

# **The importance of being heard: Stories of unrepresented litigants in small claims cases and private family proceedings**

**Dr Tatiana Grieshofer**

## **Abstract**

The article explores narrativisation practices in small claims cases and private family proceedings, focusing predominantly on cases where at least one of the parties is not represented by a lawyer. By drawing on the data collected during court observations and analysed using the ethnography of communication as the main methodological framework, the study identifies narrative genres across different stages of legal proceedings and illustrates communication barriers experienced by lay court users. The discussion focuses on how formalised narrative genres and the staggered presentation of narratives impact the degree to which court users can use their voice. The article also links the notion of voice projection to procedural justice and suggests that the main narratives should be elicited sooner as part of an open narrative strategy to ensure the court users' voices are heard by the judiciary in the initial stages of the proceedings.

## **Introduction**

The exploration of legal-lay discourse has always been at the centre of research into courtroom discourse and, more broadly, spoken interaction in legal contexts (e.g. Heffer et al., 2013). Yet, the most challenging settings for legal-lay communication, i.e. when lay people represent themselves in legal proceedings, remain largely unexplored. In such settings, the differences in institutional powers and recourse to linguistic resources among the legal and lay participants are unequal by default, yet lay people have to perform the role of lawyers. The article focuses on cases where one or neither of the parties is represented by a lawyers and court users have to act in their own behalf. Self-representation is a frequent phenomenon in common law jurisdictions (e.g. Trinder et al., 2014; McKeever et al., 2018; MacFarlane et al., 2013), with most self-represented litigants often concentrated in small claims cases and private family proceedings as these types of cases are most common and for lay people possibly more manageable than other types of civil proceedings (Trinder et al., 2014; Lee and Tkacukova, 2017).

Semi-represented and fully unrepresented cases (i.e. cases where one of the parties or neither of the parties is represented) create the conditions in which the discrepancies between legal and lay discourse types are most apparent; establishing effective communication is thus key for ensuring procedural justice and judicial efficiency. A crucial part of legal-lay communication is formed through narrativisation practices embedded in relevant legal proceedings, i.e. the processes of eliciting and presenting narratives. Narrativisation has previously been explored predominantly in criminal contexts, in which lay participants are restricted to the position of active recipients of legal discourse responding to questions related to legal principles (e.g. narrativisation as part of witness examination or trial discourse in Cotterill, 2003 or Heffer, 2005). The role of self-represented litigants is, however, much more complex as they have to construct their narratives and ensure that different reiterations of these narratives retain legal coherence (Tkacukova, 2016).

The exploration of stories told by self-represented litigants in non-criminal settings has so far focused on the discrepancy between deductive narratives used in US small claims cases and the chronologically organised and overly emotional inductive narratives of self-represented litigants

(O’Barr and Conley, 1991); the disparity between the legal and lay narrativisation styles leads to delays, misunderstandings and the overall dissatisfaction of self-represented litigants with the court system. Furthermore, the litigants using a powerless speech style (with hedging, hesitations, intensifiers, questioning intonation), as opposed to the powerful speech style used by lawyers, were found to be less successful in their claims (O’Barr, 1982). This raises concerns about access to justice for the most vulnerable in the society, especially given the rising numbers of lay court users across different jurisdictions (e.g. Trinder et al., 2014; McKeever et al., 2018; MacFarlane et al., 2013).

In England and Wales, the number of litigants in person (LIPs), the terms used for self-represented litigants, has risen dramatically since the introduction of cuts to legal aid by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. In private family proceedings, the number of hearings with at least one unrepresented party has increased from approximately 55% in 2012 to approximately 80% since 2015 (*Family Court Statistics Quarterly: April to June 2021*). The judiciary are thus often presiding over cases where neither of the parties is represented, despite the fact that the court processes were designed by lawyers and for lawyers. Some improvements are gradually introduced through the current HMCTS (Her Majesty’s Courts and Tribunals Service) reform programme, which aims to enhance the efficiency of courts and increase the accessibility of the legal system. As part of the programme, the user experience is recognised as one of the key aspects of the redesigned system and a considerable part of the digitisation innovations (*HMCTS Reform Update Summer 2019*<sup>1</sup>). Although communication with court users and LIPs is already viewed as an important area which requires further improvements, it is increasingly becoming clear that legal processes and procedures would also benefit from a structural redesign which would put court users at the core of the system (e.g. see suggestions in Hunter et al., 2020). The article argues that narrativisation practices (how and when narratives are elicited and presented) and voice projection opportunities (how and when court users can voice their claims) should be considered as a key part of the potential redesign of the legal system, especially in the types of cases with a markedly high concentration of LIPs, such as private family proceedings.

The study presented here is part of the wider project on communication in legal proceedings with LIPs<sup>2</sup>. The theme of story-telling and voice projection as a key challenge interweaves several aspects of legal-lay discourse, explored through court observations, interviews with lawyers and LIPs and textual data (Grieshofer et al., 2021), but the main focus here lies on court observations as they allow for a more in-depth investigation of voice projection and narrativisation practices (see methodology section). The originality of the article lies in its focus on previously unexplored aspects of legal-lay communication, such as (1) investigating narrativisation practices embedded in civil and private family proceedings; (2) incorporating pre-court stages into the exploration of narrativisation; (3) aligning narrative genres to communicative goals of individual hearings; (4) examining voice projection opportunities for self-represented litigants; and (5) establishing connection between voice projection and procedural justice. Although the main focus is on cases with self-represented litigants, the discussion is equally relevant to fully represented cases as represented clients also need to actively engage with legal proceedings by providing evidence and narrating their stories throughout different stages of the proceedings.

