



## LEGAL RESEARCH PAPER SERIES

Paper No 66/2014

September 2014

### No Justice Without Lawyers—The Myth of an Inquisitorial Solution

(2014) 33 CJQ 355

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# Editor's Note

## No Justice Without Lawyers—The Myth of an Inquisitorial Solution

☞ Access to justice; Adversarial proceedings; Civil proceedings; Inquisitorial proceedings; Legal representation; Litigants in person

### Introduction<sup>1</sup>

The number of parties to civil proceedings who do not have legal representation has risen steadily for a number of years. The volume of unrepresented litigants is expected to increase still faster now that legal aid has been withdrawn from most civil cases. According to Government figures, 623,000 of the 1 million people who benefited from Legal Aid annually will be denied access to this aid from April 1, 2013, when the Legal Aid, Sentencing and Punishment of Offenders Act 2012 became effective.<sup>2</sup> There is already evidence that the number of unrepresented litigants is fast increasing. Sir James Munby, President of the Family Division, has recently drawn attention to

“a drastic reduction in the number of represented litigants in private law cases. The number of cases where both parties are represented has fallen very significantly, the number of cases where one party is represented has also fallen significantly and, correspondingly, the number of cases where neither party is represented has risen very significantly.”<sup>3</sup>

Litigants in person (LIPs, also known as self-represented litigants) are a cause of much concern for several reasons.<sup>4</sup> Since lay persons are not familiar with the substantive law and court procedure, they have difficulty to prepare adequately and to comply with rules and court orders, with the result that the court is forced to devote disproportionate time and effort to cases involving. We may refer to this aspect as the efficiency deficit.

A more serious concern is, however, the disadvantage that unrepresented litigants suffer as a result of their unfamiliarity with the law and court procedure. In order to protect their rights persons need to know the relevant substantive law and what the rules of procedure require in order to take a dispute to court. Persons who lack legal knowledge are therefore poorly placed to defend their rights in court, as well as outside it. If obtaining justice calls for legal expertise, then those who cannot

<sup>1</sup> I am grateful to Dr Rabeea Assy, author of *The Right to Litigate in Person* (Oxford: Oxford University Press, 2014, forthcoming), for his comments.

<sup>2</sup> See <http://www.judiciary.gov.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf> [Accessed August 25, 2014].

<sup>3</sup> *Q v Q* [2014] EWFC 31 at [11].

<sup>4</sup> Kim Williams, *Litigants in person: A literature review*, Ministry of Justice (2/11), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/217374/litigants-in-person-literature-review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217374/litigants-in-person-literature-review.pdf) [Accessed August 8, 2014]. See also Rabeea Assy, *Revisiting the Right to Self-representation in Civil Proceedings* (2011) 30 C.J.Q. 267.

afford to pay for it are in effect denied access to justice. We may refer to this aspect as the justice deficit.<sup>5</sup>

These efficiency and justice deficits have been so serious that the last couple of years have seen a flurry of reports and initiatives seeking to come to grips with the problems that unrepresented litigants pose to the civil system of justice.<sup>6</sup> The Judicial Working Group on Litigants in Person Report, headed by Hickinbottom J., noted that

“providing access to justice for litigants in person within the constraints of a system that has been developed on the basis that most litigants will be legally represented poses considerable and unique challenges for the judiciary.”<sup>7</sup>

The Judicial Working Group went on to say that

“litigants in person are not in themselves ‘a problem’; the problem lies with a system which has not developed with a focus on unrepresented litigants. We consider it vital that, despite the enormous challenge presented, judges are enabled and empowered to adapt the system to the needs of litigants in person, rather than vice versa.”<sup>8</sup>

Broadly speaking, two strategies have been put forward for assisting litigants in person: out-of-court assistance and in-court-assistance.<sup>9</sup> Out-of-court assistance can take a variety of forms. It may consist of easy to comprehend explanations of the law and of court procedure in the form of pamphlets or internet sites, simple to complete court forms and simplified rules and practice directions. Out-of-court assistance may also be provided by court staff to help unrepresented litigants to comply with the process requirements involved in litigation. Finally, wider pro-bono schemes may be made available to litigants who cannot afford legal representation.

Ideas for assisting unrepresented litigants in the course of court proceedings take two very different forms. The first consists of permitting persons not holding the traditional legal qualifications to provide legal representation in court, at affordable fees for their services. This would in effect amount to opening up the market for legal services to non-lawyers, which would increase competition and bring down the cost of legal representation, so that fewer litigants would feel obliged to represent themselves. Such a reform would be similar to that which took place in the 1980s, when the solicitors’ monopoly over conveyancing was abolished, which in turn resulted in a dramatic fall in the cost of conveyancing. A more modest proposal along similar lines is to relax the conditions for allowing unrepresented litigants to be assisted by McKenzie friends.

Although breaking the monopoly over rights of audience is bound to be controversial, it might be worth examining, especially in view of the success of

<sup>5</sup> For the different manifestations of this deficit see Sir James Munby P.’s discussion in *Q* [2014] EWFC 31.

<sup>6</sup> The Civil Justice Council produced *Access to Justice for Litigants in Person*, November 2011; *Judicial Proposals for the Modernisation of Family Justice*, (Judiciary of England and Wales, July 2012); *Judicial Working Group on Litigants in Person Report*, headed by Hickinbottom J., July 2013, to mention a few.

<sup>7</sup> *Judicial Working Group on Litigants in Person Report*, headed by Hickinbottom J., July 2013, para.2.5.

<sup>8</sup> *Judicial Working Group on Litigants in Person Report*, headed by Hickinbottom J., July 2013. See also Lord Woolf, *Access to Justice—Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995), p.119; John Sorabji, “*Tinkler v Elliott*: Promptly setting aside a judgment given in a party’s absence” (2013) 32 C.J.Q. 9.

<sup>9</sup> Hazel Genn, “Do-it-yourself law: Access to justice and the challenge of self-representation” (2013) 32 C.J.Q. 411.

the reform of conveyancing. However, this article is not concerned with this strategy but with a more radical proposal of changing the nature of court proceeding so that litigants would not be disadvantaged by the lack of legal representation. Central to this proposal is the idea that the court should take an active role in the process so as to ensure that justice is done whether or not a litigant is legally represented. The Hickinbottom Report advocates the introduction

“of a specific power into CPR Rule 3.1 that would allow the court to direct that, where at least one party is a litigant in person, the proceedings should be conducted by way of a more inquisitorial form of process”.<sup>10</sup>

A similar view was expressed by Lord Thomas CJ.<sup>11</sup>

The aim of this paper is to assess the merits of this idea. The first obstacle that one encounters in doing so is the uncertainty of what is being proposed and, indeed, the ambiguity of the notion of an “inquisitorial process”. If by inquisitorial process one means a process in which the court of its own initiative decides how to define the issues, what evidence should be called, tests such evidence and investigates the conflicting allegations by considering arguments for and against, then no such procedure is in operation today in any advanced system. On the contrary, the legal systems of continental Europe consider legal representation indispensable to justice and impose a mandatory requirement of such representation in civil proceedings (other than small claims). These systems do so because they recognise the limitations on the court’s ability to fairly and effectively protect the interests of the opposing parties when it is both the investigator and the adjudicator. For the same reason common law systems insist on adversarial process, which distances the judge from the investigation process. I shall therefore examine the reasons for the long held belief by both common law and civilian systems that justice requires an adversarial process and consider whether the proposals put forward for lawyerless trials could overcome the justice deficit.

