The litigant in person and the access to justice dilemma: *quo vadis* South Africa[*]

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Abstract

In recent years much attention has been given to the ever-increasing phenomenon of litigants in person (also referred to as self-represented litigants or *pro se* litigants) in civil practice within common law countries, particularly in the United States of America, Canada, Britain and Australia. Although the common law has long accepted a litigant's right in civil proceedings to litigate in person, legal representation has more or less been the norm for centuries. Despite a substantial body of research material that has been steadily building up around various aspects of self-represented litigants, many questions have still not been answered definitively, including the reason for the growth of this phenomenon. However, what is certain is that this phenomenon is placing all aspects of the various justice systems under tremendous pressure, including the adversary system itself. Although various common law countries have made huge strides in trying to understand the phenomenon, the various role players in South Africa's judicial administration have paid little or no attention to litigants in person (despite a regular appearance of such litigants in our courts). As it is probably only a matter of time before our legal system comes under the same pressure experienced elsewhere, it is the purpose of this article to offer proposals to first, ameliorate and secondly, to manage the consequences of such expected pressure based on the experience of other common law countries

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[*] This article is based on work supported financially by the National Research Foundation. Any opinion, findings and conclusions or recommendations expressed in this material are those of the author and therefore the NRF does not accept any liability in regard to them.

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INTRODUCTION

In recent years considerable attention has been given to the ever increasing phenomenon of litigants in person (also referred to as self-represented litigants or *pro se* litigants[1]) in civil proceedings within common law countries, particularly the United States of America, Canada, Britain, and Australia. Although the common law has long accepted a litigant's right to litigate in person in civil proceedings,[2] legal representation has more or less been the norm for centuries.[3] Despite a substantial body of research which has been steadily building up around various aspects of self-represented litigants, many questions, including the reason for the growth of this phenomenon, are yet to be answered definitively.[4] There is also a strong possibility that the views of many role players in this regard are based on assumptions, rather than facts. It is also not clear why the rise is particularly noticeable in certain areas of the law, such as family law. However, what is certain is that this phenomenon is placing all aspects of the various justice systems, including the adversary system, under tremendous pressure.

The common-law countries referred to above have made huge strides in trying to understand the phenomenon, and to this end have, among others, hosted many conferences, established task forces, commissioned studies, delivered commission reports, drafted guidelines, established NGOs, and gathered statistical information. In stark contrast the various role players in South Africa's judicial administration have paid little or no attention to

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1 This latter term literally means for him/herself (or: on behalf of), and is frequently encountered in American literature: see *eg* Bradlow 'Procedural due process rights of *pro se* civil litigants' (1988) 55 *Univ of Chi L Rev* 659; Goldschmidt 'How are courts handling pro se litigants?' (1998) 1 *Judicature* 13; Goldschmidt 'The pro se litigant's struggle for access to justice' (2002) 1 *Family Court Review* 36 (hereafter 'The pro se'); Andrews 'Duties of the judicial system to the pro se litigant' (2013) 2 *Alaska Law Review* 189; Mather 'Changing patterns of legal representation in divorce from lawyers to *pro se'* (2003) 1 *Journal of Law and Society* 137.

2 A person may of course also resort to self-representation in criminal proceedings. Self-representation is not new: even in Roman law litigants presented their case to the *praetor* who not only established whether the correct steps were taken and the dispute properly formulated, but who ensured that the matter was finally brought before a judge. One saw the rise of the jurists (who knew the law and advised clients free of charge) during the Republican period: Kunkel *An introduction to Roman legal and constitutional history* (2ed 1975) ch 7.

3 During the 12th century parties were allowed representation in the common law: Plucknett *A concise history of the common law* (5ed 1956) 216–217. A party's place was often taken by a *responsalis* ('answerer'), a friend, and this *responsalis* became 'attorney' in the 13th century – Harding *A social history of English law* (1966) 170 – and had the power to bind his principal: Plucknett 216. See also in general Brand *The origins of the English legal profession* (1992) 2–3 33 *et seq*.

4 See below.

litigants in person (despite the regular appearance of such litigants in our courts). The unfortunate result of this neglect is a complete lack of official statistical information. No official records are kept[5] by courts detailing the prevalence of this phenomenon and in what type of dispute it is most often encountered.

The South African civil legal system follows the common-law tradition to a large extent, and is thus also adversarial by nature. It is probably only a matter of time before our legal system comes under the pressure experienced elsewhere. It is therefore the purpose of this article to offer proposals firstly, to ameliorate, and secondly, manage the consequences of this anticipated pressure based on the experience of other common-law countries.
Regardless of contrary views regarding litigants in person,[6] the growth in litigation by self-represented persons suggests that they are here to stay. And as their presence has far-reaching implications for the judicial administration, they cannot be ignored.

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5 Although persons appearing in person in criminal trials is a regular sight, litigants in person in civil matters are less common, and tend to occur mostly in family law matters (such as uncontested divorce matters and in the maintenance court) and in debtor's court. Information is anecdotal and also based on personal experience. On enquiry the Department of Justice and Constitutional Development indicated that no data on litigants in person was available.

6 Litigants are often treated with hostility by judges, opposing legal representatives and court officials, or are made to feel unwelcome. Recognition hereof is found in the literature: see *eg* Richardson, Sourdin & Wallis 'Self-represented litigants' 2012 *Literature Review, Australian Centre for Court and Justice System Innovation (ACCJSI)* par 2.2 2.4; Ellison 'Litigants in person – the good, the bad, and the ugly. A counsel's perspective' Bar Practice Course, The New South Wales Bar Association: Professional development Department (2014) available at: http://www.nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Ellison%20SC%20-%20Litigants%20in%20Person.pdf (last accessed 24 July 2015) 2–7; Murray 'Coping with self-represented litigants in Supreme Court' Continuing Legal Education Society of British Columbia paper (2012) pars I–II, available at: https://www.cle.bc.ca/PracticePoints/LIT12-SelfRepresentedLitigants.pdf (last accessed 24 July 2015); 'Statement of Principles on self-represented litigants and accused persons' adopted by the Canadian Judicial Council (2006) 1 and 9 available at: http://www.cjc-ccm.gc.ca/cmslib/-general/news_pub_other_PrinciplesStatement_2006_en.pdf (last accessed 24 July 2015); Cardwell 'The "scourge" of unrepresented litigants' in *Canadian Lawyer* 7 January 2013 available at: http://www.canadianlawyermag.com/4463/The-scourge-of-unrepresented-litigants.html (last accessed 24 July 2015); Goldschmidt (How are courts …) n 1 above at 37. See also Woolf *Access to justice* Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (1995) ch 17 par 2.

THE ADVERSARIAL SYSTEM AND THE LITIGANT IN PERSON: A SQUARE PEG IN A ROUND HOLE?

The adversarial system is rooted in English common law which developed in the Middle Ages.[7] Due to historical developments and modification by individual countries, present day common-law countries do not adhere strictly to the original model. Therefore, the concept 'adversarial system' is best described with reference to the general characteristics[8] associated with the adversarial model. Broadly speaking, such a system refers to the conduct of proceedings where the parties control all stages from inception to judgment, as well as the pace of pre-trial litigation.[9] The judge must decide only the issues in dispute as defined by the parties without investigation.[10] This means that only the evidence which the litigating parties choose to place before the judge can be adjudicated upon, and the judge is unable to determine what questions are to be answered or what evidence should be presented. Put differently, it is 'no part of a judge's business to search for an independent truth'.[11] The judge is required to remain neutral and has often been described as an 'umpire'[12] who plays a passive and non-interventionist

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7 At this time centralised courts replaced blood feuds, trials by combat and appeals to divine judgment by judicial authority: Pollock & Maitland *The history of English Law* (1923) Vol 2 671; Holdsworth *A history of English law* (1956) vol 1 299–302; Landsman *The adversary system: a description and defense* (1984) 8; Boon *The ethics and conduct of lawyers in England and Wales* (3ed 2014) 10.

8 Much has been written on the topic – see *eg* Jacob 'The English system of civil proceedings' in *The reform of civil procedure law* (1982) 191; Stacy & Lavarsh (eds) *Beyond the adversarial system* (1999); Ipp 'Reform of the adversarial process in civil procedure litigation—Part 1' (1995) *ALJ* 705; Andrews 'The adversarial principle: fairness and efficiency' in Zuckermann & Cranston (eds) *Reform of civil procedure* (1995) 169; Pollock & Maitland n 7 above; Langbein 'The German advantage in civil procedure' (1985) 4 *U Chi LR* 823.