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<sup>2</sup> The study is part of the AHRC funded project *The Language of DIY Justice: Communication Practices & Processes*.

## **Linguistic barriers to justice for LIPs**

Research in socio-legal studies on self-representation has shown that irrespective of their educational or socio-economic background, many LIPs are vulnerable due to the stressful nature of court proceedings and clustering of legal problems with additional financial or health-related difficulties (Trinder et al., 2014; Pleasence and Balmer, 2019). Furthermore, the lack of accessible advice and information complicates LIPs' understanding of court processes and procedures as many litigants cannot find reliable sources relevant to their case or do not know how to search for information (Lee and Tkacukova, 2017). What helps move LIPs' cases forward is an active engagement of a legal professional (usually a judge or, possibly, a legal representative for the other party, a legal representative for the child or a social worker or another expert involved in the case) as they guide lay court users through the process (Trinder et al., 2014: sec 4.4). Apart from the crucial support from a legal professional, the workable hearings tend to have the following characteristics: relate to less complex cases; be at the stage of the proceedings which requires less LIP participation (e.g. directions hearings in the initial stages of the proceedings require less input from court users than a substantive hearing); involve the settlement-oriented and confident LIP who is prepared for the hearing (ibid). Although these are specific factors which can help make hearings more efficient, in broader terms LIPs commonly face intellectual, practical, emotional and attitudinal barriers when accessing the justice system (McKeever et al., 2018). Many of these barriers are rooted in the complexity of legal discourse and relate to crucial procedural and communicative stages, such as understanding legal texts, identifying specific legal problems pertinent to relevant legal principles, and, finally, communicating the case following the discursive principles used in the discursive community of legal professionals (Tkacukova, 2016).

Even the possibility of full comprehension of legal discourse by the lay court user has been shown to be unrealistic by research in linguistics, applied psychology and law (Assy, 2011; Azuelos-Atias, 2011; Grieshofer et al., 2021; Greene et al., 2012; Hiltunen, 2012; Masson et al., 1994; Mindlin, 2005; Pavlenko et al., 2019; Zódi, 2019). Although the principles of plain language movement are efficient when dealing with some lexical and grammatical complexity (Adler, 2012), there are important challenges to simplifying legal texts: firstly, legal texts express complex realities and thus need to rely on some linguistic complexity as explicit expression of legal scope and legislative intention reduces the transparency of the texts (Bhatia and Bhatia, 2011); and, secondly, the implicit meaning of procedural and conceptual aspects embedded in the legal system may not always be apparent to lay users even if expressed in simple terms (Assy, 2011). For instance, Yeung and Leung (2019) argue that legal homonyms (same words with different legal and ordinary meanings) or even legal terms with phonetic resemblance to common use words can hinder unrepresented litigants' understanding of legal texts.

Beyond the psycholinguistic barriers of processing and comprehending legal texts, many LIPs also struggle with discursive competence (Tkacukova, 2016). According to Bhatia (2004: 144), discursive competence in specific institutional settings involves three types of competences: textual, generic and social. As discussed above, the textual competence is hindered by the linguistic complexities of legal discourse as LIPs tend to struggle with the linguistic competence (use of specialised language) and communicative competence (interpretation and production of contextually relevant and legally coherent narrative genres). The degree to which LIPs display textual competence is limited not only due to the restricted comprehensibility of legal texts but also their generally restricted knowledge of law or wider experience with legal texts. The generic competence (the ability to effectively participate in communicative professional practices) and social competence (the ability to

communicate effectively by using the linguistic resources appropriate to the institutional role) are closely related to court procedures. It is overcoming challenges with generic and social competence that legal professionals can help LIPs with. As recorded in previous research, LIPs' active participation in the proceedings can be supported through effective elicitation and communication strategies (see Trinder et al., 2014 for support offered by legal professionals to LIPs; Tkacukova, 2015 for explanations and guidance offered by the judiciary to LIPs; Tkacukova, 2016 for the impact of power relations on LIPs' ability to self-represent). Narrativisation practices and voice projection play an important part in creating the space for lay court users to tell their stories, drawing on varying degrees of discursive competences.

## **Data and methods**

The article draws on 40 court observations of private family hearings and small claims hearings: 10 small claims hearings and 30 private family law hearings, of which 21 were related to child arrangements, five to financial dispute resolution issues, and four to non-molestation orders. In order to examine the narrative development during pre-court preparations and in-court interactions and explore communication goals of different stages of court proceedings, the study presented here also draws on additional data sets collected as part of the wider project on linguistic aspects of access to justice for LIPs: textual data (court forms and guidance documents) and empirical data (questionnaires, interviews and court observations) from all key stages of legal proceedings in civil and private family law contexts in England and Wales. The exploration of diverse datasets from the perspective of communicative challenges, discursive practices and the distribution of linguistic agency among the trial participants has led to the enquiry into the centrality of voice in court processes and its link to procedural justice. The analysis presented here explores the overarching theme of narrativisation and voice projection as interlinked with procedural steps which take place during pre-hearing stages and court hearings. The article thus makes a key contribution to understanding narrativisation embedded in court processes and procedures by introducing theoretical frameworks for analysing narrativisation practices and voice projection, which can be further built on through empirical and experimental investigations in future research.