## Adversarial process

Central to the adversarial process is the separation of roles between the parties and the adjudicator. The parties define the controversy, present proof in support of their allegations, and test each other’s evidence and arguments. The judge’s role is limited to deciding between the competing cases that the parties have presented, and to supervising the process to ensure it is conducted in an appropriate manner. Lord Devlin explained<sup>12</sup>:

“Where the judge sits as an arbiter between two parties, he need consider only what they put before him. If one or other omits something material and suffers from the omission, he must blame himself and not the judge. Where the judge sits purely as an arbiter and relies on the parties for his information,

<sup>10</sup> *Judicial Working Group on Litigants in Person Report*, headed by Hickingbotton J., July 2013, paras 2.10, 5.11.

<sup>11</sup> Lord Thomas C.J., “Reshaping Justice” (Justice Lecture, March 3, 2014), available at: <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lcj-speech-reshaping-justice.pdf> [Accessed August 8, 2014].

<sup>12</sup> *Official Solicitor v K* [1965] A.C. 201 at 240–241; [1963] 3 All E.R. 191 at 210. See also: *Air Canada v Secretary of State for Trade (No.2)* [1983] 2 A.C. 394 at 438; [1983] 1 All E.R. 910 at 919; *Commissioners of Customs and Excise v A & D Goddard (a firm)* [2001] S.T.C. 725; *Al-Rawi v Security Service* [2010] EWCA Civ 482.

the parties have a correlative right that he should act only on information which they have had the opportunity of testing.”

Justice is done, Lord Greene said, by a judge who holds “the balance between the contending parties without himself taking part in their disputations”.<sup>13</sup> The way that Denning L.J. explained the role of the judge in *Jones v National Coal Board*<sup>14</sup> is worth quoting at length as it draws attention to the salient aspects of the adversarial system and their purpose:

“Yes, he [the judge] must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales ... but the judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties ... So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other ... and it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost ... The judge’s part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.”

These constraints on judicial participation in the litigation process are designed to place a distance between the judge and the investigation that takes place in front of the court. It is for the advocates to clarify the issues. It is for them to deploy evidence, to test it, to debate the inferences to be drawn from it, and to discuss the strengths and weaknesses of the competing accounts.

“An adversary presentation seems the only effective means for combatting this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known”,

wrote Lon Fuller and John Randall.<sup>15</sup>

During the trial the judicial role is confined to keeping order, as Denning L.J. was at pains to stress. Order, in the sense of ensuring that adequate standards are maintained in the conduct of the proceedings; e.g. by keeping out irrelevant,

<sup>13</sup> *Yuill v Yuill* [1945] 1 All E.R. 183.

<sup>14</sup> *Jones v National Coal Board* [1957] 2 Q.B. 55 at 63 CA. Followed in *Hadi Jemaldeen v A-Z Law Solicitors* [2012] EWCA Civ 1431.

<sup>15</sup> Professional Responsibility: Report of the Joint Conference, Lon L. Fuller and John D. Randall (1958) 44(12) *American Bar Association Journal* 1159–1162, 1216–1218, 1160.

confusing or distracting evidence, or ensuring that the investigation of the issues is not diverted from its main object, or stopping improper or oppressive examination of witnesses.

It is, therefore, somewhat misleading to say that the common law adversarial system requires the judge to be passive. The discipline that the judge must impose on the trial calls for considerable judicial activity. Under the CPR the disciplinary role of the court is greater and judicial activity is considerably more extensive than it was when Denning L.J. made those remarks. Today, court supervision over litigation starts well before the trial and is exercised by means of case management conferences and case management directions. However, although the scope of judicial management has greatly expanded, especially in promoting expeditious and economic resolution, its objective has remained essentially the same: to ensure that pre-trial preparations are adequate and to promote an effective trial of the issues and see to it that the trial is conducted in an effective manner. This may involve the court in excluding irrelevant or superfluous evidence, limiting the number of expert witnesses, placing limits on disclosure to ensure proportionality of effort and costs, and the like. We may refer to this aspect of judicial involvement in the litigation as the managerial aspect.

The court's managerial role is distinct from the investigation of the issues, in the sense of defining the issues, adducing evidence and testing that of the opponent. Today's judge is no more permitted to take part in the choice of issues to be decided, in directing the parties what evidence to adduce, or in cross-examining witnesses, to any greater extent than it was permissible for a Denning era judge to do. In short, a judge may not decide what to investigate and how to do so. This means that the judge must not put forward arguments in favour of one party and against another. The judge must not seek witnesses and interview them in private in order to decide whether they should be called. The judge must not instruct experts on what matters to investigate. The judge must not question witnesses with a view to testing, let alone undermining, their reliability. These matters have traditionally been left to the parties and continue to be outside the judicial remit even under the CPR system of court control of litigation. As we shall presently see, such limitation on the judicial role is not peculiar to the common law system but is followed by all advanced jurisdictions.

In addition to its managerial function the court has of course a decision making function. It has to adjudicate, to determine the law governing the issue and apply it to the facts of the case; namely, it must deliver judgment in favour of the claimant or the defendant. The managerial role may be called into play at any stage before the court has delivered judgment. But the decision making role comes into play only when the parties have completed their presentation of evidence and argument. It is only then that the court embarks on assessing the parties' respective allegations in order to reach a conclusion.

It will have become clear that the court's managerial and decision-making roles are distinguishable from the role that the parties and their lawyer play in litigation. Theirs is an inherently mercenary or adversarial role: to advance a particular position in opposition to another. Advancing a party case inevitably involves an intellectual or emotional commitment to the correctness and justness of the case advanced. Detachment, even-handedness, an open mind, are attributes that cannot

be expected from the parties or their advocates. In the face of resistance from an opponent it is practically impossible to present a case without some commitment to, or bias in favour of, its rectitude. It is logically impossible to have a commitment both to the rectitude of a particular position and to its negation. It is therefore impossible for a party to present its own case and that of the opponent with equal conviction. On occasion, a party is expected to draw the court's attention to the arguments that may favour the opponent's case, as where a party applies for an interim injunction without notice to the affected party. But no one believes that the interests of the absent party are fully served even where the applicant has conscientiously discharged its duty. This is why a person affected by an *ex parte* decision is entitled to have the decision reviewed at a hearing of which she has received notice and has had an opportunity to attend.

