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The Interpretation and Application of the Right to Effective Participation

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Introduction

In the case of *SC v UK*,¹ the European Court of Human Rights provided a description of the defendant's right to participate effectively in their criminal trial. Yet, more than 10 years later, the extent to which defendants can be said to participate effectively in criminal proceedings is often limited (see Jacobson et al., 2016; Johnston et al., 2016). Many factors operate to alienate, exclude and intimidate defendants, causing a lack of engagement or understanding. These factors include the ritual and formality of the courtroom (see Kirby, 2017), the defendant's position in the dock (see Mulcahy, 2013; Justice, 2015), and complex procedures and legal language (see Jacobson et al., 2016). There have been calls for participation to be encouraged through less formal, and more relatable, criminal justice processes, focused on creating a less intimidating and isolating environment for defendants (see Kirby et al., 2014). In practice, the focus has been on improving the experience of defendants who are categorised as 'vulnerable'. Significant steps can now be taken to support and facilitate the participation of vulnerable defendants, including: ground rules hearings to determine the appropriate treatment of vulnerable defendants (see Cooper et al., 2015); adjustments to style and approach to questioning (see Henderson, 2014; Henderson, 2016); court adaptations, such as removal of wigs and gowns, frequent breaks and allowing the defendant to sit with a supporter, as set out in the Criminal Practice Directions 2015;² in 'rare' cases, an intermediary can be appointed to assist the defendant while giving evidence;³ and there is provision for some vulnerable defendants to give evidence through live-link.⁴ The development of special measures and trial adjustments for vulnerable defendants is to be welcomed given the prevalence of communication difficulties, learning disabilities and mental health problems among those who come into contact with the criminal justice system.⁵ However, the potential for meaningful engagement of all defendants continues to be limited by an uncertain scope and restrictive application of the right to effective participation.

The term 'effective participation' is frequently employed by practitioners, policy-makers and academics, but often with little or no explanation of what it means to participate effectively in criminal proceedings. In fact, with the exception of the Law Commission's publications on fitness to plead (Law Commission, 2010; Law Commission, 2014; Law Commission, 2016a), the concept of 'effective participation' has received little scrutiny since the case of *SC v UK*. This is surprising and unfortunate not only because there is increasing awareness of the need to assist vulnerable people to participate in court proceedings, but also because there are plans to modernise court proceedings through

¹ (2005) 40 EHRR 10.

² Criminal Practice Directions 2015 [2015] EWCA Crim 1567 (CPD), General Matters 3G: Vulnerable Defendants.

³ CPD, 3F.13.

⁴ Youth Justice and Criminal Evidence Act 1999 (YJCEA), ss 33A.

⁵ Research indicates that between 20% and 30% of offenders have learning difficulties or learning disabilities that interfere with their ability to cope within the criminal justice system. See Loucks (2007: 1). Communication difficulties are most prevalent amongst children, with over 60% of children who offend having communication difficulties. See Talbot (2012: 1). In respect of mental health, a recent report by JUSTICE, citing the available research, notes that 'an estimated 39% of people detained in police custody and an estimated 29% of those serving community sentences, have a mental health issue. ... around 60% of prisoners have personality disorders, compared to 5% of the general population; 11% of those serving community sentences have psychotic disorders compared to 1% of the general population; and 76% of female and 40% of male remand prisoners have a common mental health disorder.' See Justice (2017: 11-12).

greater use of virtual hearings which will undoubtedly have an impact on defendant participation.⁶ Recent research on pre-trial and sentencing hearings has detailed the way in which the use of video-links can undermine the defendant's ability to communicate with their lawyers and the court (Transform Justice, 2017). The prospect of reforms that could hinder participation at a time when much effort is being made to facilitate participation, means that it has become more important than ever to examine the right to effective participation.

This article explores the current definition and scope of the right to effective participation, as guaranteed by Article 6 of the European Convention on Human Rights (ECHR) and as applied by the courts in England and Wales in the context of the contested criminal trial.⁷ The first part of the article traces the development and meaning of the right. It highlights two particular areas of confusion and uncertainty: whether a defendant's ability to give evidence and the quality of their evidence is relevant to effective participation; and the unclear relationship, or boundary, between the concepts of 'effective participation' and 'fitness to plead'. The second part of the article focuses on the way in which the right to effective participation has been applied by the courts, drawing from the limited case law which specifically addresses the issue of effective participation of defendants. It is submitted that the right has been restricted by: the suggestion that it can be exercised by proxy; a judicial willingness to reject medical opinion; and an optimistic approach towards the effectiveness of special measures. The article concludes that, in the absence of further guidance on what 'effective participation' entails, and without a new approach to determining whether a defendant can participate effectively, we risk trying defendants whose level of engagement or understanding is such that they cannot fairly be tried.

What is 'effective participation'?