Given the main data draws on court observations, the methodological approach adopted in the study builds on the ethnography of communication, which enables to accomplish a dual objective: explore the theoretical principles of narrativisation in legal proceedings and at the same time investigate practical aspects of communication and narrativisation practices in context (Hymes, 1962; Carbaugh, 1989). The data interpretation builds on previous narrativisation frameworks adapted for forensic contexts from everyday narratives (Heffer, 2005 & 2018; Cotterill, 2005; Gibbons, 2003); as shown in the following section, these approaches are adapted to reflect the communicative complexities inherent in civil and family proceedings. The notion of voice projection is construed as part of socio-cultural and institutional practice (Heffer, 2013a & 2018) and draws on Hymes' (1996) link between voice and an opportunity to use language, with the caveat that some voices are "acceptable, even valued, in certain roles, but not others" (70) and that the realisation of the voice is "partly at the mercy of others" (xi). The current study expands the understanding of narrativisation practices and voice projection by establishing a link between pre-court and in-court narrative genres and a further link between voice projection and procedural justice.

There are some disadvantages in relying on court observations as the main data source. The observations of court hearings depended on the availability of hearings with LIPs on the days the author attended court and explicit consent from the judiciary and the parties concerned. It was also

not possible to gain access to the recordings or even the transcripts of the hearings observed due to the current policy of the Data Access Panel of the HMCTS, which does not allow the release of recordings of hearings for research purposes. Even the parties can only gain access to verbatim transcripts, rather than the recordings of their hearings. Furthermore, gaining access to transcripts is only possible through purchasing court-approved transcription services. Given that the quality of transcripts is generally insufficient for the linguistic analysis (Walker, 1986 & 1990; Fraser, 2003; Eades, 1996), the high costs associated with obtaining the verbatim transcripts create an additional obstacle. The accessibility of the Ministry of Justice (MoJ) and HMCTS data for research purposes, alongside the practices of gathering the data for internal research, have been recently criticised, amongst other reasons, for hindering the collaboration between the academia and justice institutions (Byrom, 2019). The understanding of the data requirements for different methodological frameworks (i.e. the importance of accessing audio files for linguistic purposes) should be another essential aspect for the internal data policy of HMCTS and MoJ.

The above-mentioned weaknesses are counterbalanced by the advantages that ethnographic research frameworks employed here offer: the detailed analysis of the participants' linguistic behaviour and mutual interactions and attitudes in the analysed settings; inductive investigation of social and linguistic patterns recurring during diverse interactions; exploration of the data collected in the most naturalistic and realistic environment without artificially pre-defined criteria (Ejimabo, 2015; Sangasubana, 2011). The observation notes focused on the role of hearing participants and the type of hearing, the main topics discussed, the framing of the topics by the parties, interaction patterns, legal/procedural explanations presented by the judiciary and any arguments presented by the parties. Whenever possible, the notes were verbatim to capture the framing of questions or important arguments (i.e. when non-confidential information was discussed and the speed of speech allowed for a verbatim transcription). The methodological approach adopted here allows to explore current cases common in district courts across the country and provide a representative overview of the most frequent challenges experienced by LIPs and coping strategies employed during legal-lay interactions (rather than searching for singular cases with available transcripts). Exploring narrativisation and voice projection throughout different stages of legal proceedings allows the study to reflect on systemic issues within the legal system and explore the potential role applied linguistics research can have on the justice system.

### **Narrativisation practices in civil and private family proceedings**

At the core of the adversarial legal system is the battle of narratives. As shown in research on criminal law, narrativisation in courtroom settings is characterised by fragmentation, deconstruction and re-interpretation (Cotterill, 2003; Harris, 2001 & 2005; Heffer, 2005). In civil and family legal settings, the narratives are equally fragmented, but it is mostly court users, whether represented or not, who are responsible for providing evidence for their stories and constructing micro, or satellite, narratives (see Snedaker, 1991 quoted in Gibbons, 2003, p. 155), such as witness statements or responses during witness examination. Interestingly, private family proceedings (and to some extent also civil proceedings) rarely reach the stage of the final hearings as there is strong emphasis on the parties settling their cases (Trinder et al., 2014). What is crucial for the narrativisation in civil and family settings is the pre-hearing stages as these are the evidentiary stages during which the main evidence is collected. It is also during these pre-hearing stages that LIPs experience difficulties with constructing their cases due to practical obstacles and/or lack of comprehension or discursive competence (Grieshofer et al., 2021; Tkacukova, 2016 & 2020; Trinder et al., 2014).

Yet, most of the linguistic research has so far focused on narrativisation during court hearings (e.g. Cotterill, 2003; Heffer, 2005); this is mainly due to the focus on the narratives that emerge during criminal proceedings, which start at the point when most of the evidence is already gathered and the evidence is then put on trial. During criminal cases, stories are thus narrated through the narrative and question/answer discourse types (Harris, 2005: 220-221; Cotterill, 2003; Coulthard and Johnson, 2007: 97). Previous research has mapped out Labov's narrative structure (1972) onto the narrativisation principles within the trials with *abstract* and *orientation* represented in opening statements, *complicating action* in witness examination, *evaluation* in closing arguments, and *resolution* and *code* in verdict and sentencing/release respectively (Cotterill, 2003: 24) with *orientation* and *evaluation* being the focal points of the narration (Heffer, 2005; Harris, 2005). But this structure is not immediately applicable to civil and family proceedings as each hearing in these settings has a specific communicative aim and includes an *abstract* and *orientation* (see Table 1) whereas *complicating action* or *evaluation* are often introduced throughout the proceedings (e.g. expert reports from social services as part of pre-court investigations).