9 Also referred to as party prosecution and party control.

10 In legal systems where case management has been introduced, it is clear that this feature of the adversarial system has been eroded (because the parties' freedom to present their case as they please, is curtailed), but is still compatible with this system. See also Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55–63: 'In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large […] .'

11 See *Air Canada v Secretary of State for Trade* [1983] 2 AC 394–396.

12 Pollock & Maitland n 7 above at 671. A judge has also been referred to as a 'neutral decision-maker': Kramer *Reforming the civil justice system* (1996) 223. Part of the criticism leveled at the system is encapsulated in the reference to the 'adversary myth' based on the 'dubious supposition' that the opposing sides are roughly equally matched: Goldschmidt 'The pro se' n 1 above at n 57 and sources quoted there. Critics often point out that the skills and competence of lawyers differ, and therefore parties are not evenly matched. As the judge can do little to rectify this situation it is said that the adversarial system is not concerned with 'material truth', and that victory does therefore not necessarily belong to the party with a more just cause, but rather to the party with the

role during the litigation process (and in particular during the trial). It has been suggested that by performing this role the court's dignity and independence are enhanced and its impartiality is underscored.[13] It is accepted that the passivity of the judge prevents the pre-judging of a matter (or put differently, it prevents a judge from 'jumping to conclusions' before weighing all available evidence). In sum, the judge simply adjudicates the case the parties choose to present.

The days when a judgment was not given 'strictly in accordance with the technicalities of the law codes, *which were intended only for guidance*, but according to what the judge considered right, fair and just'[14] are long gone. Along with the rise of the legal profession came a 'refinement of procedural arrangements and sophistication of procedural action,'[15] which in practice meant that rules of evidence developed, eventually restricting not only the role of the jury and the judge, but also firmly established attorneys as the controllers of the evidentiary process and 'managers of litigation'.[16] Despite evidence of the softening of the adversary system in more recent times by allowing a larger degree of judicial activism,[17] the practice of procedure in courts has remained technical, complex, and is, generally speaking, strictly followed. This has resulted directly in the need for legal representation.

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more skillful lawyer (see *eg* Goldschmidt 'The pro se' n 1 above at 41, quoting the often recited view of Roscoe Pound in 'Causes of the popular dissatisfaction with the administration of justice' (1906) 40 *Am L Rev* 729–738). This view is unnecessarily cynical: leaving the full investigation of a matter in the hands of a judge who may pre-judge a matter, decide which expert witnesses not to call and which line of investigation to favour is possible in the inquisitorial system offers no guarantee of superior truth seeking. In the end parties seek justice, whatever that means to them. See also Hurter 'Seeking truth or seeking justice: reflections on the changing face of the adversarial process in civil litigation' (2007) 2 *TSAR* 240.

13 Jacob n 8 above at 191. It is understood that there is a difference between neutrality and passivity: see *eg* Moorhead 'The passive arbiter: litigants in person and the challenge to neutrality' (2001) 16 *Social and Legal Studies* 405. See also the well-known view of Fuller & Randall 'Professional responsibility: report of the joint conference' (1958) 44 *American Bar Association Journal* 1160 regarding the natural human tendency to quickly judge the familiar without having all the facts.

14 Own emphasis. See Roth & Roth *Devil's advocates: the unnatural history of lawyers* (1989) 2. The writers also describe this as 'happy times' when no lawyer was to be found on the globe!

15 Damaška *The faces of justice and state authority: a comparative approach to the legal process* (1986) 144.

16 Landsman n 7 above at 19–20. Over a period of approximately two centuries the investigatory role of the jury came to a halt while the curtailment of judicial activism was evident in the period of the late 17th to 19th centuries.

17 See *eg* provision for case management and judicial management: see the seminal article by Resnik 'Managerial judges' (1982) 96 *Harvard LR* 374 as well as Elliot 'Managerial judging and the evolution of procedure' (1986) 53 *Univ Chi L R* 306; Sallmann 'Observations on judicial participation in caseflow management' (1989) 8 *CJQ* 129.

While the adversarial system clearly favours lawyers, it is also simultaneously maintained by the roles of trained lawyers who practise procedure, and judges who apply procedure. In such a specialised and technical environment the position of litigants in person in an adversarial system is consequently precarious, and as non-lawyers they clearly find themselves at a disadvantage. However, merely focusing on the challenging position of the litigants in person in the legal system, creates the danger of over-simplifying the matter, as they are not the only role players to be affected. The increasing numbers of litigants in person also directly affect judges and opposing lawyers, especially as it appears that the judicial system (in the wide sense) owes a duty to the litigant in person in the name of access to justice.

There are various aspects of the adversarial system which would cause the litigant in person discomfort, and only a few of the most obvious are highlighted. The first and most obvious is, without doubt, the lack of legal training and knowledge, especially relating to procedural and evidentiary rules. The inability of the litigant in person to fulfil his or her role as far as party control and party presentation are concerned results in a situation where, pre-trial, court rules relating to the drafting of pleadings and procedure; and during trial, rules relating to trial procedure and evidentiary rules, are not complied with. This leads to a two-pronged conundrum: (a) *for the litigant in person*, who often experiences feelings of being overwhelmed, isolated, bewildered, embittered, and of pervading unfairness,[18] apart from often also expecting the court to assist him or her by mere fact of being unrepresented; and (b) *for the court*, experiencing the judicial tension between maintaining a position of limited interference and one of neutrality[19] and its responsibility[20] to assist the litigant in person. Maintaining neutrality

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18 See Goldschmidt 'The pro se' n 1 above at 37, quoting from Goldschmidt, Mahoney, Solomon & Green *Meeting the challenge of pro se litigation: a report and guidebook for judges and court managers* (1998) (A Justice Management Institute Project) American Judicature Society 53.

19 Although Landman n 7 above at 34 states that the adversarial theory requires the judge to remain passive to 'ensure that the trier will remain neutral', it should be clear that passivity cannot necessarily be equated with neutrality. I would also argue that the adversarial system has developed beyond this view, given the procedural reform in common law countries over the past decade. There is in fact a considerable amount of activity on the part of the judge as allowed by court rules, but the main objective remains the same.

20 Access to justice is readily acknowledged in all common law countries. This is also a constitutional right in South Africa (see s 34 of the Constitution, 1996). In the USA judges have a constitutional duty to provide a 'meaningful hearing' under the due process clause (see Goldschmidt 'The pro se' n 1 above at 37). This obligation is now also contained in Resolution 31 taken at the Conferences of Judges and State Court Administrators: see *Position Paper on self-represented litigation* (2000) Arlington, available at:

is necessary to ensure a fair adjudication process, and the assistance given to a litigant in person should not lead to the represented party being disadvantaged.[21] This assistance not only entails allowing some latitude in the presentation of a case (including the application of court rules and standards of pleading), but also in guiding a litigant through the trial proceedings.[22] In effect, a judge is, to some extent, required to take on the role of a legal representative in these circumstances. Conversely, the court is to an extent hindered in the discharge of its duties, because the court cannot obtain assistance from such parties as it would from a legal representative;[23] (c) *for court officials*, whose duties do not entail giving legal advice or information, and who are used to assisting trained lawyers administratively. This places additional strain on court resources;[24] and (d) *for legal representatives*, who have been trained to conduct litigation against trained lawyers and face an opponent who may not present their cases with the necessary skill and cogency, nor the appreciation of what matters are relevant to the legal issues raised, or of the fact that matters should be adjudicated efficiently and speedily. The extent to which a court will allow technical objections by

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http:// costa.ncsc.dni.us/WhitePapers/selfrepresentation.pdf (last accessed: 28 July 2015) and adopted on 1 January 2002 see: http://www.ncsconline.org/wc/Publications?Res_ProSe_CCJCOSCAResolution31Pub.pdf (last accessed 24 July 2015). Despite the British Constitution being 'unwritten' (it is not in any manner formally enacted: Jackson & Leopold *O. Hood Phillips and Jackson Constitutional and Administrative Law* (8 ed 2001) par 2–006), art 6 of The Human Rights Act 1998 (enacted to give effect to rights and freedoms guaranteed under the European Convention on Human Rights – *id* at 22–015) guarantees the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (*id* at par 22–036), and the court has held that the right to a fair hearing implies that each party must have a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage against his or her opponent (the so-called principle of 'equality of arms') – *id* at par 22–037.