A judge who becomes actively involved in the process of presenting and testing evidence and argument is bound to be seen as favouring one party over the other. This is not just a matter of appearance but a reality, as we shall presently see. For the present it is sufficient to note that a person who conducts an investigation will necessarily form a hypothesis at some stage in the investigation, commonly early on. Once a hypothesis has been formed, the investigator would tend to focus attention on that hypothesis and be less able to give adequate attention to other possibilities. This phenomenon is the natural product of the intellectual or emotional commitment just described.

It is for this reason that the common law insists on keeping the judge out of the investigation of the issues until the parties or their advocates have concluded their presentations. This position is founded on the belief, going back a long time, that once a judge starts to take a hand in the investigation (such as by pressing witnesses about the cogency of their accounts), the judge is likely to form a view about the merits of the respective party positions. And once such a view has been formed the judge becomes less receptive to counter indicators. Put differently, a judge who attempts to present both parties' cases is bound to end up pressing harder for the case of one party long before he retires to decide the outcome. The perception of partiality that arises when a judge takes an active role in the investigation reflects the widely understood cognitive limitations that effect all of us.

### **The myth of an inquisitorial system**

Although it is often said that the adversarial system is a peculiar feature of common law systems, this is by no means the case, if by adversarial process we mean a process where the court must leave the investigation of the disputed facts to the parties. Attention has been given in England to the possibility of introducing a more inquisitorial system in order to assist litigants in persons. Although some may assume that an inquisitorial system (in the sense of judicial investigation of the issues) is to be found in civilian legal systems, this is not the case. Far from it, the major European systems impose mandatory legal representation in civil proceedings, except in very low value claims. This is true of Germany, France,

Italy and other European systems, where the advocates are expected to define the issues and present evidence and argument.<sup>16</sup>

The court in civilian systems may have a greater role in managing the hearings and in eliciting witness testimony, but the process remains strictly adversarial in the sense explained above. As in England, the parties define the issues. The continental civil court has no greater power than the English court to decide what matters to investigate. Since legal representation is compulsory, the litigation process is conducted by lawyers and not their clients.<sup>17</sup> The advocates present their parties' allegations and indicate to the court the evidence they wish to adduce and witnesses they wish to call. The court summons only witnesses indicated by the parties; it does not seek witnesses of its own motion. While it is true that witnesses in civilian systems are questioned by the court and not the parties' advocates, the court tends to pursue the line of questioning suggested by the advocates. This is only to be expected since it is the advocates who define the issues and therefore determine the matters that require examination.

The litigation process in civilian systems is largely conducted in written form. In France, for example, oral evidence is rarely taken. The rules of procedure in these systems lay down fairly detailed requirements concerning documentary evidence. The formalistic aspects of the continental legal process require a high degree of learning which untrained persons cannot hope to muster, even if they were permitted to represent themselves. Litigation in civilian systems assumes therefore a good deal more forensic knowledge than in common law systems. The mandatory requirement of legal representation in such systems is more a reflection of the reality that litigation is practically impossible without lawyers than of an ideological commitment to high procedural standards.

Legal systems such as the French, the German or the Italian, are no more inquisitorial than the English system. In all modern legal systems the parties control the issues, determine the evidence to be called and decide how to develop their respective positions and test that of the opponent. As noted, there are differences between common law and civilian procedures. In continental systems, for example, the court not the parties puts questions to witnesses. Or, to take another example, the court appoints experts to assist the court in deciding issues that require expertise, not the parties as in common law systems. But none of these differences alters the adversarial nature of the process and the court's reliance on professional advocacy in carrying out the investigation of disputed allegations.

## **Safeguarding the integrity of fact-finding processes**

### *Confirmation bias*

The insistence by both the common law and the civilian traditions on an adversarial system is based on the long standing belief that judicial involvement in the investigation of the issues would undermine the integrity of the decision making

<sup>16</sup> Legal representation is mandatory in: Austria, Belgium France, Germany, Greece, Italy, Luxembourg, the Netherlands; Portugal, and Spain; see, e.g. A. Layton and H. Mercer (eds), *European Civil Practice*, 2nd edn (London: Sweet & Maxwell, 2004), Vol.2.

<sup>17</sup> Dagmar Coester Waltjen and Adrian Zuckerman, "The Role of Lawyers in German Civil Litigation" (1999) 18 C.J.Q. 291.



process. Studies in cognitive psychology have demonstrated this belief to be well founded due to confirmation bias which investigators are liable to acquire.<sup>18</sup> Confirmation bias consists in a tendency to seek evidence supporting the hypothesis that the investigator has formed and to ignore evidence or explanations that undermine this hypothesis.

A series of experiments in the 1960s showed that people tend to be biased in favour of their existing beliefs. More recent work shows this to be a tendency to test ideas in a one-sided way, focusing on one possibility and ignoring alternatives thereby undermining the integrity of outcomes and conclusions. Explanations for this bias include the limited human capacity to process information and the tendency to be unduly influenced by the risk of reaching a wrong conclusion, which gets in the way of open minded rational investigation. Confirmation bias has been shown to contribute to overconfidence in one's own beliefs and to make one less receptive to contrary evidence. Poor decision making due to these biases has been found in a variety of decision making processes in different contexts.

Experiments have consistently found that people tend to test hypotheses in a one-sided way, by searching particularly for evidence consistent with the hypothesis that they formed, rather than looking at all the relevant evidence. In oral questioning, for instance, investigators tend to phrase questions to receive an affirmative answer that supports their hypothesis. They look for the consequences that they would expect if their hypothesis were true, rather than what would happen if it were false.

Confirmation bias is unintentional and unconscious. It takes the form of automatically adopting a biased strategy rather than of deliberate deception. Confirmation bias affects researchers and decision makers who honestly and conscientiously seek to reach a correct conclusion by employing the most appropriate and reliable method available to them. Notwithstanding best intentions, bias tends to creep in and infect the investigative process in a variety of ways. Where the investigator defines the question to be examined, the very framing of the issue may point the search in a particular direction, leaving out other possible lines of investigation. Investigations may consist of numerous decisions about what to look for, where to look, and how to interpret what has been found. An inclination, albeit unintended, towards a particular position may, therefore, affect the investigation process at many different points and in a variety of ways.