To reflect on how narratives are constructed in different jurisdictions, it is important to explore discursive practices embedded in the construction of narratives and view narration practices as part of the socio-cultural context (Heffer, 2018: 258). Heffer (2012 & 2018: 265) proposes the Narrative Navigation model which illustrates how institutional practices used in forensic contexts relate stories to the relevant audiences within the pre-defined discursive constraints in the institutional context. The model aligns trial genres to embedded narratives and narrative focus, alongside the mode of narration and type of narrator. The trial genres are, however, limited to the oral genres. Within the context of civil and family law hearings, the genres are, however, much more diverse and permeate between written and spoken modes. Given the need to link witness testimony to the written evidence, the principle of orality is weakened in civil and family hearings (cf Hrabovska et al., 2021), which means that it is not sufficient to consider only narrative genres embedded within the hearings and it is necessary to explore pre-court narrative genres.

A related construct, the conceptualisation of legal genres, has so far also been explored predominantly through the lenses of criminal law and the succession of genres within criminal court proceedings or, alternatively, through their link to criminal court proceedings (e.g. Heffer, 2005: 67; Gibbons, 2003: 132-133). Gibbons (2003), for instance, provides a detailed summary of the dynamic and codified genres involved in trials, including the pre-trial stages; but these pre-trial stages are either characterised by their dynamic nature evolving from legal-lay interaction (e.g. police interviews) or include codified genres which are used for information or as a point of reference (e.g. a will, legislative text). The genres embedded within civil or family proceedings, especially the pre-hearing stages, do not fit within these boundaries (Table 1).

This study explores narrativisation by, firstly, identifying narrative genres involved in the construction of satellite narratives in pre-court and court stages equally, and, secondly, by exploring the limitations these genres put on the court user's voice projection. Since narratives arise within specific socio-cultural and institutional constraints, the genre approach to narrativisation is useful for exploring the complexity within related taxonomies of genres or 'genres within genres' (Hyvärinen, 2015: 190; Gibbons, 2003: 131), especially when narrative genres are aligned with the communicative aims of procedural stages. Drawing on the terminology and concepts established by Heffer (2013a, 2018) and Gibbons (2013), Table 1 shows the diversity of narrative genres used throughout all stages of the proceedings. The focus of the table is on child arrangements proceedings as these are representative of the most common cases in which lay court users are likely to participate due to the following reasons: the high frequency of child arrangements cases in

district courts; the highest concentration of LIPs in these types of cases; and the wide scope for narrativisation due to the personal nature of the cases; court processes representative of other civil or family proceedings (see Tkacukova 2016 for narrativisation in financial remedy proceedings). For illustrative purposes, the table presents a simplified version of the child arrangements proceedings; many cases require several interim hearings or are disposed of before reaching the final hearing stage (cf flowcharts in the *Guide to Family Court Statistics 2021*). Similarly, for brevity, the table refers to judges presiding over hearings, though it is important to note that child arrangements cases are heard by either magistrates, supported by a legal adviser, or a district judge (if there are any safeguarding concerns).

Narrativisation boundaries		Pre-hearing stages		Court hearings	
Court procedures (CPR/FPR), legal framework, discursive practices, justice system narrative	Evidential stage	<b>Narrative genres</b>	<b>Narration</b>	<b>Narrative genres</b>	<b>Narration</b>
		<b>Communicative goal:</b> initiating proceedings		<b>First Hearing Dispute Resolution Appointment (FHRA)</b> <b>Communicative goal:</b> case management, identifying issues	
		Court forms (procedural, adversarial); Risk identification interview with a Children and Family Court Advisory and Support Service (CAFCASS) worker (procedural, adversarial); CAFCASS safeguarding report (procedural, adjudicative elements)	Codified and Direct (parties or lawyer); Expert-mediated (CAFCASS worker, parties); Expert-framed (CAFCASS)	Out-of-court negotiations; Presenting the case/position (adversarial); Case management and narrowing down issues (procedural, adversarial, adjudicative); Directions, interim court order or consent order (procedural, adjudicative)	Direct (parties or lawyers); Direct (parties or lawyers); Judge-mediated (judge & parties or their lawyers); Directive for narrative scope (judiciary)
		<b>Communicative goal:</b> preparing evidence		<b>Directions/Dispute Resolution Appointment</b> <b>Communicative goal:</b> case management, narrowing down issues	
	Interviews for the section 7 CAFCASS report (procedural, adversarial); CAFCASS section 7 report (procedural, adjudicative elements).	Expert-framed (CAFCASS worker, parties); Expert-framed (CAFCASS)	Out-of-court negotiations; Presenting the case/position (adversarial); Case management and narrowing down issues (procedural, adversarial, adjudicative); Directions, interim court order or consent order (procedural, adjudicative)	Direct (parties or their lawyers); Direct (parties or their lawyers); Judge-mediated (judge & parties or their lawyers); Directive for narrative scope (judge)	
	<b>Communicative goal:</b> preparing further evidence		<b>Fact finding hearing/Interim hearings (in case of domestic violence allegations)</b> <b>Communicative goal:</b> consider the evidence around domestic abuse allegations		
	Further evidence, statement of facts/issues, witness statements/skeleton arguments (procedural, adversarial); Scotts Schedule, i.e. numbered list of allegations and responses to these (adversarial); Court bundle (procedural, adversarial).	Direct, antagonistic (Applicant, then Respondent); Direct, antagonistic (Applicant, then Respondent); All.	Presenting the case/position (adversarial); Case management and narrowing down issues (procedural, adversarial, adjudicative); Witness examination (adversarial); Decision as to allegations (adjudicative, procedural)	Direct (parties or their lawyers); Judge-mediated (judge & parties or their lawyers); Direct/lawyer-mediated and antagonistic (parties, lawyers, judiciary); Directive for narrative scope (judge)	
	<b>Communicative goal:</b> finalising court bundle		<b>Final hearing</b> <b>Communicative goal:</b> consider all evidence and make the final decision		
Court bundle (procedural, adversarial)	Direct, expert-framed	Presenting the case/position (adversarial) Case management and narrowing down issues (procedural, adversarial, adjudicative); Witness examination (adversarial)  Child Arrangements Order (adjudicative)	Direct (parties or their lawyers) Judge-mediated (judge & parties or their lawyers); Direct/lawyer-mediated and antagonistic (parties, lawyers, judge) Directive for post-proceedings stage (judge)		
	Submissions				