21 Bell 'Judges, fairness and litigants in person' (2010) 1 *Judicial Studies Institute Journal* 1 6. For example, a judge certainly cannot act as a tactical advisor. See also Moorhead & Sefton *Litigants in person: unrepresented litigants in first instance proceedings* Research Series 2/05 Department of Constitutional Affairs (2005) 192. The writers noted the diversity in approaches by judges and suggest that the judicial role in relation to unrepresented litigants would benefit from close scrutiny 'by research and within the judiciary itself'. Varying degrees of intervention by judges is problematic, and too much may lead to procedural inequality.

22 Such as the order and manner in which evidence is presented, including the marking of exhibits; how cross-examination should be undertaken; *etc*.

23 Such as presenting heads of argument during trial on a particular point of law that has arisen. See also Davies 'The reality of civil justice reform: why we must abandon the essential elements of our system' (2003) 2 *Journal of Judicial Administration* 155–168.

24 See *eg* Moorhead & Sefton n 21 above at 197 *et seq* detailing the problems experienced. In some cases written assistance leads to increased administrative workload for judges who vet the correspondence by court officials to ensure that they do not give legal advice, and to draft a response for them where advice is sought: see 204–205.

lawyers may differ between jurisdictions, but whether real disadvantage is shown is generally decisive.[25] Furthermore, opposing lawyers may find themselves in a position where they are required to assist the litigant in person in the preparation and lodging of court documentation.[26]

REASONS FOR THE PHENOMENON

From literature it is evident that a variety of reasons prompt litigants to forego legal representation. Although the most common reason proffered, is that legal representation cannot be afforded,[27] Moorhead and Sefton[28] interestingly point out that in Britain the most common reason given to Genn[29] by respondents, was that they did not think that they had to be represented. What is often assumed to be the primary reason – costs – was in fact the second most common reason. This seems to tie in with the experience in Australia where self-representation often occurs in uncontested divorce matters, and where no need for representation is felt.[30] The Canadian Bar Association[31] reported that after a number of studies it had not received a 'definitive answer' to this question, and suggested that respondents might not have carefully reflected on 'their decision-making', or that there might be a complex combination of reasons which may change over time. However, what is interesting about the report is the observation that while costs played

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25 See Goldschmidt 'The pro se' n 1 above at 52; Andrews n 1 above at 189.

26 See *eg* Richardson, Sourdin & Wallace n 6 above at 32. See also Moorhead & Sefton n 21 above at 185 where the tendency of judges to request the represented party to take steps (*eg*, to prepare bundles) is noted. Although there is cost-saving for the litigant in person, there is also a tactical advantage for the represented party in that there is a cost saving because documents are in order, time is not wasted and judges remain calm for not having to try to find a particular document referred to during trial.

27 See *eg* Richardson, Sourdin & Wallace n 6 above at 14 and governmental reports cited in n 19; Macfarlane *The National Self-represented Litigants Project: identifying and meeting the needs of self-represented litigants* Final Report (2013) 8; Engler 'Connecting self-representation to civil Gideon: what existing data reveal about when counsel is most needed' (2010) 37 *Fordham Urban Law Journal* 37–41.

28 Note 21 above at 15.

29 *Paths to justice – what people do and think about going to law* (1999) 22.

30 Faulks 'Self-represented litigants: tackling the challenge, paper delivered at the Managing People in Court Conference, National Judicial College of Australia and the Australian National University (Feb 2013) par 12.

31 See Bala and Birnbaum 'The rise of the self-represented litigant and the challenge for family lawyers' available at: www.cba.org/CBA/sections_family/newsletters2012/PrintHTML.aspx?Doc/d=49801 (last accessed: 24 July 2015). Regardless of the conventional view of lawyers as litigious who draw matters out, empirical research (relating to divorce processes) have shown that lawyers in fact seek consensual settlements in most of their cases, and only infrequently take cases to adversarial hearings: Mather n 1above at 151. See also 151–153 on the question 'what do lawyers add besides cost', highlighting matters such as emotional support, financial advice (iro property and tax concerns), counselling, *etcetera*.

a significant role in their decision-making, for many middle-income earners there was no absolute inability to pay for legal representation, but that the cost of the lawyer outweigheded the *value* of having a lawyer. Clearly it is not merely a simple matter of affordability. It is, therefore, not advisable to make quick assumptions, especially if those assumptions are to be used to inform decisions regarding possible solutions.

For many the decision to opt for self-representation reflects a confidence in their own ability and knowledge to navigate the legal system, especially in those who are repeat self-represented litigants. This confidence may also stem from their view that the matter is straight forward, because they have been so advised by a lawyer, or simply because we live in an increasingly 'do-it-yourself' society.[32]

Other reasons often presented are dissatisfaction with the legal services provided by lawyers, and sentiments that lawyers are not to be trusted. Conversely, respondents have also stated that they felt that judges listen more to those with lawyers, but that having a lawyer slowed down the process because the presence of a lawyer caused an increase in the complexity of the proceedings.[33] There are a number of further (less common) reasons that are mentioned in literature, such as the influence of television shows (such as *Judge Judy*) in emboldening litigants to forego legal representation; the view that if the opponent is not represented then, they do not need to be either; or a fear that lawyers would make the matter more adversarial; and then there are those with a specific reason.[34] (One may also wonder what role the mushrooming of free internet legal resources play in litigants' decisions!)

The diverse nature of the reasons advanced, as well as the fact that some are unrelated (and even contradictory) seem to suggest that the current predominant focus on affordability is too narrow, and that other factors, such as the type of dispute may play an important role in a litigant's decision,

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32 See Moorhead & Sefton n 21 above at 15. In (**PROFILE OF THE LITIGANT IN PERSON**) below it is pointed out that in Canada a high number of litigants in person are educated at tertiary level which might explain why they opt for self-representation (confidence in their own ability to navigate the legal system). See also Bala & Birnbaum n 31 above at 3. However, not all litigants' experience match up to expectations, and some of those interviewed blamed the 'over-selling' of access to justice for this and their reported feelings of being overwhelmed by the experience: Macfarlane n 27 above at 50–51.

33 Bala & Birnbaum n 31 above at 2; Moorhead & Sefton n 21 above at 16; Williams *Litigants in person: a literature review* Research Summary 2/11, Ministry of Justice (2011) 7.

34 See Ellison n 6 above at par 5. This category includes those seeking vindication, the compulsives, the obsessives, *etc*.

especially if the frequency of appearance by self-represented litigants in foreign common-law jurisdictions in (particularly) family courts and divorce courts is considered.

A BRIEF OVERVIEW OF DATA GATHERED IN COMMON-LAW COUNTRIES REGARDING INCIDENCE

The idea here is not to try and give a comprehensive report on exact growth figures regarding litigants in person in the various common-law jurisdictions. Rather it is to give an indication of trends. For one, there is a shortage of comprehensive and systematic data across a great many jurisdictions, despite a host of studies and scholarly papers, invariably containing statistics that have been published during the past decade or so. Consequently, answers to many vexing questions remain unavailable.

From the surveys undertaken by the Canadian Bar Association in 2012[35] approximately sixty per cent of 275 'family' litigants surveyed in Ontario were unrepresented. About two-thirds of these said that they found it difficult to find their way through the family justice system, and half said that the absence of a lawyer slowed down the process. Most recently, Macfarlane, in the Final Report of the National Self Represented Litigants Project,[36] referred to the 'extraordinary' numbers involved, and indicated that thirty to thirty-eight per cent of all litigants in Alberta, British Columbia, and Ontario were self-represented, of which sixty percent involved family law matters.[37]

Despite claiming that the evidence base to support an understanding of the phenomenon is limited,[38] Australia boasts impressive data collection[39] across all court tiers. However, as there is no consistency in the manner of reporting by all courts (probably in part because collection occurs in accordance with particular operational needs), no systematic or reliable quantitative data is available. What is apparent is that self-representation is higher in certain matters – as high as ninety-three per cent in immigration matters and seventy

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35 These include a survey of 275 'family litigants' in Ontario, 400 family lawyers in Ontario and Alberta, and fifty-four judges. See Bala & Birnbaum n 31 above at 1.

