

*Injustice in Person: The Right to Self-Representation.* By RABEEA ASSY [Oxford: Oxford University Press, 2015. 233 pp. Hardback £70. ISBN 9780199687442.]

Rabea Assy's *Injustice in Person* addresses one of the most difficult problems currently confronting courts in common law jurisdictions. Lawyers, judges, and court administrators face increasing numbers of litigants in person (LIPs). The presence of LIPs demonstrates our collective failure to realise the ideal of access to justice for all. *Injustice in Person* provides a refreshingly clear consideration of the seemingly intractable issues surrounding the phenomenon of LIPs from a rich variety of perspectives.

The existence of LIPs reveals a significant level of misunderstanding and frustration with the administration of justice. It is also a by-product of the high cost of litigation. Legal fees rise, legal aid sinks, and LIPs flood the courts. Assy acknowledges this practical dimension but he insists that the problem must be approached primarily from a principled perspective. He identifies the common law right to self-representation as the core issue and presents a powerful theoretical and doctrinal argument, supported by extensive references to comparative law, that the right should be abandoned. We should not, Assy contends, accept the "unscrutinized" assumption that "an unqualified right to self-representation is a natural good" (p. 14) and we must avoid getting trapped into thinking that there are ways to make the system work for LIPs. The first step is to ask whether there should be a right to self-representation in principle. If the answer is no, the right should be abolished or significantly qualified and more effective responses developed to ensure access to justice.

By and large, LIPs fare badly in the adversarial process. They struggle to comply with the rules of court and the law of evidence, and they lack the ability to deal sensibly with substantive legal issues. They have difficulty presenting their cases in a manner that will permit a court to give them the relief they seek. It might be possible to tolerate their failure to litigate successfully if it were the product of their own free choice and the only consequence of allowing them to proceed without legal assistance. However, LIPs often have no choice because they cannot afford counsel and, as Assy argues, they impose significant costs and burdens on others. LIPs extend the length and cost of proceedings to the detriment of their opponents and the court system. Assy argues for the application of accepted procedural justice norms of fairness and proportionality to reduce or minimise the costs LIPs inflict on others by curtailing, if not eliminating, the right of self-representation.

The routine response to the LIP problem has been to look for ways to make it possible for them to function within the existing system. One possibility is to simplify the law and legal procedure to make it LIP user-friendly. Assy provides an engaging demolition of this argument rooted in both legal theory and practicality. By all means, simplify legal language and make laws and procedures as clear and understandable as possible. But recognise that legal clarity often requires legal detail and that "[t]he devil that lies in the details cannot be eliminated by eliminating the details; it will surface in litigation" (p. 84). Paring down the detail may only sacrifice legal "precision on the altar of clarity" (p. 83). Complexity in the law is often the product of the complexity of human affairs rather than the language of the law. We may be able to improve the language of the law but we cannot save LIPs from the inherent complexity of their disputes. And, as Assy points out, in civilian systems which pride themselves in having elegant, comprehensive, and understandable codifications of the law, LIPs are not tolerated. Legal representation is

mandatory in civilian systems because it is only with legal representation that a litigant can hope to navigate the legal system successfully.

Another response to the LIP problem is to alter the judge's role to better assist LIPs. On this view, judges should tolerate procedural lapses and actively assist LIPs with the presentation of their cases. Again, this argument crumbles under close scrutiny. Assy is certainly not blind to the drawbacks of the adversarial system but, as he points out, the problem for LIPs is not the adversarial system, but rather the lack of a lawyer. Proponents of a more active judicial role fail to take into account that European judge-centred civilian modes of civil procedure typically impose mandatory legal representation. What litigants need to survive and succeed in contested litigation, be it common law or civilian, "is extensive partisan advocacy from a lawyer, rather than sporadic neutral suggestions from judges" (p. 119). Low-cost lay assistance such as "McKenzie friends" can help LIPs by providing moral support and assistance in specific specialised areas, but they do not have the legal skills and training to satisfy the fundamental legal deficit LIPs face.

There has been surprisingly little consideration of the nature of the common law right to self-representation in civil cases. It is assumed to exist but its rationale has not been the subject of careful analysis in either the case law or academic writing. There are two arguments to be made favour of maintaining the right of self-representation, one theoretical and the other practical.