Table 1: Narrativisation in child arrangements cases (according to 'Practice Direction 12b – Child Arrangements Programme')



There are several key characteristics of narrativisation in private family proceedings: (1) the limited number of opportunities for direct narration in the initial stages; (2) limited opportunities for Respondents to provide direct narration without the pre-defined narrative framing from the Applicant; (3) presentation of the initial information through codified and fragmented narrative genres (e.g. court forms); (4) prevalence of procedural genres; (5) presence of genres leading to the adjudicative stage even in pre-court stages (e.g. CAFCASS<sup>3</sup> report); (6) significance of expert-mediated and expert-framed narration; (7) reduced opportunities for an input from the lawyer (even for represented parties). The combination of these complex factors goes beyond creating a narrative disjunction (Coulthard and Johnson, 2007: 111): the process requires lay court users to engage with codified and procedural genres (witness statements, skeleton arguments, court forms) without much information or support. The guidance embedded in court forms, for instance, often lacks clear explanation of court processes or definitions of relevant concepts (Grieshofer et al., 2021), which leads to court users searching for more user-friendly, yet potentially biased and inaccurate, advice on social media (Tkacukova, 2020).

Furthermore, when constructing satellite narratives through the use of codified written genres, LIPs need to ensure that they meet procedural, discursive and legal criteria in terms of evidence presentation. The genres through which such evidence is elicited are, however, not conducive to the storytelling practices common in everyday situations. The closest genre to storytelling is witness statements filed by the parties, though this mainly applies to applicants; respondents file their statements in response to the applicants' statements, which pre-determines the topics they need to address. Despite the narrative-like qualities of witness statements, they incorporate complex discursive tasks and need to comply with legal rules and directions (Cooper and Mattison, 2021) as well as present all the necessary information in an accurate and coherent manner; the quality of witness statements varies even among legal professionals, so it is not realistic to expect LIPs to conform to all the norms. Although there is some guidance available on how to prepare witness statements (e.g. templates given out in court), this support tends to be limited to formal characteristics of witness statements as a genre (the header, paragraphs, statement of truth) and many LIPs struggle with the identification of relevant content (Trinder et al., 2014).

In addition to presenting the main opportunity to construct the narrative, witness statements also define the interpretative scope of disputed issues, ensure judicial efficiency and impact the case outcome (Cooper and Mattison, 2021). The centrality of witness statements in civil and family hearings leads to the crucial evidence being provided in a non-interactive manner. Yet, it is the interaction with legal professionals or other experienced experts (e.g. CAFCASS officers) that can help LIPs navigate the proceedings and provide relevant information (Trinder et al., 2014). An important narrativisation thread is thus created via expert-framed (e.g. CAFCASS investigations) or judge-mediated genres. Despite the potential guidance these interactions provide, it is important to note that they are imbalanced in terms of power relations and driven by such factors as the specific framing of questions, the choice of topics and control over turn-taking with typically minimal opportunities for court users to introduce new topics (Thornborrow, 2002). Another issue with expert-framed genres is that they may introduce potential inaccuracies into satellite narratives through expert reports: in six out of 11 observed hearings, where the CAFCASS report was discussed, the reports contained factual errors or misrepresented some information (the concerns about misrepresentations were expressed by the judiciary, the parties or their lawyers).

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<sup>3</sup> Children and Family Court Advisory and Support Service (CAFCASS)

Expert-framed narratives precede direct narrative opportunities, i.e. mainly witness statements or the initial presentation of the case at the beginning of each hearing. The fact that oral submissions and opportunities for direct narratives (witness statements) occur in the final stages means that in the initial stages LIPs are repeatedly stopped from telling their story due to the procedural steps that need to be taken before oral submissions. The court observation sample included two hearings (out of four hearings in the initial stages of the proceedings), in which LIPs were told to not tell their story as it did not fit with the aim of the hearing. The adversarial approach and current procedures have previously been criticised as inefficient and insufficiently trauma-aware, especially in cases with an element of domestic violence or serious offence (Hunter et al., 2020). The future reforms, such as suggested by Hunter et al. (2020), should thus consider giving parties an opportunity to present their direct narratives earlier in the proceedings as this can improve the relevance of the elicited information and ensure the appropriate safeguarding and gatekeeping measures are established earlier in the process (Grieshofer, submitted).

### **Opportunities for Voice projection**

Central to narrativisation is the concept of voice projection, which applies to individuals or groups and communities. It is viewed as a discursive and communicative concept related to a discursive style and at the same time the freedom or right to speak (Heffer, 2013a: 3; Hymes, 1996). It is particularly important to explore the link between the degree of freedom to speak and the impact of the act of speaking. In institutional settings, those with the authority to use their voice can expect that their voice would have an impact on the audience even if the message is not completely comprehended; for instance, jury instructions perform a ritualistic function irrespective of whether they are understood (Heffer, 2013b). Those with restricted rights to use their voice (e.g. witnesses during cross-examination) are more likely to be subjected to the conditions in which their voices are lost, though this can happen even to speakers in powerful institutional roles (Heffer, 2019). It is not only the institutional role, but also the discursive competence with which the voice is projected and the degree to which the appropriate discursive norms, expected in the relevant discursive community, were conformed to that determine the potential impact on the audience (Bernstein, 1990). This is especially relevant to LIPs, who find themselves in a precarious institutional position as they act in their own behalf and thus fulfil the role of lawyers, yet often lack the discursive competence due to insufficient knowledge and experience; furthermore, they often do not have the same rights as legal professionals (e.g. LIPs may not be in the position to instruct an expert witness or conduct cross-examination).