36 Note 27 above at 25.

37 Eighteen per cent appeared in the civil court; thirteen per cent in the small claims court; and nine per cent in tribunals. See also *Alberta Legal Services Mapping Project: an overview of findings from the eleven judicial districts* Canadian Forum on Civil Justice (July 2011) for earlier data, available at: www.cfcj-fcjc-org/sites/default/files/docs/2011/mapping-final-en.pdf (last accessed 31 July 2015).

38 Richardson, Sourdin & Wallace n 6 above at par 3.3.

39 *Id* at par 3.6–3.14 (in respect of all territories). However, there are many one-off studies in different jurisdictions: par 4.2.

per cent in divorce matters[40] – and that figures vary between territories. For example, data show that in Victoria for the period 2006–2007, eleven per cent of cases in the Court of Appeal involved one unrepresented person, whereas only a few years later in Queensland (for the period 2010–2011), the figure was forty-two per cent for the Court of Appeal.[41] As in Canada, a high percentage of litigants in the Family Court (seventy nine per cent of applicants and eighty-eight per cent of respondents) were litigants in person in 2011.[42]

In Britain, it is said that, despite various studies, concrete research on unrepresented litigants is 'minimal', and that little systematic data is kept by the court service.[43] This observation is echoed in a report by the Civil Justice Council,[44] a literature review published by the Ministry of Justice,[45] and Genn[46] (who further notes that little descriptive or analytic academic research has been carried out in this regard). Moorhead and Sefton's report was based on a fair sample (2 432 case records and 748 case files apart from interviews and focus groups) and found that family cases often involved one or more parties without legal representation.[47] In the case of private adoption matters, the figure was seventy-five per cent, for divorce it was sixty-nine per cent, and forty-nine per cent and forty-eight per cent for Children's Act-

matters and injunction cases respectively. In civil cases the figures were even higher eighty-five per cent in the County Court and fifty-two per cent in the High Court). Despite the range of studies conducted in Britain which

40 Figures referred to are not necessarily over the same period: for example, the percentage for immigration matters were taken over the period 2010–2011, whereas the divorce figures were for the period 2007–2008.

41 Richardson, Sourdin & Wallis n 6 above at par 3.13–3.14.

42 *Id* at par 3.15. Unfortunately the point at which reporting is done is not always clear (*ie* at filing; at trial stage, *etc*), and Faulks n 30 above at par 13 states that twenty-seven per cent of finalised cases in Family Court involved at least one litigant in person.

43 Moorhead & Sefton n 21 above at 2–3. Even in the most recently published statistics of the Family Court, no mention is found of litigants in person, despite reporting that 60 902 cases were started in family courts in England and Wales during the first quarter of 2015: see *Family Court Statistics Quarterly* Ministry of Justice Statistics bulletin (25 June 2015), available at: www.gov.uk/government/collections/court-statistics-quaterly (last accessed 31 July 2015).

44 *Access to justice for litigants in person (or self-represented litigants)* A report and series of recommendations to the Lord Chancellor and to the Lord Chief Justice (Nov 2011) 17, available at: https://www.judiciary.gov.uk/wp-content/uploads/2014/05/report-on-access-to-justice-for-litigants-in-person-nov2011.pdf (last accessed 10 December 2015).

45 Williams n 33 above at 3.

46 'Do-it-yourself law: access to justice and the challenge of self-representation' (2013) 4 *CJQ* 411 432.

47 Note 21 245.

have provided 'useful indicators', Williams[48] nevertheless points out that no conclusive evidence was provided on, inter alia, the number of self-represented litigants by case type, because there is only a limited understanding of the scale of the issue.

There is no shortage of data in the form of statistics or reports for the United States of America,[49] but comparable data appear to be problematic. The number of litigants in person is staggering. For example, even as early as 2006, forty-nine per cent of litigants in person appeared as petitioners (plaintiffs) and ninety-nine per cent as respondents (defendants) in divorce cases in state court cases. Regardless of a particular state's High Court, the data points to the same result: a significant number of litigants, especially in family matters and small civil matters, are self-represented.[50]

Although many statistics show a growing prevalence in family matters, litigants in person are active in most types of case, and across all court tiers, thus underlining the notion that a significant number of such litigants will be a permanent feature of justice systems in common-law countries.

PROFILE OF THE LITIGANT IN PERSON

Because of the general assumption that financial considerations are the main drivers of the phenomenon, there is also a risk of assuming that the litigants in person are a homogenous group. Such a view would be far removed from reality.

There is little doubt that the 2011 world economic slump and the present economic climate have negatively affected people directly. These economic factors have not only plunged many people into debt crises (and even poverty), but have led to various funding crises; and have also directly

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48 Note 33 8.

49 See *eg* 'Pro se Statistics' for State Court pro se statistics at: www.nacmnet.org/sites/default/files/04Greacen_ProSeStatisticsSummary.pdf (last accessed 31 July 2015) and the statistics on: www.texasatj.org/sites/default/files/3ProSeStatisticsSummary.pdf ; www.nydivorcefirm.com/presestatsmemo/ (last accessed 31 July 2015); Hannaford-Agor and Mott 'Research on self-represented litigation: preliminary results and methodological considerations' (2003) 2 *The Justice System Journal* 163; Engler n 27 above; Mather n 1 142.

50 *Eg* figures given for California indicate that in 2004, 67 percent of petitioners represented themselves in family law cases, while in Maryland the figure is 38 percent for divorce and 32 percent for custody matters. Regardless of the year or the state, figures remain significantly high.

resulted in cuts to legal aid.[51] Where funding for legal aid was not cut, the threshold for qualifying for legal aid was raised, effectively increasing the number of those needing assistance.[52] Either way, those in need of legal assistance have been left with unmet legal needs, although they are not equally poor. Conversely, not all litigants in person are necessarily poor. Although not often the focus of attention, the middle-income earner who is faced with a legal dilemma is often also faced with the same financial obstacle – although he or she may not be considered poor in terms of means tests, he or she most certainly cannot afford costly legal services and does not qualify for legal aid.[53]

Although I have already alluded to the fact that the lack of appropriate data relating to litigants in person does not allow role players to determine the growth (of the phenomenon) accurately, another result is that too little is known fully to construct an effective profile of a litigant in person, and so this void is 'vulnerable to being filled by anecdote'.[54] Already too many studies and commentaries seem to suggest that the phenomenon is largely due to financial constraints. While it is not suggested that financial constraints do not play a huge role in the decision to act as a litigant in person, it is suggested that one should be cautious in overemphasising one factor, because it is clear that poverty cannot be assumed in all instances.

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51 See *eg* LSC *Documenting the Justice Gap* 5 (available at: http://www.sc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf (last accessed 24 July 2015): this document points out that the economic crisis has brought high unemployment, home foreclosures and family stress resulting in legal problems relating to consumer credit, housing, unemployment, bankruptcies, domestic violence and child support. See also Richardson, Sourdin & Wallace n 6 above at 13. Houseman 'The future of legal aid: a national perspective' (2007) 10 *UDCL Rev* 35 43–46. In Britain the Legal Aid Sentencing and Punishment Act 2012 came into operation in 2013 and significantly reduced the type of claims that are eligible for public funding: Genn n 46 above at 413.

52 See *eg* Hunter, Giddings & Chrzanowski *Legal aid and self-representation in the family court of Australia* National Legal Aid (2003) pointing out that this has had the effect of creating a group of people who are not eligible for legal aid but yet are unable to afford representation. However, see Richardson, Sourdin & Wallace n 6 above at par 2.5 for a more sceptical view. See also Genn n 46 above at 413–414.

53 See *eg* Buhai 'Access to justice for unrepresented litigants: a comparative perspective' (2009) 42 *Loy LAL Review* 979 979 (and n 1) 983; Richardson, Sourdin & Wallace n 6 above at par 2.5.