Defendants have long held rights to participate in their criminal trials. In *R v Lee Kun*,⁸ for example, the Court of Appeal found that the accused should be present at the trial to hear the case made against him and have the opportunity, having heard it, of answering it. Lord Reading CJ stated that, 'The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings.'⁹

The defendant's participatory rights are now guaranteed by Article 6 of the ECHR and, in particular, Article 6(3). The right to effective participation is derived from the Article 6(3) rights, particularly the right to defend oneself in person or through legal assistance of one's own choosing, to examine or

⁶ The Prisons and Courts Bill 2016-17, which included proposals for online courts and virtual hearings, was scrapped as a result of the 2017 general election. However, there are plans to introduce new legislation to modernise the courts system. See Queen's Speech 2017, available at www.gov.uk/government/speeches/queens-speech-2017 (accessed 27 April 2018). See also the recently published consultation paper on court and tribunal estate reform, in which it is stated that virtual hearings will continue to be tested and developed: Ministry of Justice (2018) *Fit for the Future: Transforming the court and tribunal estate*, available at https://consult.justice.gov.uk/digital-communications/transforming-court-tribunal-estate/supporting_documents/hmctsstrategyapproachconsultation.pdf (accessed 27 April 2018).

⁷ The right to effective participation operates from the first stages of involvement in a criminal investigation and, in particular, during any questioning by the police (see *Panovits v Cyprus* [2008] 27 BHRC 464 at [67]). Arguably, it should also apply to post-conviction hearings. However, as the focus of this article is the interpretation of 'effective participation', rather than the stages at which the right applies, it is only necessary to consider the contested trial, which is the focus of the relevant case law.

⁸ [1916] 1 KB 337.

⁹ *Ibid.* at 341.

have examined witnesses, and to have the free assistance of an interpreter if the defendant cannot understand or speak the language used in court.¹⁰ The right of an accused to participate effectively in a criminal trial has been described as ‘implicit in the very notion of an adversarial procedure’.¹¹ It can ensure that the defendant is treated as the autonomous subject of the proceedings, and not simply as an object for the imposition of conviction and punishment. In sum, a defendant cannot have a fair trial if they cannot participate effectively. Yet, despite the central role which the right plays in ensuring a fair trial, few cases have directly addressed the meaning of ‘effective participation’.

The European Court of Human Rights recognised the right to effective participation as an implicit Article 6 guarantee in the case of *Stanford v UK* in 1994.¹² The applicant claimed that, during his trial, he had been unable to hear a prosecution witness from his position in the dock. The applicant’s claim that he did not have a fair trial was rejected for reasons explained below. However, the Court stated that, ‘Article 6, read as a whole, guarantees the right of an accused to participate effectively in a criminal trial. In general this includes, inter alia, not only his right to be present, but also to hear and follow the proceedings.’¹³ Beyond this statement, *Stanford* tells us little about the scope of the right. It does not, for example, specify whether the defendant should be able to actively engage in the proceedings, what level of understanding is required, or how a defendant’s ability to participate effectively can be determined, monitored or attained.

Following *Stanford*, the right to effective participation was applied in the case of *T v UK*.¹⁴ This was the first case in which the European Court had to consider the right in relation to children. The case concerned the high-profile trial of Robert Thompson and Jon Venables for the murder of James Bulger in 1993. At the time of their Crown Court trial, T and V were 11 years old. Adjustments were made to take account of their age and facilitate their understanding of the proceedings. These adjustments included: shortened hearing times to reflect the school day; a break every hour; seating the applicants next to social workers and near their lawyers and parents; and a raised dock so that they could see the proceedings.¹⁵ However, the judge and counsel wore wigs and gowns, and because of significant public and media interest in the case, the courtroom, press benches and public gallery were full. The judge was aware that the public interest in the trial was distressing for witnesses. In his summing-up, he asked the jury to take this into account when assessing the witnesses’ evidence.¹⁶ As for the applicants, the situation was worsened by the raised dock which caused them to feel further distress and intimidation.¹⁷

The European Court was satisfied that, due to the conditions of the trial, as well as the applicants’ disturbed emotional state, T and V had been unable to: pay attention or follow the proceedings; give their own account of events; or adequately communicate with their lawyers outside of court. The applicants had, in sum, been unable to effectively participate in the trial. While the Court did not expand on the meaning or scope of the right to effective participation, it did recognise a difference between children and adults, finding that children should be treated differently. The Court held that ‘it is essential that a child charged with an offence is dealt with in a manner which takes full account

¹⁰ See *Stanford v UK* App no 16757/90 (ECHR, 23 February 1994) at [26].

¹¹ *Ibid.* at [26].

¹² *Ibid.* at [26]. See also *Colozza v Italy* (1985) 7 EHRR 516 at [27], where the European Court stated that a person charged with a criminal offence ‘is entitled to take part in the hearing’.

¹³ *Stanford v UK* App no 16757/90 (ECHR, 23 February 1994) at [26].

¹⁴ (2000) 30 EHRR 121.

¹⁵ *Ibid.* at [9].

¹⁶ *Ibid.* at [88].

¹⁷ *Ibid.* at [88].

of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.¹⁸ Following the judgment, a Practice Direction was issued,¹⁹ stating that the ordinary trial process should so far as necessary be adapted to assist young defendants to understand and participate in the proceedings.