Exploring linguistic inequality, Blommaert (2008) highlights that the key to being perceived and understood is linked to the discursive competence of the speaker and the authenticity of their voice. So far, the concept of voice in courtroom discourse has been explored primarily in the context of witness examination by combining stylistic features used to establish factual and character credibility with varied degrees of success of 'responsive understanding' (Heffer, 2013 & 2018). The ambiguity of the LIPs' institutional role, alongside reduced discursive competence (Tkacukova, 2016), can potentially impact the degree to which their voices are heard. Given the central role of expert-framed and judge-mediated genres in civil and family proceedings, the pre-defined narrativisation boundaries and delayed presentation of direct narratives, it is important to explore the outcome of LIPs' voice projection and different types of agentive support that can help court users project their voice, irrespective of whether they are represented or not (see Figure 1).

In the figure below, the inner circle represents the situation in which the voice is heard thanks to the procedural and legal relevance of the message. In practice, this means that points raised by the court user impact the hearing or the course of the proceedings: the points were reflected in the

(interim) order or directions or were at least discussed in court. The middle circle refers to the scenario in which the voice was acknowledged, but did not elicit a 'responsive understanding' or could not be taken into consideration due to issues with content relevance for the specific hearing or issues with discursive competence. The outer circle relates to situations in which the voice was used, but the projection failed due to procedural or legal irrelevance. And, finally, the space outside the circles represents circumstances in which the opportunity to use the voice is lost: the court user was prevented from exercising their right to speak or did not wish to say anything.

The degree to which the court user's voice is projected can be supported or challenged through the authoritative voices of other participants in the proceedings, namely the judiciary, legal representatives and experts (e.g. CAFCASS workers), as shown through the triangles in the figure below. Represented clients are more likely to have their story heard thanks to the discursive competence of their lawyers, though there may be a discrepancy between the narrative presented by the lawyers and the narrative their clients would like them to present, especially if clients have unrealistic expectations or misunderstand law or court processes. Experts (e.g. CAFCASS workers) can also project the court user's voice in their reports, though there is a potential for court users' voices to be misrepresented (see above on the rate of errors in social services' reports) or even lost due to expert investigation practices (Macdonald, 2017). What has become evident in court observations is the active role the judiciary take to ensure LIPs contribute to the proceedings: the judiciary either mediate LIPs' voices (rephrasing what LIPs are saying to clarify) or enable them to project their voices (by asking the questions which are pertinent to the case). As the triangular shapes aim to indicate, even with support, it is still challenging for a party to ensure their voice is heard as this involves efficient engagement with the participants who can frame, enable, mediate or represent their voice. The voice projection figure below is relevant for all the stages of the proceedings, though the degree to which the voice is projected differs at each stage (e.g. the voice projection opportunities at the FHRA hearings are much more restricted than at the final hearings).

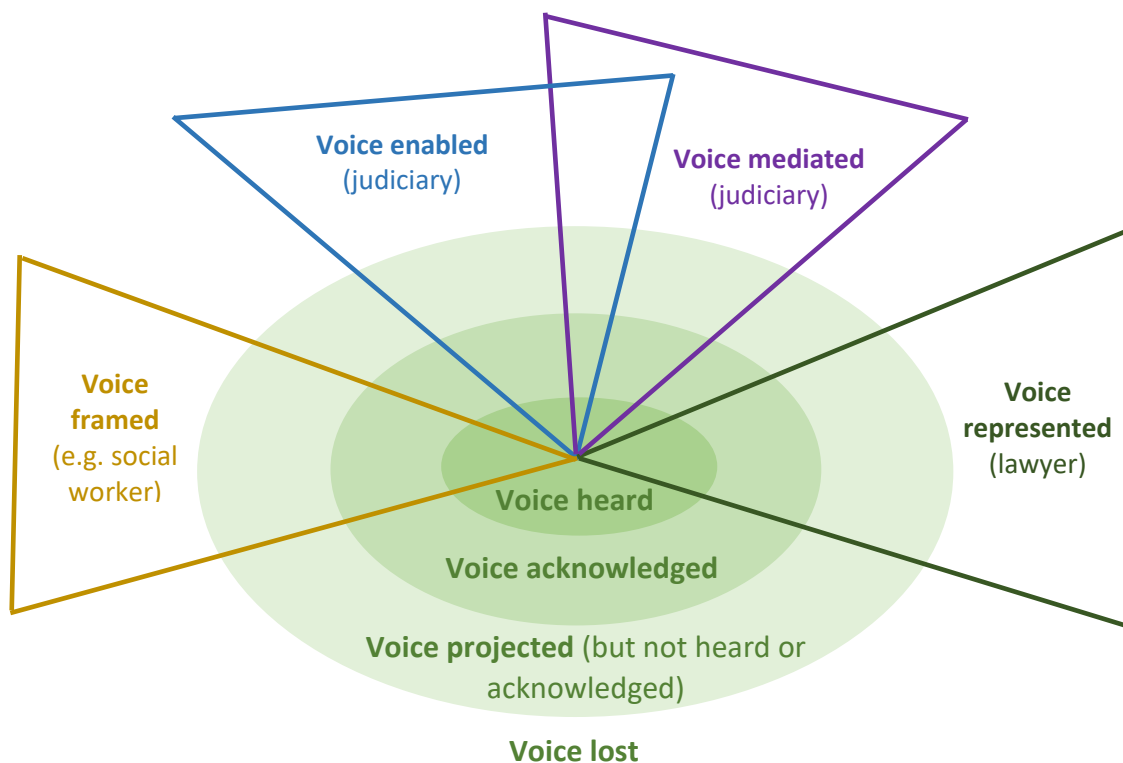


Figure 1: Opportunities and outcome of Voice Projection for represented and unrepresented parties.