### *The influence of background assumptions*

The impact of the confirmation bias is magnified by the role that prior generalisations play in factual reasoning. The process of drawing inferences from data necessarily involves the use of generalisations which enable us to move from evidence to conclusion. Some generalisations used in the inferential process are scientifically proven and universally accepted. For instance, we are able to reason from the presence of a particular DNA to the identification of a decomposing body because it is accepted that every person's DNA is unique. But many generalisations are informed by assumptions that may be held only in a particular society, or are

<sup>18</sup> For a review of the literature see Raymond S. Nickerson, "Confirmation Bias: A Ubiquitous Phenomenon in Many Guises" (1998) *Review of General Psychology* 175.

shared only by persons of similar background, or are formed as a result of particular experience. Consequently, many assumptions used in common sense are relative to time, to place and to the investigator's experience and background.

Personal experience, and the beliefs which go with it, are moulded by class, gender, age, ethnicity, nationality, and religion. There is consequently much variation between the background assumptions used in reasoning from data to conclusions by differently situated groups and individuals. For instance, whilst running away from the police might look like an admission of guilt to some people, others might perceive it as nothing more than a sensible act of self-preservation with no bearing on an individual's involvement in crime.<sup>19</sup> We may refer to the relativity of generalisation used in common sense reasoning as the subjectivity factor.

### *Strategies for overcoming distortion in fact finding: replication and debate*

Decision makers are primarily interested in reaching a correct decision and would therefore try to make their processes as robust as possible in order to achieve maximum accuracy. However, no matter how hard we try we cannot eliminate the confirmation bias nor is it possible to escape one's background assumptions. Where reaching a correct decision is important two strategies are employed to overcome the distorting effects of bias and subjectivity: validation and debate. Validation is the common method used in science. A scientific theory derived from experiments must be independently validated before it becomes accepted. To be validated the experiment must be capable of being independently replicated with the same results. Further, it must be shown that there is no other plausible explanation for the result obtained other than that claimed.

The methodology of validation through replications is unavailable for the investigation of past events. We can know the past only by means of drawing inferences from evidential data, such as contemporary witness accounts, documents, and circumstantial evidence of many kinds. To form a conclusion about the occurrence of a past event we need to piece together the relevant evidence in support of a particular hypothesis and eliminate other possible hypotheses. The process may be simple or complex depending on how long ago the events took place and on the quantity and quality of data left behind. Factual disputes brought to court tend to be contentious otherwise they would not require court adjudication, or would have been disposed of before reaching trial. The same is true of historical events that continue to be discussed long after they took place.

Investigations of past events, whether in legal proceedings or in other contexts, suffer from the inherent weaknesses identified above: confirmation bias and the relativity of the investigator's mental resources. Persons who research the past, whether professional or amateurs, whether inside or outside an institutional framework, are vulnerable to cognitive bias and subjective relativism no matter

<sup>19</sup> This is not an argument for racial quotas on juries, which raises a host of further complications. English law has always resisted the suggestion: *R. v Smith* [2003] EWCA Crim 283; [2003] 1 W.L.R. 2229, *R. v Ford* [1989] Q.B. 868 CA. Also see Cheryl Thomas, *Are Juries Fair?* Ministry of Justice Research Series 1/10 (2010) (finding no evidence of racial bias amongst mock jurors and concluding that "one stage in the criminal justice system where BME groups do not face persistent disproportionality is when a jury reaches a verdict").

how hard they try to overcome them. The reconstruction of the past is therefore bound to be influenced by the intellectual and cultural baggage brought to the task, whether by academic historians, journalists or professional judges. Moreover, we are bound to remain unconscious of the effects that these cognitive factors have on our thought processes.

In most contexts these latent cognitive limitations pose no special difficulty because accounts of the past are usually offered as explanations to be tested or debated before they are accepted or before they are relied upon in a decision making process. For every historian, scientist, journalist, political pundit, or economic analyst, pronouncing a view about past events there are many others looking into the same question or phenomenon who would be only too ready to expose the flaws in the view offered. To gain widespread public confidence a factual account of any consequence must first be tested by open debate. Robust knowledge of past events is therefore reached only through the exposure of competing explanations to the rigours of the market of ideas.

*Adversarial process: the only guarantee of integrity of judicial process*

Since judgments are meant to be determinative of the parties' rights and final, court decisions are not amenable to testing in the market of ideas. Court findings cannot be further assessed once the appeal process has been exhausted. There is no mega-test by which to gauge the factual accuracy of final judgments. If we were able to design a superior process for measuring the conformity of judicial pronouncements with the truth, we would have reason to discard our existing process in favour of the superior one, in which case we would again be left with no further means of evaluating the accuracy of court findings. Given that court judgments cannot be tested outside the legal process, the only guarantee of rectitude of decision has to be found within the process itself.

The solution adopted in the judicial context consists of the adversarial system. The adversarial process does not seek to immunise judicial reasoning against confirmation bias and subjective relativism, which is of course impossible. Instead, it distances the judge from the activity which is most prone to these corrosive factors: the investigation of the issues. It is for this reason that the subject-matter of the investigation is determined by the parties and it is they who take turns in offering competing accounts, adducing evidence and challenging each other's explanations and theories. In other words, the adversarial process mirrors the open market of ideas that operates outside the law for testing factual account outside the court.

Today's judiciary is as aware as ever of the risks of becoming involved in the articulation of party cases. English judges are reluctant to take over the presentation of a party's case even where the law seems to require it. They are especially disinclined to engage in cross-examination of witnesses in strongly contested disputes. Two decisions in the Family Court demonstrate the judicial attitude in this context. In *H v L*<sup>20</sup> a father (F) applied for a contact order in respect of his young daughter. The mother (M), who was not married to F, resisted the application

<sup>20</sup> *H v L* [2006] EWHC 3099 (Fam).

alleging that F had sexually abused her older daughter by a different father. F, who was unrepresented, denied the allegation and the question arose as to who should cross-examine the older daughter. In criminal proceedings a person accused of a sex offence is not permitted to cross-examine in person child witnesses or alleged victims of sex offences.<sup>21</sup> In *H v L* Roderic Wood was troubled by what the Family court should do when it considered that a victim of alleged sexual abuse should not be cross-examined by a litigant in person. Roderic Wood J. referred to an earlier criminal case where Lord Bingham C.J. said that where an unrepresented accused was forbidden to cross-examine in person the complainant of a sexual assault, the court may have to do so as a measure of last resort.<sup>22</sup> Although Lord Bingham stressed that in such situations judges should limit themselves to putting questions suggested by the accused, rather than descend into the arena on behalf of the defence, Roderic Wood J. expressed “a profound unease at the thought of conducting such an exercise in the family jurisdiction”.<sup>23</sup> In the event, the Attorney General provided an advocate for the purpose of cross-examination in *H v L*.