The most significant judgment on the scope of the right to effective participation was delivered by the European Court five years after *T*. The applicant in *SC v UK*²⁰ was 11 years old at the time of his Crown Court trial for attempted robbery. As in *T*, adjustments were made to take account of the applicant's age and low intellectual ability, and to facilitate his participation and understanding. For example, he was accompanied to trial by a social worker; he did not sit in the dock; there were regular breaks; and wigs and gowns were not worn.²¹ However, the applicant had little comprehension of the role of the jury or of the importance of making a good impression on them. More significantly, he did not comprehend the consequences of being convicted; even once sentence had been passed and he had been taken to the holding cells, he appeared confused and expected to be able to go home with his foster father.²² Because of his lack of understanding, the applicant had been unable to participate effectively in accordance with Article 6 of the ECHR. The Court described the right to effective participation as follows:

“effective participation” in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.²³

This is the most comprehensive statement of ‘effective participation’ that has been provided by the courts. It implies that, overall, defendants should be able to maintain a level of general understanding and active engagement throughout the trial. They do not need perfect engagement; they do not need to be able to understand everything said or every point of law. The Court recognised that ‘many adults of normal intelligence are unable fully to comprehend all the intricacies and exchanges which take place in the courtroom’.²⁴ The right to effective participation is, therefore, a right to ‘broad understanding’ of the proceedings and a comprehension of the ‘general thrust’ of what is said in court. But it also includes some specific requirements, such as: an understanding of the significance of any penalty which may be imposed; an ability to understand what is said by prosecution witnesses; and an ability to instruct one’s lawyers.

The description of ‘effective participation’ provided in *SC* has been cited in subsequent cases, but the concept of effective participation has not been further explained or expanded in any significant way. In the recent case of *R v McGill, Hewitt and Hewitt*,²⁵ for example, the Court of Appeal found that three children, who had a range of communication and learning difficulties, could participate effectively at

¹⁸ *Ibid.* at [86].

¹⁹ Practice Direction (Crown Court: Young Defendants) [2000] 1 WLR 659. See also CPD, General Matters 3D-3G.

²⁰ (2005) 40 EHRR 10.

²¹ *Ibid.* at [15].

²² *Ibid.* at [33].

²³ *Ibid.* at [29].

²⁴ *Ibid.* at [29].

²⁵ [2017] EWCA Crim 1228.

their Crown Court trial for murder, without specifying or explaining the necessary criteria for effective participation. However, in the earlier case of *R (TP) v West London Youth Court*,²⁶ in determining whether a trial judge had been correct to find that a 15 year old could participate effectively in accordance with the decision in *SC*, the Divisional Court endorsed the following minimum requirements for a fair trial:

- i) the defendant has to understand what he is said to have done wrong;
- ii) the court has to be satisfied that the defendant, when he had done wrong by act or omission, had the means of knowing that was wrong;
- iii) the defendant has to understand what, if any, defences are available to him;
- iv) the defendant has to have a reasonable opportunity to make relevant representations if he wishes;
- v) the defendant has to have the opportunity to consider what representations he wishes to make once he has understood the issues involved.²⁷

The defendant has, therefore, 'to be able to give proper instructions and to participate by way of providing answers to questions and suggesting questions to his lawyers in the circumstances of the trial as they [arise].'²⁸

The requirements set out in *TP* were directed at a young defendant who would be tried in a youth court. They are not identical to the criteria for effective participation, as set out in *SC*, and raise some issues. For example, the second requirement reflects the principle of *doli incapax*, under which very young children are incapable of committing a criminal offence. The rebuttable presumption of *doli incapax*, which applied to defendants between the ages of 10 and 14, meant that the prosecution had to prove that the defendant knew that what was alleged was seriously wrong. The presumption was abolished by section 34 of the Crime and Disorder Act 1998, but it was not until 2009 that the House of Lords confirmed that section 34 also abolished the defence of *doli incapax*.²⁹ Since *TP* pre-dates the 2009 decision, it may be that the second requirement is no longer considered necessary or appropriate. On the other hand, if the defendant did not understand that what they are alleged to have done was wrong, they may not be able to appreciate what is at stake for them or make their lawyer aware of any facts which should be put forward in their defence, which are necessary abilities for effective participation, in accordance with *SC*. Despite some uncertainties, in so far as the requirements set out in *TP* are intended to ensure compliance with *SC*, and are directed towards the defendant's ability to instruct and communicate with a lawyer, they do not appear to contradict or add anything significant to the European Court's concept of 'effective participation'.

An uncertain scope

Although *SC* provides the most comprehensive statement of 'effective participation' to date, the scope of the right remains uncertain. For example, in order to participate effectively, the defendant must be able to follow what is said by prosecution witnesses, but what about defence witnesses, co-defendants and other participants? Furthermore, since much emphasis is placed on communication with a lawyer, it is not clear what is required of unrepresented defendants. The European Court did

²⁶ [2005] EWHC 2583 (Admin).