The court observations showed a multitude of situations in which the voice projection of court users had varied degrees of success. The patterns that emerged and defined the outcome of the voice projection were related not only to procedural and legal relevance but also the 'good character' narrative thread, sometimes even despite the fact that the voice is expert-framed or represented. For instance, in a semi-represented child arrangements case (case 2), the LIP's voice is heard despite the opposing lawyer's arguments against the LIP parent seeing the child (the child is completely non-verbal and possibly autistic, does not respond well to changes and there needs to be a special needs assessment completed before any contact could be resumed). The LIP parent's satellite narrative is presented in a fragmented manner through responses to the lawyer's arguments (the LIP often interrupts the lawyer and asserts their right to speak) and to the judiciary's questions and invitations to speak. Despite the fragmented presentation, the LIP parent manages to make three clearly-defined points by reiterating that they are not a threat ("I've proved I am not a threat. I want to see my child", "I'm not a risk"); that they want a relationship with the child ("It is frustrating, my family didn't see the daughter for two years", "Even if [the child] is autistic, I'm still a [parent] and want contact"); and by challenging the lawyer's arguments ("It is far-fetched to say [the child] is not comfortable with changes. [The other parent]'s got a new family, partner, the [child] changed friends..."). As a result, the court approved of contact with the LIP parent on the basis that the decision would be reviewed after three initial contact sessions. A number of factors contributed to the LIP's voice being heard: the legal and procedural relevance of arguments made, the assertion of the right to speak, and the pro-contact culture of the family courts as one of the overarching justice system narratives (Hunter et al., 2020).

In another example (case 16), a pre-final semi-represented hearing, the LIP parent also asserted their right to speak, but did so by interrupting the lawyer and the judiciary to the extent that they had to be continuously reprimanded for constant interruptions. The LIP's fragmented satellite narrative lacked coherence or clear focus due to constantly shifting topics: irrelevant topics (e.g. difficulty with obtaining legal advice due to costs as even lay advisers quoted £60 per hour, difficulties in the past getting CAFCASS support with child care due to the child's special needs, difficulties due to being carer for the partner with special needs) and relevant ones (the other parent not signing up the child for school in the new place of residence; the other parent using cannabis, possibly while caring for the child; notes from the observed contact sessions not being representative of the sessions). The relative informality in which small claims cases and private family proceedings are held means that judges often talk to parties directly to explore core issues in the case. As a result, much of the communication from lay court users is enabled or mediated by the judiciary. To streamline the discussion in the hearing, the legal adviser and the chair of magistrates mediated the LIP's voice projection (by suggesting how the argument on notes from the contact session can be framed) as well as enabled it on multiple occasions (by eliciting responses on why the LIP thought the child is safe with them and should live with them and suggesting what to include in the witness statement), but the LIP was not able to have their voice heard due to misplaced framing of their arguments (lack of school registration and their experience as carer could be reframed into how they can meet the child's education requirements and special needs more efficiently than the other parent). The LIP's voice was acknowledged in relation to one point in the CAFCASS report, which said that their house is "grimy". When the LIP challenged the CAFCASS worker, who was in attendance in court, they retained that the house "was not dirty, but grimy" and after the discussion of the meaning of the word, the court decided to record the difference in opinion, though acknowledged that the condition of the house did not constitute an issue in respect to the child. Despite multiple attempts to be heard, the LIP's voice remained only acknowledged in the expert-

framed narrative and did not impact the court of the proceedings as neither of the changes suggested are recorded in the interim order.

Another semi-represented case (case 11) illustrates a situation, in which the voice was allowed to be projected, but could not be acknowledged due to its irrelevance to the substantive matters in the case. The LIP parent decided to withdraw from the case and not pursue contact with the child. The court enabled the LIP to express how they felt, despite the opposing lawyer's objections and despite the case being effectively closed: "After two years of not seeing [the child], it is not fair for [the child] or me to see [the child]. CAFCASS is absolute shambles and law is blind. Is it not my right to know where [the child] lives, where [the child] goes to school, how often does [the other parent] travel [abroad]? CAFCASS didn't talk to [the other parent], who knows where [the other parent] was." Despite the substantive irrelevance of the emotional narrative, the court recognises that the LIP has the right to project their voice as part of their access to justice journey as this could help to potentially initiate the emotional recovery (cf Bendall, 2020). Deviating from the institutional norms and practices, which do not welcome overly emotional narratives, this example illustrates that there is space for the therapeutic jurisprudence in private family law proceedings (Lens, 2016). Though it is important to note that the comparison of hearings led by magistrates to those presided over by district judges shows a pattern of the hearings before magistrates (and a legal adviser) more likely to create interactional space for emotional accounts, possibly because of the role of magistrates as representatives of the public or because there is more variability among the magistrate members.