The right of self-representation has been defended as respecting the personal autonomy of the litigant. The autonomy rationale evolved in criminal proceedings where the individual accused directly faces state power and the risk of its abuse. Autonomy and the liberal ideal of free choice have been identified by the United States Supreme Court and the International War Crimes Tribunal as values justifying the right of self-representation in criminal proceedings. The autonomy and free-choice rationales may be less compelling in the civil context. Civil proceedings pit one party against another and the rights of both litigants have to be balanced and reconciled. But autonomy and free choice are still in play. Civil litigants do not face the threat of state punishment, but they are confronted with the power and the authority of the law. However unwise the choice to self-represent may appear to be to a legally trained person, many litigants feel compelled to tell the court their story in their own words and in their own way.

In the end, Assy accepts that denying the right of self-representation would infringe autonomy but he argues that the infringement would be justified, essentially for two reasons. The first is to protect others from harm: "Justice for the self-represented, if achievable, must not translate into injustice for others" (p. 23). A litigant's "right to control her own destiny" does not allow her "to control the destiny of the court or of other litigants" (p. 142). The civil justice regime is entitled to impose procedural limits to ensure fairness to other parties and to protect the capacity of the system to deliver timely and cost-effective justice.

The second reason is more subtle but equally compelling. Assy argues that the autonomy interest in relation to court proceedings only entitles a litigant to an effective forum for the vindication of his rights. Litigants do not have an unqualified right to proceed before the civil courts in the manner of their choice. Procedural rules defining and limiting the mode of participation and the time and attention to be given any case or issue are accepted features of a modern justice system. So, for example, if a litigant can be denied the right to a full trial under summary judgment rules on the ground that a proportional, cost-effective, and fair resolution of the case does not require a full-blown trial, why should an LIP be able to insist on self-representation when according that right risks undermining proportionality and procedural fairness to others? Provided the litigant is afforded an accessible and

effective way of presenting his case, his autonomy is respected. Assy's argument gains significant support from European jurisdictions that mandate legal representation and from the jurisprudence of the European Court of Human Rights that has upheld those laws as being consistent with the right to fair trial.

This brings me back to where I began this review and the practical problem of access to justice. While the empirical evidence appears to be weak, many LIPs come before the court unrepresented not because they want to be there without a lawyer, but because they cannot afford one. For these LIPs, the right of self-representation is the only way the law pretends to satisfy the fundamental right of access to justice. And, as Assy fully accepts, it would be inconceivable to deny the right of self-representation without taking steps to reduce legal costs and enhance legal aid in order to ensure that all litigants have access to justice. This is supported by the Strasbourg jurisprudence that holds countries mandating legal representation to an enhanced obligation to provide adequate legal aid. Assy explores some of the ways courts might control the problem of legal costs but this is a complex political issue and there is no obvious answer in sight. In the competition for public funds, legal aid has been faring badly.

Even if the problems of excessive legal costs and inadequate legal aid were solved, mandatory representation would still leave residual access to justice concerns. Manageable meritorious low value claims may not justify the cost of legal representation. Some considerations would have to be given to LIPs named as defendants and not in the system by choice. Mandatory representation would also interpose lawyers to screen unmeritorious claims. While that would have a positive systemic effect, it might nevertheless be necessary to maintain a residual discretion to permit self-representation if the LIP can satisfy a judge that the claim has merit. Assy accommodates these concerns by proposing a presumptive rule prohibiting self-representation but allowing LIPs to apply for permission to proceed in person.

I find Assy's arguments for curtailing the right of self-representation compelling but, until we unlock the problems of legal costs and legal aid, I see little hope for change. My pessimism should not, however, detract from the importance of this readable and engaging book. Assy demonstrates a masterful command of the principles of civil procedure and their theoretical underpinnings. He skilfully dissects the arguments favouring the right of self-representation and exposes the hopeless plight in which we leave LIPs. In the end, he demonstrates that the right of self-representation is hollow for the LIP and harmful to others. Fair and effective adjudication of rights depends upon the active participation of trained lawyers to promote the interests of the litigants. *Injustice in Person* reveals the right to self-representation to be an unsatisfactory response to the demand of ensuring access to justice for all.

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*The Politics of Judicial Independence in the United Kingdom's Changing Constitution.* By GRAHAM GEE, ROBERT HAZELL, KATE MALLESON and PATRICK O'BRIEN [Cambridge: Cambridge University Press, 2015. xi+293 pp. Hardback £65. ISBN 978-1-107-06695-3.]

Many international and domestic foundational texts set out the core conditions required for judicial independence to exist. A recurrent concern is that the fixed