²⁷ *Ibid.* at [7].

²⁸ *Ibid.* at [7].

²⁹ *R v JTB* [2009] UKHL 20.

not suggest that it was providing a complete definition or exhaustive list of criteria for effective participation, and the fact that the defendant must have general understanding and capacity for active engagement suggests that the scope of the right extends beyond the specific abilities set out in SC. However, one particularly notable absence from the European Court's description of effective participation is the ability to give evidence.

On the one hand, in *Stanford*, the Court explained that the right to effective participation is derived from the participatory rights in Article 6(3) of the ECHR, including the right to examine witnesses and to defend oneself in person.³⁰ This suggests that the defendant should be capable of giving evidence in court. Moreover, in *T*, in finding that the applicants had not been able to exercise their right to effective participation, it was relevant that they had been unable to give their own account in court.³¹ On the other hand, in the more recent case of *R v Hamberger*,³² the Court of Appeal found no unfairness in trying a defendant who could not testify because he was involuntarily absent from court by reason of ill health. The Court found that it was sufficient that the defendant could have applied for his version of events to be admitted as hearsay evidence, under sections 114 and 116(2)(b) of the Criminal Justice Act 2003.³³ However, in reaching this decision, the Court of Appeal did not consider the jurisprudence on the right to effective participation or what 'effective participation' entails. In particular, the Court could have considered *Romanov v Russia*,³⁴ in which the applicant, who was involuntarily absent because of illness, had been denied the right to participate effectively in his trial. The European Court held that, exceptionally, a trial court could proceed in the defendant's absence on account of illness. However, where the proceedings involved an assessment of the defendant's personality and character and of their state of mind at the time of the offence, and where the outcome could be of major detriment to them, it was essential for the defendant to be present and given the opportunity to participate together with their counsel.³⁵ Arguably, all trials which involve an assessment of *mens rea* fall within this category.

Following the Strasbourg jurisprudence, it seems that the ability to give evidence is an aspect of effective participation. It is less clear whether the defendant must have the capacity to, for example, concentrate while giving evidence, provide coherent and consistent answers, and generally do themselves justice in the witness box. Arguably, the defendant's capacity to provide evidence of a good quality is, or should be, relevant in determinations of effective participation, as the European Court's notion of 'effective participation' is generally concerned with the quality of a defendant's engagement in the proceedings. Moreover, rule 3.9(3)(b) of the Criminal Procedure Rules 2015 states that the court must take every reasonable step 'to facilitate the participation of any person, including the defendant.' In accordance with the Criminal Practice Directions, this includes 'enabling a ... defendant to give their best evidence'.³⁶ While 'best evidence' is not defined, it is likely to refer to 'quality' of evidence, which is a term used in respect of vulnerable witnesses in the Youth Justice and Criminal Evidence Act 1999. Following section 16(5) of the 1999 Act, 'quality' of evidence refers to its

³⁰ *Stanford v UK* App no 16757/90 (ECHR, 23 February 1994) at [26].

³¹ *T v UK* (2000) 30 EHRR 121 at [82].

³² [2017] EWCA Crim 273.

³³ *Ibid.* at [44]. The Court of Appeal also considered the possibility of the appellant giving evidence through live-link, but, unlike the trial judge, found that he did not meet the criteria set out in s 33A of the YJCEA 1999. In any event, the defence submitted that live-link was not available in practice because it exposed the appellant to the risk of ill health or even death (at [30]).

³⁴ (2007) 44 EHRR 23.

³⁵ *Ibid.* at [108].

³⁶ CPD, 3D.2.

‘completeness, coherence and accuracy’.³⁷ This is not to suggest that a defendant’s evidence must necessarily be complete, coherent or accurate, but that, in order to participate effectively, they should be *capable* of giving such evidence.

Further support for the proposition that quality of evidence is relevant to effective participation is found in section 33A of the 1999 Act, under which vulnerable defendants can give evidence through live-link. One of the conditions for the use of live-link is that it ‘would enable [the defendant] to participate more effectively in the proceedings as a witness (whether *by improving the quality of his evidence* or otherwise).’³⁸ Section 33A was enacted as a direct response to the decision in *SC v UK*, where the concern was effective participation (Fairclough, 2017b: ch 4).³⁹ Likewise, the legislative provision for vulnerable defendants to give evidence with the assistance of an intermediary, although not in force, is intended to enable effective participation.⁴⁰ Notably, the legislation only provides for defendant intermediaries to assist with giving evidence, and not to facilitate understanding during other parts of the proceedings. Although the legislative provision is not in force, the court has inherent jurisdiction to appoint an intermediary to assist the defendant throughout criminal proceedings.⁴¹ However, the courts have also taken the view that intermediaries are most appropriate and useful while the defendant gives evidence, and appointment of an intermediary under the common law should generally be restricted to that purpose.⁴² If special measures were developed and enacted specifically to facilitate effective participation by enabling defendant’s to give evidence, and by improving the quality of their evidence, surely the right to effective participation includes the ability to give good quality evidence.