54 Genn n 46 above at 126. See also Gillis 'A judge's view on one of the biggest problems facing the justice system' Macleans Newsletter 4 February 2013, available at: http://www.macleans.ca/news/canada/a-judges-view-on-one-of-the-biggest-problems-facing-the-justice-system (last accessed 24 July 2015) in which Justice Price cautions against the use of stereotypes to describe litigants, as it tends to over-simplify a legal landscape that 'by its nature, encompasses society as a whole in all its diversity'.

It has also been found that there is a certain number of so-called 'repeat performers' who may or may not also be termed 'vexatious litigants'. Infrequent references to these litigants are found in literature,[55] and as vexatious litigation is not new,[56] it comes as no surprise that vexatious litigants in person (which often include litigants who may be emotionally disturbed or mentally ill) form part of the landscape.

Litigants are also not necessarily unrepresented from the outset[57] – some terminate representation because funds have dried up, or because of a parting of the ways with their legal representative for whatever reason. It may also be because they no longer qualify for legal aid. Others are partially represented.

Individual litigant characteristics are not only associated with income. Demographics shape litigants in person. Demographic characteristics also differ, and while in Australia it was found that litigants in person were more likely to be male (consistent with findings in Britain); younger (median-age thirty-five years); unemployed and with lower education levels; and come from culturally and linguistically diverse backgrounds. It was, however, also found that they may also be employed, in which event they were employed in a range of professional, trade, and service occupations. [58]

Many of these characteristics coincide with litigants in person in the United States of America where it would appear that most litigants tend to be novices to self-representation.[59] Many of the characteristics identified coincide with

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55 See *eg* Dewar, Smith & Banks *Litigants in person in the Family Court of Australia* Research Report No 20 (2000) 34, available at: www.familycourt.gov.au/wps/connect/1987e373-90f0-4ebe-a886-db7c7174080f/report20.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=f987e373-90f0-4ebe-a886-db7c7174080f (last accessed 31 July 2015); Genn (n 46) 127–132; Moorhead & Sefton n 21 above at 245–265; Macfarlane n 27 above at 32.

56 In Britain legislation to control vexatious litigation dates back to 1896 and the Vexatious Actions Act 1896: see in this regard also Taggart 'Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896' 2004 *Cambridge Law Journal* 656. See also Rule 6(2) Order 40 of the Family Court Rules which allows an Australian court to make an order to permit the bringing of vexatious proceedings in Family Court, as well as the their Vexatious Procedures Act 2008.

57 Macfarlane n 27 above found that 54 percent of litigants in person had a lawyer at some point during litigation. The death or incapacity of a lawyer initially retained may also result in self-representation. See also Gillis n 54 above at 3.

58 Richardson, Sourdin & Wallace n 6 above at par 3.15.

59 See *eg* Mather n 1 above at 149; Note 44 14.

what has been established in Canada, save that a large number of American litigants are educated.[60]

Case characteristics also shed some light on the matter. Matters with little complexity increase the likelihood of litigants in person, and overall family matters (including divorce) attract the largest proportion of such litigants.[61]

The above case and individual litigant characteristics extracted from the literature, defies a simple and all-encompassing definition of litigants in person. An individual litigant in person's situation is highly personal, and who he or she is, is also influenced by the reason(s) why a decision to act without representation was made, or whether there was in fact little or no choice. These variables point to the fact that litigants in person represent a fluid category of litigants, fraught with complexities, and go some way to explain why this issue is not yet fully understood. Clearly, for future purposes, it would be more appropriate to adopt a broad view of litigants in person and to avoid attempts at a narrow definition.

RESPONSE TO THE PLIGHT OF LITIGANTS IN PERSON

Gaps in current data collection have not deterred common-law jurisdictions from embracing the challenge posed to their respective judicial systems by litigants in person. It is generally understood that the complexities surrounding such litigants require a comprehensive strategy to meet this challenge effectively, and while several of these jurisdictions are taking steps in this direction, it is still some way off. In the meantime a variety of strategies and a plethora of initiatives have been launched in the various jurisdictions to assist litigants in person. Due to the sheer volume only some will be highlighted and are conveniently grouped together under five broad fields.

Establishing reliable data collection

Earlier it was pointed out that there is agreement that data collection in the various jurisdictions is not necessarily effective. As there is a general awareness of this fact, there have been a number of serious attempts to

60 See Macfarlane n 27 above at 29–30. Some 50 percent of participants reported having a university degree, and a further 23 percent having a college qualification. Only 3 percent reported having Grade 10 only.

61 See above. The large number of studies specifically conducted in this field of the law further bear testament to this fact. See also Williams n 33 above at 4; Mather n 1 above at 138.

improve data collection, as well as the quality of studies[62] as a precursor to developing a strategy to improve access and to formulate policies to give effect to such strategy. Reliable data regarding numbers, case types, demographics, and other personal data is essential, including the reasons for not using representation.[63] The information will also enable limited resources to be applied to areas where the need is greatest and to effect improvements.

Making legal information and advice available and providing advocacy

Litigants may in some instances need early advice on the merits of their claim or defence to decide whether or not to pursue a matter. In other instances litigants may only need to be put in contact with appropriate resources. As will be seen, a myriad of initiatives exist (mostly uncoordinated), and there is no shortage of information on virtually all aspects of the legal proceedings – almost an overload – raising concerns regarding its quality and suitability. The quantity is explained when keeping in mind the diverse nature and type of litigant in person, the diverse nature of the legal issues which may range from simple to complex, as well as the nature of the role players.

Despite the fact that courts have always been accustomed to interacting with lawyers and not lay persons, they have taken a leading role in assisting their communities to self-represent.[64] Bearing this fact in mind, one can appreciate that this stance required a concerted effort on the part of the judiciary and court officials, and the shift towards increased accessibility required a change in attitude[65] and a reorientation towards assistance to litigants.

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62 Since Williams n 33 above at 8 noted that the range of evidence the particular review drew on for Britain was of 'variable quality', the Civil Justice Council (including its Working Group) has generated a number of reports with proposals and recommendation. See *eg* Note 44; *Access to justice for litigants in person: implementation update* Civil Justice Council (Nov 2013). Likewise, since the literature review by Richardson, Sourdin & Wallace n 6 above at par 2.1 noted that little evidence on why self-representation was increasing and its impact on the courts was gleaned from studies up to that point, many developments have taken place in Australia. For the position in Canada, see Macfarlane n 27 above, representing the most recent report.

63 Genn n 46 above at 137–138. Although unaffordability of legal representation is often presented as reason, the fact that court procedures have been simplified and demystified may also play a role in the increase in numbers of litigants in person: see Mather n 1 above at 145.

64 Mather n 1 above at 145 does not view courts as passive institutions, and supports their active participation in providing help to litigants in person.

65 *Id* at 146 quotes a response from a family court clerk in Louisiana who responded to a request for information by a litigant in person that '[w]e don't have any forms and I don't have any copies of papers that I can show you' (cited in Esquival 'The ability of the indigent to access the legal process in family matters' (2001) 1 *Loyola Journal of Public Interest Law* 79 102. Considering the assistance available at this time, one can probably safely assume that such a response would now be the exception rather than the norm.

In the United States of America, with its diverse cultures, courts early on printed brochures and forms in different languages to assist and accommodate non-English speaking litigants, and some supplemented this information with videotapes and brochures outlining, specifically, the divorce process in a step-by-step manner. Many of these information tools are also available online and, in some instances, helpful computer kiosks are available twenty-four hours a day with instructions to help litigants in person file pleadings, motions, and the necessary forms.[66] Courses, clinics and other educational programmes are run to teach people how to represent themselves. In addition there are many instances of courts teaming up with law schools to provide instruction and advice.[67] The recently published Greacen Report for the Michigan State Bar Association[68] considered how litigants in person are supported in 50 American states, and apart from measures already mentioned as examples of support, it also refers to websites which assist potential litigants not only to assess whether they have the ability and skills to be a litigant in person, but also to assess the strength or weakness of their cases.

Court guides for various courts in Canada provide a step-by-step assistance to assist litigants to understand the processes and procedures in those courts, and are available on the website of the Ministry of the Attorney General.[69] As in the United States of America, a number of self-help centres have been established in the provinces of Ontario, British Columbia, Quebec, and Alberta. Their services include basic legal information, referrals to other agencies, assistance with form completion and legal advice, as well as resources such as self-help packages and forms. These services are provided in various settings (at or near a courthouse, mobile unit or on the Internet).[70]

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66 Mather n 1 above at 146; Goldschmidt n above at 1 20–21. This kiosk is called a 'QuickCourt', and assists in small claims, child support and landlord-tenant matters.