No such solution, however, was available in three separate appeals that were considered by the Court of Appeal in *Q v Q*.<sup>24</sup> In each of the cases a father was seeking access to their child. The fathers were unable to afford legal representation and were unsuccessful in obtaining legal aid. The mothers were represented with public funding. In *Re B*, one of the three cases under appeal, the mother alleged that she had been raped by the father. The question was again whether the father should be permitted to cross-examine the mother. The Matrimonial and Family Proceedings Act 1984 s.31G(6) states:

“Where in any proceedings in the family court it appears to the court that any party to the proceedings who is not legally represented is unable to examine or cross-examine a witness effectively, the court is to —

- (a) ascertain from that party the matters about which the witness may be able to depose or on which the witness ought to be cross-examined, and
- (b) put, or cause to be put, to the witness such questions in the interests of that party as may appear to the court to be proper.”

The trial judge, Judge Wildbood, found that it was inappropriate to permit the father to conduct the cross-examination. However, the judge also considered that the court was ill placed to conduct a satisfactory cross-examination on behalf of the father. First, because the judge could not take instructions from the father. And, secondly, the preparation for such cross-examination required legal advice that would explain to the father the consequences of various options that could be pursued; something that the court was in no position to offer.

On appeal, Sir James Munby P., stated the problem bluntly<sup>25</sup>:

<sup>21</sup> Criminal Justice Act 1988 s.34A; Youth Justice and Criminal Evidence Act 2005 s.35. And see *R. v Brown* [1998] 2 Cr. App. R. 364.

<sup>22</sup> *Brown* [1998] 2 Cr. App. R. 364.

<sup>23</sup> *H v L* [2006] EWHC 3099 (Fam) at [24].

<sup>24</sup> *Q* [2014] EWFC 31.

<sup>25</sup> *Q* [2014] EWFC 31 at [43]. Cf John Sorabji, “Experts — An Inquisitorial Future?” *Expert Witness Institute News* (May 2014).

“The absence of public funding for those too impoverished to pay for their own representation potentially creates at least three major problems: first, the denial of legal advice and of assistance in drafting documents; second, and most obvious, the denial of professional advocacy in the court room; third, the denial of the ability to bring to court a professional witness whose fees for attending are beyond the ability of the litigant to pay.”

None of these deficiencies could be cured by the court itself. The court cannot provide legal assistance for preparation, the court cannot act as advocate for a party, and the court cannot determine the case justly having determined that expert reports were necessary but a party has no financial means of obtaining them.<sup>26</sup> Sir James Munby P. was quite clear that “in cases where the issues are as grave and forensically challenging as in *Re B* and *Re C*, questioning by the judge may not be appropriate or, indeed, sufficient to ensure compliance with Articles 6 and 8” of the European Convention on Human Rights.<sup>27</sup> He stated<sup>28</sup>:

“... the matters to which I have referred above (in particular those relating to the issues of privilege and related issues) are matters on which the father in *Re B*, desperately needs access to skilled legal advice, both before and during the fact-finding hearing. These are not matters which the judge conducting the fact-finding hearing can determine without the benefit of legal argument on both sides. If the judge is deprived of adversarial argument, and if the father is denied access to legal advice both before and during the hearing, there must, in my judgment, be a very real risk of the father’s rights under Articles 6 and 8 being breached both in the family proceedings and possibly also, in the case of the father in *Re C*, in the criminal proceedings.”

Having concluded that the court could not do justice in the absence of legal representation for the fathers, Sir James Munby P. advanced the following solution<sup>29</sup>:

“In the ultimate analysis, if the criteria in section 31G(6) are satisfied, and if the judge is satisfied that the essential requirements of a fair trial ... cannot otherwise be met, the effect of the words “cause to be put” in section 31G(6) is, in my judgment, to enable the judge to direct that appropriate representation is to be provided by — at the expense of — the court, that is, at the expense of HMCTS.”

He went on to hold that since the court was satisfied that that expert attendance at court was necessary, the cost of such attendance would have to be borne by HMCTS if there is no other properly available public purse would pay.<sup>30</sup> The proceedings in the appeals considered in *Q v Q* were private law proceedings. Child care proceeding brought by local authorities are considered public law proceedings. Sir James Munby P. expressed the view, obiter, that failing all else the local

<sup>26</sup> *Q* [2014] EWFC 31 at [54], [59].

<sup>27</sup> *Q* [2014] EWFC 31 at [76].

<sup>28</sup> *Q* [2014] EWFC 31 at [85].

<sup>29</sup> *Q* [2014] EWFC 31 at [79].

<sup>30</sup> *Q* [2014] EWFC 31 at [82].

authority should pay the costs of the unrepresented party where such representation was necessary.<sup>31</sup>

Providing legal representation at the court's own expense is a novel and radical solution, one which may well be challenged by the treasury. For our purpose, however, the important aspect to note is that the Court of Appeal has recognised that there are situations where it is impossible to do justice without an adversarial process in which all parties are legally represented. No increase in the inquisitorial nature of the proceedings can make up for the adversarial deficit in such situations.

There is a further aspect that the case airs: compulsory legal representation in certain circumstances. At common law litigants have a right to act in person; they are free to choose not to be legally represented.<sup>32</sup> This right has now been cut down in certain instances. The right of accused persons to cross-examine rape complainants in person was removed by Parliament.<sup>33</sup> Cross-examination of sexual offence complainants is conducted by professional advocates bound by the professional ethics of the Bar. An accused may still choose to defend himself in a rape case, but court-appointed special counsel now takes over the phases of the trial involving cross-examination of the complainant.<sup>34</sup> However, the prohibition on cross-examinations by litigants in person is limited to specified criminal offences. The Court of Appeal in *Q v Q* posed the question whether the Family court had the power to forbid an unrepresented litigant to cross-examine in person, when the court considered that to do so would be oppressive to a witness who alleges to have suffered abuse at the hands of the unrepresented litigant. As the question did not arise in the appeals before the court, no decision was required on the point. But Sir James Munby P. thought that an argument could be made that to expose the alleged victim to cross-examination by the alleged perpetrator might infringe the alleged victim's rights under ECHR art.8 or art.3 so as to impose on the court an obligation prevent it.<sup>35</sup>

*Q v Q* provide a timely reminder of the importance of having competent legal advice in preparation for litigation, as well as having legal representation during legal proceedings. The solution that the Court of Appeal devised is by its very nature limited to overcoming the difficulty of cross-examination of alleged victims of sexual abuse in private law family proceedings. However, the need for access to legal expertise goes well beyond such situations. Knowledge of the law is an obvious precondition to the rule of law. A system governed by law can only exist where the law is knowable, for otherwise persons cannot discharge their duties or take advantage of their rights.