Notwithstanding the link between the Criminal Procedure Rules, Criminal Practice Directions and legislation, clarification is needed as to the extent to which the ability to give evidence and quality of evidence are relevant factors for effective participation. Clarification is important because these factors may affect how a defendant is treated. For example, if a defendant cannot concentrate while giving evidence, or if they do not have the capacity to give coherent or consistent evidence, should they be considered ‘unable to effectively participate’ or are they ‘unfit to plead’, or, alternatively, is it ‘undesirable’ for them to give evidence? As it stands, there is significant confusion and overlap between these three areas of law, as explained in the following paragraphs.

Under section 35(1)(b) of the Criminal Justice and Public Order Act 1994, if a court finds that it is ‘undesirable’ for a defendant to give evidence because of a mental or physical condition, adverse inferences cannot be drawn from the defendant’s silence in court. While the application of section 35(1)(b) is a matter of judicial discretion,⁴³ it is not clear whether, in practice, it is contingent on lack of capacity to participate effectively (see Roberts, 2014: 143). In other words, is it possible for a defendant to have the capacity to participate effectively in their trial, yet have a condition which makes it undesirable for them to give evidence? The notion of ‘undesirable’ has been construed very narrowly (Owusu-Bempah, 2011). In determining whether it is undesirable for a defendant to give

³⁷ I am indebted to Samantha Fairclough for alerting me to the link between the court’s obligation to take every reasonable step to facilitate the best evidence of a defendant and the quality of a defendant’s evidence. See Fairclough (2018: 13-14).

³⁸ YJCEA 1999, ss 33A(4)(b) and 33A(5)(c). Emphasis added.

³⁹ See also Hansard, HL Deb 11 July 2006 vol 684 col 678-679.

⁴⁰ Hansard, Coroners and Justice Bill Deb 10 March 2009 col 585; YJCEA 1999, ss 33BA(5) and 33BA(6).

⁴¹ See, for example, *C v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin); CPD, 3F.11-3F.18.

⁴² See, for example, *R (on the application of OP) v the Secretary of State for Justice and Others* [2014] EWHC 1944 (Admin); *R v Rashid* [2017] EWCA Crim 2; CPD, 3F.13.

⁴³ *R v Friend* [1997] 1 WLR 1433.

evidence, quality of evidence can be taken into account,⁴⁴ but has been accorded little weight in comparison to health risks and the perceived importance of a defendant's evidence.⁴⁵ Overall, section 35(1)(b) has been interpreted and applied by the appellate courts such that, even if it is not contingent on lack of capacity to participate effectively, if a court deems it undesirable for a defendant to give evidence, it is likely that they are also unable to participate effectively in their trial.⁴⁶ But this approach renders section 35(1)(b) largely redundant; if the defendant cannot participate effectively, they cannot have a fair trial, and, so, should not be tried. Consequently, the section 35(1)(b) issue should not arise.

The ability to give evidence in one's own defence is an express requirement for fitness to plead.⁴⁷ Whether the defendant has sufficient intellect to give evidence has been said to be a very different matter from whether it is 'undesirable' for a defendant to give evidence.⁴⁸ However, it has also been suggested that the majority of those who fall within section 35(1)(b) on the basis of a mental condition will be unfit to plead.⁴⁹ In the context of determining fitness to plead, giving evidence means that the defendant must be able: '(a) to understand the questions he is asked in the witness box, (b) to apply his mind to answering them, and (c) to convey intelligibly to the jury the answers which he wishes to give.'⁵⁰ The Law Commission took the view that it would not be appropriate or helpful to expand on what giving evidence requires in this context (Law Commission, 2016a: para 3.106). However, as the above analysis suggests, the concept of 'giving evidence', and the factors relevant to determining whether a defendant can (or should) give evidence, are not necessarily straightforward. The matter is further complicated by a recent Court of Appeal judgment which suggests that a defendant can be 'fit to plead' yet 'unfit to give evidence in cross examination', despite the fact that 'capacity to be cross examined' is 'part and parcel of the defendant's ability to give evidence in his own defence'.⁵¹ Unfortunately, the court did not go on to explain the distinction, and, so, it is unclear whether 'unfit to give evidence in cross examination' means that the defendant cannot participate effectively, or that it would be undesirable for the defendant to give evidence, or something else (see Owusu-Bempah and Wortley, 2016: 395-396). A more comprehensive definition or explanation of 'effective participation', including further guidance on the relevance of the defendant's ability to give evidence and the quality of their evidence, could help to clarify the distinction between several complex areas of procedural law.

The distinction between effective participation and fitness to plead

There is a broader uncertainty as to the relationship between effective participation and fitness to plead, as noted in the Law Commission's 2016 report on unfitness to plead (Law Commission, 2016a: para 1.43 and ch 3). The courts sometimes use language which suggests that there is no difference between the two concepts. In two recent cases, the Court of Appeal described the fitness to plead

⁴⁴ *R v Friend* [2004] EWCA Crim 2661.