67 Goldschmidt n 1 above at 21; Mather n 1 above at 147; Barry 'Accessing justice: are pro se clinics a reasonable response to the lack of pro bono legal services and should law school clinics conduct them?' (1999) 67 *Fordham Law Review* 1879.

68 Greacen *Resources to assist self-represented litigants: a Fifty-State Review of "The State of the Art"* Michigan State Bar Foundation (2011).

69 See Osborne *Civil justice reform project* (2007) 46 available at: http://www.attorneygeneral.jus.gov.on.ca/english/abouts/pubs/cjrp/CJRP-Report-EN.pdf (last accessed 10 December 2015). See also the following as an example of a court guide: *Representing yourself at your family law trial – a guide* Ontario Court of Justice (June 2013), available at: www.ontariocourtsca/ocj/self-represented-parties/guide-for-self-represented-litigants-in-family-court-trials/ (last accessed 10 December 2015).

70 Osborne n 69 above at 48. See also Malcolmson & Reid *BC Supreme Court Self-Help Information Centre: Final Evaluation Report* Law Courts Education Society of British Columbia (2006) available at: www.lawcourtsed.ca/documents/Research/SHC_Final_Evaluation_Sept2006.pdf (last accessed 10 December 2015).

As elsewhere *pro bono* services by lawyers are in operation, and many lawyers also offer innovative billing options, such as contingency, flat fees and sliding scale fees. Court programmes such as *Pro Bono* Ontario, FLIC and LinC in Alberta, and the Justice Access Centres in British Columbia[71] seem to deliver excellent services. They are located in courthouses and are available online, despite the restrictions on the time and scope of information that such court staff are allowed to offer.[72] The response within Australian courts (at both federal and state level) largely follows initiatives found elsewhere.[73]

Although of more recent vintage, Britain has made significant progress in developing measures to support litigants in person, and the Civil Justice Council has recommended what amounts to an holistic strategy to meet the challenge of litigants in person. This includes the provision of information, advice, and access to early professional assistance.[74] Apart from a number of self-help guides compiled by all role players,[75] there are also support schemes and support units (as well as guides for court staff) which aim to provide 'on the day' advice and representation.[76]

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71 Osborne n 69 above at 47.

72 There is a limitation on their providing 'legal advice': see Macfarlane n 27 above at 11.

73 See Richardson, Sourdin & Wallace n 6 above at par 2.12–2.14; Faulks n 30 above at par 22–63.

74 Note 44 par 20.

75 See *eg A guide for litigants in person* The Interim Applications Court of the Queen's Bench Division of the High Court (revised ed 2013), available at: http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/lip_qbd.pdf (last accessed 10 December 2015); *A guide to bringing and defending a small claim* Civil Justice Council (2013), available at: http://www.judiciary.gov.uk/JCO%2fDocuments%2fCJC%2fPublications%2fOther+papers%2fSmall+Claims+Guide+for+web+FINAL.pdf (last accessed 10 December 2015); *A guide for representing yourself in court* The Bar Council (2013), available at: www.barcouncil.org.uk/media-centre/publications/2013/april/a-guide-to-representing-yourself-in-court (last accessed 10 December 2015). A number of 'nutshell' guides by the RCJ Advice Bureau is also available at: www.rcjadvice.org.uk and is distributed nationally by the Personal Support Unit of the Ministry of Justice.

76 See *eg* the Chancery Bar Litigant in Person Support Scheme at http://www.chba.org.uk/about-us/the-association/clips-chancery-bar-litigant-in-person-support-scheme (also referred to as 'CLIPS', is a collaboration between the Bar Pro Bono Unit and the RCJ Advice Bureau). A pro bono guide is available at: www.probonouk.net/upload/2012_Guide_to_Pro_Bono.pdf. See also in general: www.judiciary.gov.uk/publications-and-reports/CMR and www.judiciary/advisory-bodies/cjc/self-represented-litigants . The Personal Support Unit comprises volunteers who provide practical and emotional support to litigants in person by attending court with them, by preparing them for hearings, by providing assistance with paperwork and forms, *etc*. These units are based in The Royal Courts of Justice, but also operate at other courts: see n 44 above at ch 11. See also Boon n 7 above at 546–552 detailing the Law Society's and Bar's engagement with *pro bono* services.

Procedural reforms

Across all the jurisdictions reviewed there is an acceptance that court procedures need to be simplified. Clearly, the trend towards self-representation is so strong that reversing it at this point seems highly unlikely – in fact, all indications seem to point in the opposite direction. Equally clear from the above, is that the complexity of law and procedure increases the need for assistance, and places a strain on legal resources. In the interests of judicial economy simplifying court procedures and substantive law would go a long way towards lessening the burden on the judicial system, while providing improved access to justice for litigants in person.

More contentious is whether the adversarial system can provide the solution to the litigant in person conundrum. Although some commentators have criticised the adversarial system (as seen above), no serious move is afoot to replace it. Instead, there is what amounts to a modification of the system through changes to court proceedings and the role of the judge taking place.[77]

Apart from suggestions in reports for provision of a discretionary use of more inquisitorial processes when litigants in person are involved,[78] the United Kingdom is considering relaxing the restrictions on rights of audience to allow a so-called 'McKenzie friend'[79] to assist a litigant in person and address the court.[80] Genn[81] points out that precedent for addressing the court by such representatives may be found in tribunal proceedings. Genn further suggests that in considering whether to relax the restrictions on rights of audience, the experience of tribunals should be reviewed. In the meantime a useful role is played by students acting as McKenzie friends in Bristol where law students

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77 See 2 above and also 6.5 for a more detailed discussion.

78 See *eg* the Civil Justice Council working group report n 34 above at par 5.11; Faulks n 30 above at par 72–77; Goldschmidt n 1 53.

79 A 'McKenzie friend' is a lay person/adviser who assists a litigant in person during a trial without payment, and derives from the case *McKenzie v McKenzie* [1970] 3 WLR 472; [1970] 3 All ER 1034. See in general 'Practice Guidance: McKenzie Friends (Civil and Family Courts)' [2010] 4 All ER 272; Bell n 23 above at 36. Typically such a 'friend' sits alongside a litigant in person and assists with note taking, organising documentation and lend moral support.

80 Genn n 46 above at 139–140 report that the Scottish Courts Review (*Report of the Scottish Civil Court Review* Vol 2 (2009) par 53) in fact recommended that a person without a right of audience should be entitled to address the court on behalf of a litigant in person, but 'only in circumstances where the court considers that such representation would help it'. Rule 1A.2.(1) of the Sheriff Court and Court of Sessions Rules was subsequently enacted to provide for the making of oral submissions on behalf of a litigant in person on request.

81 Note 46 140.

from the Bar Professional Training Course and universities in Bristol offer assistance to unrepresented litigants under supervision.[82]

Although the use of a McKenzie friend is known in Australia,[83] while acknowledging a litigant in person's need for moral support on appearance day, in Canada a recommendation has been made that a clear protocol should be developed for the role of litigant in person 'friends' or 'informal supporters', rather than McKenzie friends as in Britain.[84]

Legal services

Some litigants in person hire a lawyer for part of specific services (such as legal advice, document preparation, settlement negotiation, or limited court appearance), while representing themselves in all other regards. These services are described as 'unbundled' legal services.[85] While unbundling is seen as an affordable method of obtaining legal services, particularly in less complicated matters, the practice is not without drawbacks as it raises ethical and professional liability concerns,[86] which have prompted several state bar associations in the United States of America to provide guidelines for lawyers involved in limited-scope representation.

The judiciary

Although much was said a few years ago of the bench's resistance to litigants in person's 'growing frequency' in courts and for support programs,[87] it is probably safe to say in light of current literature and initiatives in the various jurisdictions, that the judiciary has taken up the challenge to ensure effective access to justice is delivered to litigants in person.

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82 Note 44 pars 150–151.