Yet, by its very nature the law tends to be complex and in numerous fields inaccessible to persons without expert legal knowledge. There are many laws that

<sup>31</sup> *Q* [2014] EWFC 31 at [89].

<sup>32</sup> *R v Woodward* [1944] K.B. 118; *Brown* [1998] 2 Cr. App. R. 364 at 369. See Rabeea Assy, "Revisiting the right to self representation in civil proceedings" (2011) 30 C.J.Q. 276; Rabeea Assy, *The Right to Litigate in Person* (Oxford: Oxford University Press, 2014, forthcoming).

<sup>33</sup> Youth Justice and Criminal Evidence Act 1999 s.34. Section 36 empowers the court to extend this restriction to any witness in *any* case, provided that the quality of the witness's evidence would thereby be improved and it is not contrary to the interests of justice to prevent the accused from cross-examining the witness in person. For discussion, see Diane Birch and Roger Leng, *Blackstone's Guide to the Youth Justice and Criminal Evidence Act 1999* (Blackstone, 2000), Ch.6.

<sup>34</sup> Youth Justice and Criminal Evidence Act 1999 s.38. For discussion see Robertts and Zuckerman, *Criminal Evidence*, 2nd edn (Oxford: Oxford University Press, 2010), p.456.

<sup>35</sup> *Q* [2014] EWFC 31 at [70]-[75].

ordinary members of the public are expected to know for themselves. For instance, that it is unlawful to kill, steal or rape, or that it is an offence to exceed the speed limits. But beyond criminal law and common regulatory offences lies a vast sea of legislation and precedent which is not only outside the comprehension of the ordinary person but may also be opaque to most lawyers unless they specialise in the relevant field.

English law has put in place a special institution designed to facilitate access to knowledge of the law: legal professional privilege. It provides persons a private and secure space in which to obtain information about their rights and obligations safe in the knowledge that they may do so without adverse consequences to themselves. Given the importance of providing access to the law, legal professional privilege is no mere rule of evidence but a fundamental constitutional right. Legal professional privilege has two branches. The first, advice privilege, provides persons with a secure space within which they may freely communicate with their lawyers for the purpose of obtaining legal advice in confidence, free of fear that they may be compelled to divulge their communications. The second branch, litigation privilege, is designed to provide similar security for communications not just with lawyers but also with third parties for the purpose of preparing for litigation.

Clients consulting lawyers do not engage in an academic exercise but seek understanding of their legal position so that they may better manage their affairs or their disputes. For lawyers to be able to provide a client with an understanding of her legal position, the client must provide the lawyer with the relevant information. However, since what is relevant depends on the law in question the client requires the lawyer's advice in identifying the facts that need to be placed before the lawyer. Hence the reason for the need for a secure and private place which removes any inhibition on the part of the client to impart to the lawyer all the necessary information.

The ability to consult a lawyer is of particular significance when it comes to preparation for litigation, as was noted in *Q v Q*. The importance of access to legal assistance is reflected in the criminal process. A denial of access to a lawyer in the police station or in a criminal prosecution may render the entire proceedings unfair, no matter how much the court has sought to make up for such denial. State denial of legal assistance to indigent litigants in civil proceedings may similarly undermine the fairness of the proceedings.<sup>36</sup> It needs stressing that court assistance during proceedings cannot be expected to make up for the disadvantage suffered by litigants' inability to consult with a lawyer in preparation for proceedings. Once before the court, parties no longer have the benefit of a private and secure space in which to consider their legal positions and prepare for litigation. A court may not confer with a party in private or keep from other parties information revealed to it.

It is widely accepted that a denial of legal assistance in criminal proceedings is a fundamental breach of due process which cannot be cured by judicial assistance during the trial. Since lawyers serve a similar function in civil proceedings, it is by no means clear why it should be thought that the civil court can make up the

<sup>36</sup> *Steel v United Kingdom* (2005) 41 E.H.R.R. 22.

deficit in legal assistance.<sup>37</sup> It is no answer to say that a civil court does so satisfactorily in child care proceedings because the court in such proceedings has the benefit of preparations made by institutions dedicated to child protection, such as social services. Local authority social services possess the legal knowledge, are vested with the requisite authority, and may obtain information in confidence. The court in care proceedings will have the benefit of expert reports compiled by specially trained persons. In the absence of input from such sources the court would lack the information necessary for deciding what is in the best interests of a child. No such facilities are available in ordinary civil litigation, nor are they part of the proposals for introducing a more inquisitorial type of civil proceedings.

### *Adversarial process shields the court from responsibility for error*

By distancing the judge from the investigation of the disputed issues the adversarial process shields the court from responsibility for erroneous decisions. Where the court's role is limited to deciding according to the evidence adduced by the parties and tested by them, the court's responsibility for the correctness of the outcome is commensurably limited to drawing the appropriate inferences from what it has seen and heard during the trial. The judge has no higher responsibility for the correctness of its decisions. However, were the court to undertake the role of settling the issues, of articulating each party's positions and of deciding which witnesses to call and how to examine them, the court would in effect undertake responsibility for the factual rectitude of its decisions. A judge who largely managed the process of fact finding would be accountable for getting it right. If miscarriage of justice occurred, it could be laid squarely at the court's door. Since any fact finding process is liable to result in error in some cases, the court could become the target of public criticism which in the long term could undermine confidence in the judicial process.

There would also be questions of redress. Litigants who have been let down by their legal representatives could hold them accountable in negligence. A self-represented litigant who mismanaged her own case can blame only herself. But if the court undertook to advance her cause, the litigant could justly feel aggrieved when the judge mishandled the task. Judicial responsibility for outcomes in cases where the judge conducted the parties' cases would be greater than judicial responsibility in child care proceeding, which are non-adversarial and in which the paramount duty of the judge is to safeguard the welfare of the child before it. This is because the judge in child care proceedings is presented with reports and representations from specialist child care agencies, such as social services, and is expected to rely on them in reaching a decision. Were inquisitorial proceedings to take root, public pressure could build up over time to recognise rights to compensation for judicial mistakes, similar to rights of compensation from other public authorities. There are therefore good policy reasons for distancing the court from the investigation process, quite apart from the cognitive factors discussed earlier.

