restricting self-representation.

**Conclusion**

This article challenges the common view that litigants should be free to choose to litigate in person. It criticises the conflation of a right to self-representation with the right of access to court and its historical, conceptual and empirical grounds. This article argues 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.