83 Richardson, Sourdin & Wallace n 6 above at par 1.7.

84 Macfarlane n 27 above at 121. It appears that a 'buddy' or mentoring system is envisaged to offer support only.

85 Mather n 1 above at 148; Goldschmidt 'The pro se' n 1 above at 44–45. Macfarlane n 27 above at 92 describes the need expressed by litigants as to get a lawyer to 'just' help them with a part of their case with matters such as reviewing their documents; checking their documents; writing a letter to the opponent; answering questions of law, *etc*.

86 Buhai n 53 above at 987; Mather n 1 above at 148; Faulks n 30 above at 11. Inadequate information or instructions can not only lead to inadequate advice, but conceivably negligent advice due to being consulted for limited purposes (and limited access to all documents, *etc*). See also Rappaport 'Unbundling and the self-represented litigant' Newsletter (undated), available at: http://www.mrlegal.ca/articles/article2/default.html (last accessed 31 July 2015); Macfarlane n 27 above at 123 suggests that a modified professional indemnity model and appropriate rules of professional conduct could offer solutions to legitimate concerns about due diligence and insurance issues.

87 See *eg* Goldschmidt n 1 above at 36–37.

That the judge finds himself or herself in an unenviable position is clear. A judge's dilemma in an adversarial system was well defined by Nicholson[88] as being 'how far a court can assist a self-represented litigant without losing the perception of impartiality so important to the discharge of the judicial function'. Drawing on jurisprudence from a number of jurisdictions, Bell[89] examined the principles that judges apply when dealing with litigants in person, and distilled three. The first and primary principle is fairness so that justice is done to all parties;[90] the second is to allow litigants in person 'considerable latitude' in presenting their cases[91] without changing the essential adversarial nature of the proceedings, but with due consideration of the nature of the case and litigant in person's intelligence and understanding of the case;[92] and the third principle is to limit judicial interference with normal procedures and practices to what is reasonable, but does not amount to acting as 'both advocate and impartial arbiter'.[93] Indeed a fine balancing act!

In order to assist judges to adapt their approach when dealing with litigants in person various reports,[94] bench books for judicial officers,[95] and training

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88 Hon Justice Nicholson 'Australian experience with self-represented litigants' (2003) 77 *The Australian Law Journal* 820–826.

89 Note 21 above.

90 The court's duty to limit the litigant in person's disadvantage may not confer a positive advantage over his represented opponent. See also Goldschmidt n 1 above at 13; Andrews n 1 above at 189 (iro the policy of pro se procedural leniency in Alaskan law).

91 *Treissman v Sagehall (66 Holland Park) Ltd* [2007] EWHC 3401 (Ch); Goldschmidt n 1 above at 15–17.

92 *Boylan –Toomy v Boylan-Toomy* [2008] NIFam 15 cited by Bell n 21 above at 9.

93 Bell n 21 above at 10.

94 See *eg Judicial Working Group on Litigants in Person Report* (July 2013) (so-called Hickinbottom Report), available at: www.judiciary.gov.uk/publications-and-reports/reports/civil/judicial-working-group-lip-report (last accessed 4 December 2015).

95 See *eg Guidance for judges on litigants in person* Judicial College (2013), (a follow-up on the Equal Treatment Bench Book), available at: www.judiciary.gov.uk/publications-and-reports/judicial-college/2013/equal-treatment-bench-book; *Handling cases involving self-represented litigants: a bench guide for judicial officers* Judicial Council of California Administrative Office of the Courts (Jan 2007), available at: http:// www.courts.ca.gov/documents/benchguide_self_rep_litigants.pdf; 'Statement of principles on self-represented litigants and accused persons' adopted by the Canadian Judicial Council (Sept 2006), available at: http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement2006_en.pdf (last accessed 24 July 2015); Richardson, Sourdin & Wallis n 6 above at 19; Goldschmidt, Mahoney Solomon & Green *Meeting the challenge of pro se litigation: a report and guidebook for judges* (1998); Macfarlane n 27 above at 65–66. See also *In Re F:*

programs,[96] have seen the light of day. However, these measures do not necessarily ensure uniformity or consistency of practice or approach by the judiciary, probably making it advisable that clear principles are adopted and that the judiciary is trained so that more consistent practice is developed. [97]

As seen above, the role of the judge in adversarial systems is to supervise the litigation process to ensure that it is appropriately conducted, and to eventually adjudicate on the matters put before him or her. This supervisory function has been extended, and today case management is a natural responsibility taken on by the judiciary. However, it is clear that the judge's role is still managerial and not investigative, and thus in keeping with the long-held belief that if a judge becomes involved in the presentation of evidence and arguments, the fact-finding process would become suspect.[98] Put differently, it is only an adversarial process, which 'distances the judge from the factual presentation of competing accounts', that is able to guarantee that everything that needs to be considered is sufficiently aired and tested.[99] It would thus be safe to state that despite modifications to the adversarial system, its core values have been retained.

However, in this regard it is interesting to note that the Family Court in Australia, in what has been described as a 'bold step'[100] in reviewing court processes that have been in place for a long time, recently introduced the 'Less Adversarial Trial' (or LAT)[101] in relation to matters relating to children. Here the litigants are more directly involved in the proceedings, and parties speak directly to the judge (not through a lawyer). This court was designed to enable litigants to understand the proceedings better, and the proceedings were designed to be more directive and focussed on matters relevant to the question for decision. The judge identifies the issues in dispute and settles these issues prior to the finalisation of the LAT. The court also identifies for the parties what sort of evidence is required for their respective cases, and the same judge presides over all phases of the proceedings, from beginning to

Litigants in Person Guidelines (2001) FLC 93–072 in which the Full Court of the Family Court set out revised guidelines for judges.

96 See *eg* the Civil Justice Council workshops (www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/self-represented-litigants) and other practical workshops (www.judiciary.gov.uk/about-the-judiciary-in-detail/how-the-judiciary-is-governed).

97 Genn n 46 above at 140.

98 The integrity of this process is of paramount importance, and it is thought that a judge who descends 'into the arena' will lose his or her impartiality and pre-judge the matter, thus failing to do justice between the parties: see 2 above, and also Jacob n 8 above.

99 Zuckermann 'Editor's Note: No justice without lawyers – the myth of an inquisitorial solution' (2014) 4 *CJQ* 355–372.

100 Faulks n 30 above at 25.

101 *Id* at 23.

end.[102] As these proceedings clearly represent a move away from the traditional role of a judge in adversarial proceedings, and more closely resembles the role of a judge in inquisitorial proceedings, it would be interesting to track this development and to see whether these proceedings will be extended to other types of cases, and how other countries will respond to this project.

PROPOSED STRATEGY FOR SOUTH AFRICA

At this point there is, lamentably, a total absence of data regarding the prevalence, characteristics, and motivation of litigants in person in South Africa. Litigant in person activities are merely anecdotal.[103] The continued economic downturn and increased availability of Internet access, will eventually lead to an increase in litigants in person appearances, if overseas trends are reflected here. Now would therefore be an appropriate time to consider our response to this phenomenon, as there is already a high uptake of the services of small claims courts and litigant in person appearances in maintenance courts and in divorce matters, especially in regional magistrates' courts.

First and foremost is the question whether South Africa should change the nature of court proceedings from a system which was not developed with a focus on unrepresented litigants, but on the basis that most litigants would be legally represented. Put differently, should South Africa change to a more inquisitorial process? It is submitted that the answer is a clear 'no'. Zuckerman[104] convincingly argues against such a consideration in Britain, and makes the point that the European continental systems (following an inquisitorial approach where the judge's role is investigative) consider legal representation indispensable to justice and impose a mandatory requirement of such representation in civil proceedings (other than small claims).[105] Very interestingly, he also refers to studies in cognitive psychology which demonstrate that a person acting as an investigator tends to acquire the so-called 'confirmation bias'.[106] Confirmation bias refers to a tendency to look for evidence that supports the hypothesis that an investigator has formed, and to ignore contrary evidence. The result is that an hypothesis is tested in a one-sided way, ignoring alternatives. Consequently, questions that are put to those

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102 *Id* at 24. This means that the parties do not have to contend with different judges, and that the judge is fully familiar with all aspects of the proceedings.

103 As far as could be ascertained, no documented evidence of litigants in person activity exists.

104 Note 99 above.

105 *Id* at 357–361.