<sup>37</sup> As Roderic Wood J. recognised in *H v L* [2006] EWHC 3099 (Fam) at [25]; and see discussion of this case by Sir James Munby P. in *Q* [2014] EWFC 31



## The model of child care non-adversarial proceedings unsuitable for assisting unrepresented litigants

Although English law, like its continental counterparts, operates an adversarial system for most disputes, non-adversarial proceedings are used in certain contexts. Child care proceedings are the most prominent instance of such proceedings. Where the welfare of children is at stake it is incumbent on the court to investigate relevant matters and to arrive at a decision that is most likely to safeguard the interests of the child.<sup>38</sup> Given that the paramount duty of the court in care proceedings is to protect the child rather than hold the balance between competing parties, the court may deviate from due process rules that are otherwise indispensable to justice. For instance, the court may withhold disclosure from other interested parties such as parents.<sup>39</sup> Since the court's function is to safeguard the welfare of a child when those who would otherwise discharge this function are unable or unwilling to do so, the court must reach a "risk-based judgment", as the Ryder report explains,<sup>40</sup> and choose the course most likely to reduce the risk of harm to the child in question. The court's role in such proceedings is that of a carer not an adjudicator.

By contrast, where the court decides a dispute between two or more parties who are entitled to equal protection, a procedure comparable to that employed in care proceeding would be indefensible. A court faced with opposing parties, each asserting a claim of right, cannot function as it does when it holds a brief for only the vulnerable child. It must therefore, be assumed that when the Hickinbottom Report recommended the introduction of some form of inquisitorial proceedings it did not have in mind a procedure comparable to care proceedings. However, since the report did not elaborate what form a more inquisitorial procedure would take it is only possible to speculate. Recent cases in which this idea has been discussed suggest that the report did not contemplate an inquisitorial process, in the sense explained above, but a different form of case management.

In *Mole v Hunter*<sup>41</sup> Tugendhat J. referred to the idea put forward in the Hickinbottom Report of introducing a specific power into CPR r.3.1 that would allow the court to direct that the proceedings should be conducted in a more inquisitorial form. But he noted that CPR r.3.1(2)(m) was already sufficiently wide to make the necessary procedural adjustments to accommodate litigants in persons ([111] of the judgment). Tugendhat J. proceeded to use this power in order to search court files for relevant papers which the parties had failed to include in the bundles of documents that they were required to produce for the court. The judge proceeded to arrange the bundles in chronological order, as the parties should have done, and conducted the hearing by asking first the claimant and then the defendant about each of the matters complained of and then gave each an opportunity of asking questions of the other. When this was done, the judge went through the

<sup>38</sup> *Re C (a minor: irregularity of practice)* [1991] 2 F.L.R. 438; *Re B (a minor) (disclosure of evidence)* [1993] Fam. 142; [1993] 1 All E.R. 931. In *Re R (a minor) (disclosure of privileged material)* [1993] 4 All E.R. 702 it was held that in wardship proceedings and in proceedings under the Children Act 1989 the judge is duty bound to investigate any material relevant to the determination of the child's welfare, whether put before him by the parties in the adversarial manner or not. See also *Oxfordshire County Council v M* [1994] Fam. 151, [1994] 2 All ER 269, CA; *Re L (a Minor) (police investigation: privilege)* [1997] AC 16, [1996] 2 All ER 78, HL.

<sup>39</sup> *(Re) C's Application for Judicial Review* [2012] NICA 47 and *A County Council v SB* [2010] EWHC 2528 (Fam).

<sup>40</sup> Ryder J., *Judicial Proposals for the modernisation of civil Justice* (July 2012), para.42. See also *RW v Neath Port Talbot CBC* [2013] EWCA Civ 1227; *DW (A Child) (Termination of Parental Responsibility)*, *Re* [2014] EWCA Civ 315.

<sup>41</sup> *Mole v Hunter* [2014] EWHC 658 (QB).

chronology of events and then invited each party to correct or complement the understanding that he had formed on the basis of reading the papers and to make their submissions.

In another case, involving an acrimonious parental access dispute in which both parties represented themselves, Ryder L.J. said that

“a more inquisitorial process may help those judges who need to deal with very difficult cases involving litigants in person where emotions can run very high”.<sup>42</sup>

Ryder L.J. outlined a process similar to the one adopted by Tugendhat J. in the above case. That is, the trial judge would ask each party to set out their access proposals and to confirm their version of the disputed key facts. They could then be asked by judge what questions they would like to put to the other party. The judge could then assimilate the issues identified into his or her own questions and ask each party the questions that the judge thinks are relevant to the key issues in the case. Finally, the judge would give the parties the opportunity to give a short reply.<sup>43</sup>

Had he stopped there, Ryder L.J.'s proposal would have amounted to a process in which the court assisted unrepresented litigants to clarify their positions, to present their evidence and to develop their respective arguments. In such a process the judge still manages rather than investigates; the judge merely assists the parties to develop their own respective cases rather than take it upon herself to do so for them. But it is possible that Ryder L.J. had in mind a deeper judicial involvement in the factual investigation. He observed that the court's rules and practice directions are not spurious but are there for a purpose and should therefore be followed by all manner of litigants.<sup>44</sup> Ryder L.J. went on to address the situation where unrepresented litigants lack the ability to follow the rules and said<sup>45</sup>:

“If the dispute is not immediately susceptible of conciliation or out of court mediation it will require a lawyer's analysis. This is after all a court of law. In the absence of lawyers, the judge has to do that and to do that without assistance and sometimes with quite vocal hindrance. That requires more time than in a circumstance where the lawyers can be required to apply the rules and practice directions, produce the witness statements, summaries, analyses and schedules, obtain instructions and protect their lay client's interests. Where a court is faced with litigants in person the judge has to do all that while maintaining both the reality and perception of fairness and due process.”

If this means that the court would have to perform all the services that a lawyer renders a party in litigation, then it creates an unfulfillable expectation. A judge cannot take instructions from each party in private, or draw up witness statements, or assist a party to discharge his disclosure obligations, or carry out many of the other functions expected of legal advisers.

<sup>42</sup> *Re C (A Child) (Prohibited Steps Order: Procedural Irregularity)* [2013] EWCA Civ 1412 at [47].

<sup>43</sup> *Re C* [2013] EWCA Civ 1412 at [48].

<sup>44</sup> *Re C* [2013] EWCA Civ 1412 at [50].

<sup>45</sup> *Re C* [2013] EWCA Civ 1412 at [40].