⁴⁵ *R v Friend* [1997] 1 WLR 1433; *R v Ensor* [2009] EWCA Crim 2519; *R v Tabbakh* [2009] EWCA Crim 464; *R v D* [2013] EWCA Crim 465; *R v Mulindwa* [2017] EWCA Crim 416.

⁴⁶ See, for example, *R v Friend* [2004] EWCA Crim 2661.

⁴⁷ *R v M (John)* [2003] EWCA Crim 3452.

⁴⁸ *R v D* [2013] EWCA Crim 465 at [56].

⁴⁹ *R v Friend* [1997] 1 WLR 1433 at 1440.

⁵⁰ *R v M (John)* [2003] EWCA Crim 3452 at [24].

⁵¹ *R v Orr* [2016] EWCA Crim 889 at [23]-[24].

test in terms of ‘capacity to participate effectively’,⁵² and ‘fitness to participate in the trial process’.⁵³ However, there are a number of cases which recognise a distinction between effective participation and fitness to plead.⁵⁴ In *SC*, for example, the European Court acknowledged that the applicant had been fit to plead, yet found a breach of Article 6 on the basis that he had been unable to participate effectively in his trial.⁵⁵ Although the two concepts are closely aligned, it is important to try to unpack the distinction between them, not least because they involve different procedures and outcomes.

If a defendant is unfit to plead, in place of standard trial procedures, a hearing of the facts must be held, at which the jury must determine whether the defendant did the relevant act or made the relevant omission.⁵⁶ If satisfied that the defendant committed the *actus reus* of the offence, the disposal options are a hospital order, supervision order or absolute discharge.⁵⁷ Fitness to plead hearings can only take place in the Crown Court. Section 37 of the Mental Health Act 1983 and section 11 of the Powers of Criminal Courts (Sentencing) Act 2000 provide a limited mechanism for dealing with defendants in the magistrates’ courts, including the youth court, who have mental health issues. However, the provisions focus on whether the defendant has a ‘mental disorder’,⁵⁸ and not on the ability to participate in criminal proceedings. Moreover, they only apply to imprisonable summary offences, and, if satisfied that the defendant ‘did the act or made the omission’, the disposal options are limited to a hospital order or, if the defendant is over the age of 16, a guardianship order.⁵⁹ Thus, many defendants in the magistrates’ courts, particularly the youth court, are tried in the usual way, despite significant participation difficulties (Law Commission, 2016a: para 7.47).

If a defendant is fit to plead (or section 37 does not apply), but they cannot participate effectively, the proceedings should be stayed as an abuse of process, as it is not possible for the defendant to have a fair trial. However, it has been made clear that the power to stay proceeding as an abuse of process ought only to be employed in exceptional circumstances.⁶⁰ Also, it is thought better to proceed with a trial and stay the proceedings if and when it becomes apparent that the defendant is unable to participate effectively, than to stay the proceedings at the outset, before any evidence has been heard.⁶¹ This may be, at least in part, because there is a public interest in the prosecution of crimes, and, where proceedings are stayed, no sentence can be imposed for any offending behaviour. Moreover, following a stay of proceedings, there is no power to impose a disposal to address the defendant’s mental health, learning difficulties, or any other problems that they face (Arthur, 2016: 236). The lack of disposal powers following a stay of proceedings may have contributed to a restrictive application of the right to effective participation, as discussed in the following section.

⁵² *R v Marcantonio* [2016] EWCA Crim 14 at [7].

⁵³ *R v Orr* [2016] EWCA Crim 889 at [23].

⁵⁴ See, for example, *R (TP) v West London Youth Court* [2005] EWHC 2583 (Admin); *CPS v P* [2007] EWHC 946 (Admin); *C v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin).

⁵⁵ *SC v UK* (2005) 40 EHRR 10 at [36]. See also *T v UK* (2000) 30 EHRR 121 at [60].

⁵⁶ Criminal Procedure (Insanity) Act 1964, s 4A.

⁵⁷ *Ibid.* s 5.

⁵⁸ Within the meaning of s 1 of the Mental Health Act 1983.

⁵⁹ For a discussion on the limitations of the legal framework for addressing participation difficulties in the magistrates’ courts, see Law Commission (2016a: ch 7); Bevan (2016).

⁶⁰ *AG’s Ref (no 1 of 1990)* [1992] QB 630 at 643; *R (Ebrahim) v Feltham Magistrates’ Court* [2001] EWHC Admin 130 at [17]; *R (TP) v West London Youth Court* [2005] EWHC 2583 (Admin) at [14].

⁶¹ *R (TP) v West London Youth Court* [2005] EWHC 2583 (Admin) at [18]; *CPS v P* [2007] EWHC 946 (Admin) at [51].