106 *Id* at 362.

being investigated tend to be phrased in a manner that supports a particular hypothesis. Therefore, where an investigator defines the question to be examined, the framing thereof may shape the particular direction of the investigation, to the exclusion of other possibilities, thus undermining the integrity of outcomes and conclusions. The argument in favour of the adversarial system (and against the inquisitorial system) consequently is that because the adversarial process distances a judge from such investigative activity, the integrity of the judicial process is protected. That which proponents of the adversarial system have always instinctively argued, now appears to be scientifically confirmed.[107]

No legal system is perfect. However, as the adversarial system does not require parties to be legally represented and recognises the common-law right to self-representation, unrepresented litigants will continue to appear in courts, and their plight cannot be ignored. The system was not conceptualised with litigants in person in mind, and this makes them square pegs in round holes. The logical strategy seems to be to further modify the adversarial processes where appropriate, beyond those already in existence.[108] However, as seen from the experiences of foreign jurisdictions, a comprehensive strategy should be developed. This is perhaps even more important for South Africa, given the fact that this is not a first world country; that it is struggling with increased socio-economic demands made on a disproportionately small *fiscus;* and that the economy is under performing in terms of growth. As resources are scarce and as a plethora of assistance measures which exist elsewhere cannot be afforded, measures have to be well considered and must fit in with a comprehensive and coordinated strategy that is not only effective, but sustainable.

Given the importance of effective access to justice, it is suggested that, at a minimum, the following initiatives from overseas jurisdictions be considered as a starting point:

Collection of information by the Department of Justice and Constitutional Development

The lament overseas concerns the paucity of data regarding the prevalence, characteristics, and motivation of litigants in person,[109] including the types of

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107 Fuller and Randall 'Professional responsibility: Report of the Joint Conference' (1958) 44 *American Bar Association Journal* 1159 1160–162; 1216–1218.

108 The Small Claims Courts Act 61 of 1984 is inquisitorial in nature, and no legal representation is allowed, while the commissioner controls the inquiry: s 7. Case management is also part of the South African legal landscape: see Uniform Rule of Court 37 and the various High Court Practice Directions.

109 Genn n 46 above at 144.

legal issues involved. Courts already provide certain statistical information regarding the number of cases, *etc*, and reporting can thus be expanded to include the above data regarding litigants in person without increasing the administrative obligations to any significant extent. This information is crucial and forms the bedrock for designing and developing effective and sustainable strategies.

Simplifying court rules and procedure

In principle, overly complex rules and convoluted language should be discarded. However, in foreign jurisdictions where such a course, as well as the simplifying of court procedures in particular courts,[110] has already been embarked upon, it has not necessarily improved the lot of litigants by removing all complexity and making processes easily navigable. Legal expertise is still required because complexity is the 'inevitable result of the commitment of treating like cases alike',[111] thus producing precedent to ensure such equal treatment.

Expanded judicial case management (through the amendment of existing rules of court) would also go a long way towards making it easier for litigants in person to comply with court rules and orders. Undoubtedly lawyers opposing litigants in person will have a contribution to make here by taking over certain procedural functions as in overseas jurisdictions,[112] such as pagination of court documents.

Although the concept of the 'McKenzie friend' is not known in South African law, and the concept is probably bound to be received with some resistance, it is suggested that it bears consideration, specially in certain matters (such as family and labour law matters) which are normally highly personal and where there is a high likelihood of appearances by litigants in person. It is not advocated that the restrictions regarding the right of audience be relaxed to allow such assistants to address the court, and their role should be merely to offer assistance (such as note taking) and moral support during proceedings. Lay assistance (usually by a fellow employee) in disciplinary matters in the employment law context may serve as precedent in this regard. The role and

110 Dewar Smith & Banks n 55 above at 24; Goldschmidt 'The pro se' n1 above at 51–52.

111 Zuckerman n 99 above at 373.

112 See the section **THE ADVERSARIAL SYSTEM AND THE LITIGANT IN PERSON: A SQUARE PEG IN A ROUND HOLE** above.

function of such an assistant can be properly regulated by the inclusion of an appropriate rule of court, as in overseas jurisdictions.[113]

Assistance by non-lawyers

This suggestion would entail opening up the market for legal services, and would lend impetus to the training of paralegals. It would also allow for specially trained court officials to assist litigants in person with the completion of court forms, easy to understand information, and guidance on court procedure, as well as advice on procedural requirements. At present court officials are already assisting litigants in respect of small claims, complaints under the Domestic Violence Act,[114] and in respect of divorce matters at regional magistrates' courts.

Currently a large number of law students graduate every year, many of whom cannot secure a legal position. It is suggested that it would be ideal for these candidates to be employed or be allowed to volunteer, to act in an advisory capacity at courts and advice centres at courts, should the Justice Department establish such centres. Such positions would also alleviate the increased administrative burden on existing court officials that assisting litigants in person would bring about. Despite not being 'legal practitioners' in terms of the Legal Practice Act,[115] the rendering of the envisaged services would not contravene section 33 of the Act.[116]

Use of senior law students and compulsory community service

The time is long gone for law students to merely receive an academic training. In this regard South Africa is lagging far behind other common-law jurisdictions in which law students are involved in a variety of practical training opportunities,[117] ranging from giving advice in non-governmental

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113 See *eg* Rule 12.A.1–8 Court of Session Rules (Scotland). See also *Practice Guidance (McKenzie Friends: Civil and family Courts)* [2010] 1 WLR 1881 governing the present practice in England and Wales.

114 Act 116 of 1998.

115 Act 28 of 2014. Section 1 defines a legal practitioner as 'an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30, respectively'.

116 This section prohibits the rendering of legal services (including those which may only be performed by a legal practitioner, notary or conveyancer) by a non-legal practitioner 'in expectation of any fee, commission, gain or reward'.

117 See the subsection **Procedural reforms** above; Mather n 1 above at 147; Note 44 par 155 in respect of California, as well as 'About Justice Corps' The Judicial Branch of California, available at: http://www.courts.ca.gov/justicecorps-about.htm (last accessed 6 December 2015) which runs a programme in terms of which undergraduates and recent graduates are trained to assist in self-help centres located in courts.

organisation offices, court offices, law clinics, to actively assisting litigants in person.[118] In an increasing digitalised era invaluable electronic assistance could be rendered not only in respect of the filing of court documents, but in assisting litigants with research, accessing forms, *etc*, especially those litigants who do not have access to the Internet or who are not computer literate. This involvement may assist in producing well rounded lawyers who enter practice not only with an understanding of the practicalities of legal practice, but who have been sensitised and are socially conscious lawyers.

Currently structural changes to the LLB syllabus in South Africa are being considered and it is suggested that the inclusion of a practical clinical module merits serious consideration to pave the way for effectively assisting litigants in person in future.

CONCLUDING REMARKS

This article is not an attempt to address all issues relating to litigants in person, or to even attempt to suggest that the full complexity of the phenomenon has been described. Although South Africa is not, as far as could be ascertained, experiencing a significant number of litigants in person in courts who placed a burden on the justice system, this situation is not expected to continue. Serious economic conditions, coupled with a high rate of unemployment and illiteracy, paint a gloomy picture for future litigants in need of legal assistance, but unable to secure the services of a lawyer for whatever reason (including limited availability of legal aid). Many with meritorious legal claims may simply abandon them, thus rendering their fundamental right of access to justice meaningless. Others may turn their backs on the judicial system and resort to self-help which the system is supposed to prevent. This is not an option that our society can afford to entertain.

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[118] See *eg* the Court Navigator Program created by New York City State's chief judge in terms of which volunteer law students are trained to assist litigants in person in the areas of housing and consumer debt. They help with scheduling proceedings, gathering of relevant information, *etc*, but may not perform any service that constitutes the practice of law: Mendleson 'Can't afford a lawyer? How courtroom innovations help self-represented litigants' *Toronto Star* 21 March 2015 available at: http://www.thestar.com/news/crime/2015/03/21/cant-afford-a-lawyer-how-courtroom-innovations-help-self-represented-litigants.html (last accessed 6 August 2015). Boon n 7 above at 548 describe how British law students have been involved in live casework since at least the late-1970s at Citizens' Advice Bureaux and Student Law Clinics, and that more than 60 percent of all law schools in England and Wales have some form of *pro bono* activity. See also McKeown and Morse 'Litigants in person: is there a role for higher education?' (2015) 1 *The Law Teacher* 122.