This brings out an aspect of legal representation that is overlooked in discussions about assisting unrepresented litigants: out of court preparation. The key to success in litigation is sound preparation, which in turn calls for an understanding of the relevant law and planning how to use legal process in order to protect the party's legal position, all of which call for considerable legal expertise. As Sir James Munby P. explained in *Q v Q*, discussed above, persons involved in a dispute of any complexity need expert legal assistance in order to assess their position and make adequate preparations for court proceedings.<sup>46</sup>

### **Alternatives to judicial assistance for making up the adversarial deficit**

While case management improvements could be of assistance to unrepresented litigants, there is a limit to the extent that in-court judicial assistance can redress the disadvantage suffered by litigants in person in an adversarial process. An adversarial process is central to any enlightened system of justice because it is the only procedure capable of providing a rational, objective and even-handed dispute resolution process. It does so by distancing the decision maker from the investigatory process and thereby preventing the judge from taking on the task of presenting the parties' cases. This distance has the added benefit of shielding the court from responsibility for the correctness of its decisions and thereby protecting it from public criticism.

The long held belief that judicial involvement in the presentation of the parties' evidence and arguments would undermine the integrity of the fact finding process is now supported by experimental work in the field of cognitive psychology. Such experiments bear out what has long been assumed, that a judge who takes it upon herself to investigate the disputed facts is liable to form an unconscious bias in favour of one of the parties' accounts. Once such bias has crept in, the fact finder tends to focus attention on indicators supporting the hypothesis and ignore contrary indicators.

Only an adversarial process, which distances the judge from the factual presentation of competing accounts, can guarantee that all the relevant considerations are adequately aired and tested. Put differently, by its very nature, the judicial role is judgmental, in the sense of forming judgment. A judge who descends into the arena where the controversy is played out is bound to adopt a judgmental approach long before he has seen and heard all that the parties wish to put forward. Such a judicial involvement is incompatible with doing justice between two parties each entitled to equal protection. The paradoxical truth is that in order to maintain an unbiased decision making process, the parties must not rely on the decision maker to develop their respective positions but must each have their own champion unburdened by responsibility to the opponent beyond ethical obligations of propriety and fair play.

While there is no alternative to the adversarial process, it is the case that there is room for improving the adversarial process so as to make it easier for unrepresented litigants to manage. Court staff may offer lay litigants easy to understand information about court procedure and advice on compliance with

<sup>46</sup> *Q* [2014] EWFC 31.

process requirements.<sup>47</sup> Sensitive judicial case management could make it easier for unrepresented litigants to comply with rules and court orders. Some consider that simplifying the rules of procedure would increase the ability of unrepresented parties to conduct their case. It is of course desirable to simplify the rules of court, to get rid of convoluted and opaque language in rules and practice directions, and to remove process requirements that serve no useful purpose. But here too the limitations need to be borne in mind. Opaque language and spurious complexity are not the only reasons why the litigation process requires legal expertise. Complexity is the inevitable result of the commitment of treating like cases alike. This commitment produces a continuing refinement of court practice and the build up to precedents to ensure that like cases are treated alike. Consequently, no matter how hard the rule maker and the court may try to make the procedure comprehensible to the lay person, unrepresented litigants are bound to remain at disadvantage.<sup>48</sup>

In order to avoid a justice deficit in an adversarial system, unrepresented litigants must be able to obtain in private competent legal advice that would enable them to work out their legal position, to assess the desirability of litigation and to navigate the court process. Aside from restoring publicly funded legal aid by the back door, as the Court of Appeal did in *Q v Q*, two main strategies seem to be emerging. The first consists of widening the class of persons that would be allowed to provide legal assistance to unrepresented litigants. This would essentially amount to liberalising the market for legal services and opening it to new entrants by conferring rights of audience on persons without formal legal qualifications.<sup>49</sup> A more modest proposal is to expand the role of McKenzie Friends.<sup>50</sup> Both ideas merit serious consideration.

A second strategy consists of establishing court annexed legal services for providing legal assistance to unrepresented litigants.<sup>51</sup> The provision of such services may be carried out by salaried lawyers employed for this purpose or by volunteer lawyers pro bono. Such an institutional framework may include specially trained personnel who do not otherwise possess formal legal qualifications.

Both these strategies attempt to provide unrepresented litigants legal assistance within an adversarial framework. Both recognise that in order to advance their case effectively untutored parties need expert help to prepare for litigation in private in order to identify the evidence needed to advance their allegations and in order to plan their strategy. It is possible that with time these alternatives to representation

<sup>47</sup> Macfarlane, *The National Self-Representation Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants (Final Report)* (May 2013), available at: [http://www.lsuc.on.ca/uploaded%20files/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2014/Self-represented\\_project.pdf](http://www.lsuc.on.ca/uploaded%20files/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf) [Accessed August 12, 2014]; *Handling Cases Involving Self-Represented Litigants: A benchguide for Judicial Officers* (Judicial Council of California Administrative Office of the Courts) (January 2007), available at: [http://www.courts.ca.gov/documents/benchguide\\_self\\_rep\\_litigants.pdf](http://www.courts.ca.gov/documents/benchguide_self_rep_litigants.pdf) [Accessed August 12, 2014].

<sup>48</sup> Rabeea Assy, "Can the Law Speak Directly to its Subjects? The Limitation of Plain Language" (2011) 28 *J. of Law and Soc.* 376.

<sup>49</sup> *Judicial Working Group on Litigants in Person Report* (Judicial Office) (July 2013), pp.7–9, available at: <http://www.judiciary.gov.uk/publications/judicial-working-group-lip-report/> [Accessed August 12, 2014].

<sup>50</sup> Report: *Fee-Charging McKenzie Friends (Legal Services Consumer Panel)* (April 2014), p.17, available at: [http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/2014%2004%2017%20MKF\\_Final.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf) [Accessed August 8, 2014]; New Zealand Law Commission Report, *Review of the Judicature Act 1908*, pp.147–150, [http://www.lawcom.govt.nz/sites/default/files/publications/2012/02/nzlc-ip29-review\\_of\\_the\\_judicature\\_act\\_1908\\_towards\\_a\\_consolidated\\_courts\\_act.pdf](http://www.lawcom.govt.nz/sites/default/files/publications/2012/02/nzlc-ip29-review_of_the_judicature_act_1908_towards_a_consolidated_courts_act.pdf) [Accessed August 8, 2014].

<sup>51</sup> Australian Productivity Commission, *Access to Justice Arrangements* (Draft Report, April 2014), available at: [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0008/135296/access-justice-draft.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0008/135296/access-justice-draft.pdf) [Accessed August 8, 2014].

by professionally qualified lawyers would become sufficiently effective to offer a realistic alternative to representation by solicitors and barristers. If that were to happen, we would have an efficient market for the provision of legal services, which in turn will result greater competition, in lowering the cost of legal services and in making them affordable to most. We might reach a situation in which becoming a litigant in persons is a matter of choice rather than economic necessity.

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