While the definition of ‘effective participation’ is derived from *SC*, the current criteria for determining fitness to plead are set out in the case of *R v M (John)*.⁶² To be fit to plead, the defendant must be capable of: ‘(1) understanding the charges; (2) deciding whether to plead guilty or not; (3) exercising his right to challenge jurors; (4) instructing solicitors and counsel; (5) following the course of the proceedings; (6) giving evidence in his own defence.’⁶³

It is difficult to ascertain the precise distinction between fitness to plead and effective participation, not least because the current test used to assess fitness to plead ‘is not consistently understood or applied by clinicians, legal practitioners and the courts’ (Law Commission, 2016a: para 1.13). There are clear overlaps between the requirements for fitness to plead and effective participation; both include an ability to instruct lawyers and follow the proceedings, and, as argued above, the ability to give evidence is implicit in the right to effective participation, despite the lack of clarity as to what it entails. On the other hand, effective participation does not require the capacity to decide whether to plead guilty or not guilty, or challenge jurors, and it does not expressly require a capacity to understand the charges.⁶⁴ However, the key distinction between the concepts of fitness to plead and effective participation is not the specific requirements or capacities, but the overall focus. The fitness to plead test focuses on intelligence and cognitive ability (see Grubin, 1993), as well as the ability to understand the trial process and certain concepts related to criminal proceedings. Effective participation, on the other hand, focuses on the ability to take an active part in the trial, as well as the quality of the defendant’s participation and engagement. Thus, if the defendant has no understanding of the nature of the trial process, or cannot respond to questions, they will be unfit to plead. Whereas effective participation seems to include, for example, the defendant’s ability to pay attention and concentrate during the proceedings, their ability to assess the strengths and weaknesses of their legal position, and their ability to challenge the evidence against them.

The Law Commission has recommended a new test of fitness to plead based on capacity for effective participation, as well as decision-making capacity.⁶⁵ The ability to make decisions, although not an express requirement, is an essential part of effective participation (Law Commission, 2016a: para 3.84). For example, defendants must be able to make decisions about which facts they think should be put forward in their defence. Under the Commission’s proposed test, ‘A defendant is to be regarded as lacking the capacity to participate effectively in a trial if the defendant’s relevant abilities are not, taken together, sufficient to enable the defendant to participate effectively in the proceedings on the offence or offences charged’ (Law Commission, 2016b: clause 3(2)). The relevant abilities are:

- a) an ability to understand the nature of the charge;
- b) an ability to understand the evidence adduced as evidence of the commission of the offence;
- c) an ability to understand the trial process and the consequences of being convicted;
- d) an ability to give instructions to a legal representative;
- e) an ability to make a decision about whether to plead guilty or not guilty;

⁶² [2003] EWCA Crim 3452. The original test of fitness to plead is set out in *R v Pritchard* (1836) 7 C & P 303.

⁶³ *R v M (John)* [2003] EWCA Crim 3452 at [20].

⁶⁴ Capacity to understand charges may be necessary if a defendant is to understand what is at stake for him or her, including the significance of any penalty which may be imposed. The Divisional Court considered that an understanding of what the defendant is said to have done wrong is a necessary requirement for a fair trial. *R (TP) v West London Youth Court* [2005] EWHC 2583 (Admin) at [7].

⁶⁵ Decision-making capacity, in this context, is based on criteria in s 3(1) of the Mental Capacity Act 2005, and consists of: an ability to understand information relevant to the decision; an ability to retain that information; an ability to use and to weigh the information when making the decision; and an ability to communicate the decision. See Law Commission (2016b: clause 3(5)).

- f) an ability to make a decision about whether to give evidence;
- g) an ability to make other decisions that might need to be made by the defendant in connection with the trial;
- h) an ability to follow the proceedings in court on the offence;
- i) an ability to give evidence;
- j) any other ability that appears to the court to be relevant in the particular case. (Law Commission, 2016b: clause 3(4))

The above is a non-exhaustive list that would be applied in the context of the particular proceedings faced by the defendant. It incorporates the abilities listed in the current fitness to plead test, except the capacity to challenge jurors, which requires a lower level of cognitive ability than several of the other criteria for fitness to plead (Law Commission, 2016a: para 3.88). It also incorporates the requirements for effective participation set out in SC. However, the Commission's proposed test of effective participation goes further than SC. It expressly includes, for example, the ability to make a decision about whether to plead guilty or whether to give evidence. Additionally, reference to following what is said by prosecution witnesses is omitted, as the defendant will need to be able to follow other aspects of proceedings, including the evidence of co-defendants (Law Commission, 2016a: para 3.103).

If adopted, the Law Commission's proposed test would provide a broader, clearer and more comprehensive statement of the right to effective participation than exists under the current law. However, using this notion of 'effective participation' as the basis for determining fitness to plead could lead to a significant increase in the number of 'unfit' defendants.⁶⁶ The Law Commission took the view that there should be a full trial wherever possible, so as to engage Article 6 rights, allow for robust and transparent analysis of all the elements of the offence and any defence advanced, and provide the broadest range of outcomes following conviction (Law Commission, 2016a: para 2.2). To prevent a sudden rise in the number of unfit defendants, the Commission highlights the role which special measures can play in achieving effective participation (see Law Commission, 2016a: ch 2). Clause 3(3) of the Commission's draft Bill states that 'the court must take into account the assistance available to the defendant as regards the proceedings.' Thus, where a defendant would ordinarily be unable to follow the proceedings, an intermediary could be employed to assist them, or where they lack the ability to give evidence in a busy and intimidating courtroom, live-link could be available. The underlying assumption is that special measure and trial adjustments can facilitate effective participation. While this assumption may often be correct, the availability of special measures may overshadow the difficulties faced by some defendants, as argued below.