What the three examples have in common is the LIPs' tendency to express their emotions, with varying degrees of success. Despite of the association of emotional narratives with powerless speech styles (O'Barr, 1982), there is a strong argument to be made in favour of supporting LIPs in expressing their narratives without the normative constraints for two reasons: firstly, dismissing emotions as irrelevant may result in important information being left out, and, secondly, using their voice and expressing their story in an authentic way reinforces LIPs' sense of fairness and procedural justice (Toy-Cronin, 2019) while also encouraging them to retain active engagement with the process. Providing space for the LIP from the last example to express their concerns in the initial stages of the proceedings could have helped them to feel heard or acknowledged and thus less emotionally withdrawn from the proceedings. All LIPs in the observation sample expressed their emotions as part of the rationale for engaging with or disengaging from the proceedings or as part of the reasoning for the final outcome or even just an excuse for why a direction could not be followed. The embodiment of emotions in the satellite narratives helped LIPs create an authentic voice, which was not observed in the satellite narratives of represented clients. The topic of the authenticity of the voices in semi-represented cases should be further explored from the point of view of judicial perceptions and the effect of voice projection.

### **Summary of narrativisation practices and voice projection in the context of procedural justice**

Focusing on civil and private family proceedings in which at least one of the parties is not represented allows the study to explore narrativisation in the challenging context for legal-lay interaction. Resorting to court observations as the only data collection option for investigating authentic representations of courtroom discourse within the context of England and Wales, the study draws on the ethnographic approach and reflects on narrative practices embedded in court processes and procedures and explores options for LIPs' voice projection.

The findings drawn from the study show that court users, irrespective of whether they are represented or not, have to engage with multiple procedural steps, provide evidence and construct satellite narratives via codified and direct narrative genres as well as engage in expert-framed investigations. Throughout the proceedings, they have little control over how satellite narratives would be perceived, interpreted or reported as most narrative genres are expert-framed, judge-mediated or codified. It is only in the final stages that court users have an opportunity to tell their direct narratives, but by that stage the narrative scope is already shaped through procedural stages, legal framework and interim orders or directions made on the basis of expert-framed reports and judge-led case management decisions. Court processes (including Civil Procedure Rules or Family Procedure Rules) thus play a defining role in shaping the narratives, which often contradicts with how lay court users would prefer to tell their story (O’Barr and Conley, 1991). The awareness of procedural aspects, such as principles of evidence admissibility (Heffer, 2018: 257) or the overview of the succession of procedural stages is as important as understanding relevant legal principles. In fact, prior experience with court procedure helps repeat LIPs to represent themselves more efficiently (Trinder et al., 2014: 83) and experienced lay advisers have been shown to support lay court users as effectively as lawyers by focusing on the provision of procedural advice (Sandefur, 2015) and supporting LIPs with framing their narratives (Tkacukova, 2020). Furthermore, the overarching justice system narrative (e.g. the pro-contact culture of child arrangements hearings) also plays an important role in defining narrativisation boundaries and the impact of voice projection, but can be difficult to engage with for anyone who has limited procedural awareness.

For unrepresented litigants, engaging with the narrativisation practices is further complicated due to very little information available on procedural steps and reduced comprehensibility of the guidance documents or explanations of legal principles embedded in the court application process (Grieshofer et al., 2021). Unofficial online resources are often too generic and their reliability and accuracy can be difficult to establish for lay people (Tkacukova, 2020). Problematic access to support has repercussions for LIPs’ development of a clear narrativisation strategy in the pre-court and even court stages, though the judge-mediated genres are useful for eliciting relevant narrativisation threads during court hearings. The current positioning of the main direct narratives towards the final stages complicates the LIPs’ narrativisation journey as they have to overcome several procedural stages to gain that opportunity to project their voice. Eliciting direct narratives earlier in the proceedings would allow court users to take advantage of the guidance offered by legal professionals and develop their satellite narratives in response to their arguments and elicitation strategies. Shifting direct narratives towards the initial stages of the proceedings would also minimise the risk of LIPs’ narratives being misconstrued through procedural stages and expert-framed narrative genres and possibly encourage court users to keep engaging with the proceedings.

The study argues that it is important to explore language use not only during individual stages, but also investigate the overarching communication processes which create narrativisation practices throughout the entirety of legal proceedings. What is equally important is that language and communication play a crucial role in the execution and perception of justice. Court users are more likely to accept decisions reached by following fair decision-making processes and in which they had an opportunity to participate (Tyler, 2000), i.e. they had their voice heard. According to Sela (2018), the perception of procedural justice incorporates four principles: process control (relevant for the stage of presenting the evidence); decision control (with respect to the choice of the final outcome); interactional justice (encompasses fair treatment with politeness, dignity, respect); and informational justice (incorporates sufficient information about the process and its justification). The four principles rely on efficient language use for reaching a specific communicative aim in the institutional context in which speakers do not have the equal distribution of power or equal access

to linguistic resources; the article mainly addresses the principles of process control and interactional justice; other principles are explored in related research (e.g. Trinder et al., 2014; Tkacukova, 2020; Grieshofer et al., 2021).

Both process control and interactional justice are restricted, firstly, due to the complexity of court procedures and lack of procedural information or understanding among lay court users, and, secondly, due to the type of interactions embedded in court processes and procedures (expert-framed narrative genres before direct narrative stage), the delay in eliciting direct narratives and lack of discursive competence among lay court users. This speaks to the core of the issues identified and solutions suggested for private family courts by Hunter et al (2020: 172), which propose to address issues with the design of basic processes by adopting a non-adversarial investigative approach based on open enquiry. The shift away from the adversarial approach to a more investigative and open enquiry based approach presents an opportunity for linguistic research to contribute to changing the communicative strategies embedded within the current narrative practices and evidence elicitation procedures and propose a more user-friendly approach in accordance with the principles of procedural justice.

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