Despite being generally well-received (see, for example, Loughnan, 2016; Justice, 2017), it seems unlikely that the Law Commission's proposals for reform to the law on fitness to plead will be taken forward in the near future.⁶⁷ However, it is open to the courts to adopt the Commission's proposed test as the basis for a more comprehensive definition of 'effective participation', ideally alongside an explanation of the extent to which quality of evidence is a relevant consideration. This definition could be used to determine whether a defendant who is found to be 'fit to plead', or who is tried in the magistrates' court, had, or can have, a fair trial. In addition, or alternatively, a more medicalised

⁶⁶ The number of individuals found to be unfit to plead is low, standing at approximately 100 per year in England and Wales. See Mackay (2016).

⁶⁷ See the Government's Interim Response on 30 June 2016, available at http://data.parliament.uk/DepositedPapers/Files/DEP2016-0605/Mike_Penning_Government_interim_response_on_Unfitness_to_Plead.pdf (accessed 27 April 2018).

approach to determining effective participation could be developed, as suggested below. A key advantage of the Law Commission's proposed test is that it sets out a clear list of relevant capabilities which could ensure that the concept of effective participation is understood and can be applied with the certainty and consistency that is currently lacking. At the same time, the list of relevant capabilities is not exhaustive, allowing flexibility to take account of the factors that pertain to individual defendants and criminal trials (Law Commission, 2016a: para 3.65). A clearer statement of what the legal right to effective participation entails is necessary, not only to achieve legal certainty, but because, in practice, many defendants who are 'fit to plead' are not meaningfully engaged in their trials.

A restrictive application of the right to effective participation

Having examined the development and uncertain scope of the right to effective participation, and having argued that further guidance is needed, we now turn to the way in which the right has been applied. This section argues that a restrictive approach has been taken which undermines defendants' participatory rights. One way in which the right to effective participation has been restricted is through the suggestion that it can be exercised by proxy through one's lawyer.

As noted above, the right to effective participation does not require that the defendant should understand or be capable of understanding every point of law or evidential detail, given the right to legal representation.⁶⁸ Where the defendant is represented, this is unobjectionable, given the intricate and complex nature of criminal and procedural law. Moreover, the defendant's legal representative will often be better placed than the defendant to articulate the defendant's version of events and to challenge the evidence against them. Legal representatives are less emotionally engaged in the case, have expert knowledge of the law, have experience of advocating in court, and are unlikely to face the same feelings of discomfort, alienation and isolation which many defendants experience. They can, in sum, give expression to defendants' participation more effectively than defendants themselves (Jackson and Summers, 2012: 286). Thus, in order to participate most effectively, defendants ordinarily require the assistance of a lawyer.⁶⁹

What is concerning, however, is that the right to effective participation does not seem to include a requirement that the defendant be able to follow the proceedings and evidence of witnesses, as long as their legal representatives can. In *Stanford v UK*, the applicant had difficulty hearing witness testimony at his trial from his position in a glass-fronted dock. The European Court found no violation of Article 6, principally because the matter had not been raised with the trial judge for tactical reasons. The Court accepted that there could be a violation of Article 6 if a defendant could not hear the proceedings properly. However, the Court also suggested that the defendant's right to hear and follow the proceedings could be exercised through his lawyer:

[I]t must be recalled that the applicant was represented by a solicitor and counsel who had no difficulty in following the proceedings and who would have had every opportunity to discuss with the applicant any points that arose out of the evidence which did not already appear in

⁶⁸ *SC v UK* (2005) 40 EHRR 10 at [29].

⁶⁹ This aspect of effective participation is itself under threat as a result of cuts to legal aid and a focus on speedy and efficient justice. Consequently, there is also less opportunity, or incentive, for a defendant's representatives to gain an understanding of, and raise as an issue, a defendant's lack of capacity for effective participation. See Arthur (2016: 228).

the witness statements. Moreover, a reading of the transcript of the trial reveals that he was ably defended by his counsel ...⁷⁰

It therefore seems possible to exercise the right to effective participation by proxy. This approach was also taken in the case of *Hamberger*, in which H appealed against his conviction for conspiracy to supply cannabis on the grounds that he had been unable to effectively participate in the proceedings. In particular, H could not present his account or give an explanation for his actions because he was involuntarily absent from court by reason of his ill health. The Court of Appeal dismissed the appeal, finding no unfairness, as H could have applied for his version of events to be presented as hearsay evidence and he was represented by counsel who were able to challenge the prosecution evidence on his behalf.⁷¹ However, in order to effectively participate by proxy, the defendant must be able to instruct and adequately communicate with their lawyer. In *T*, the European Court distinguished the position of the applicant from that of *Stanford*, finding that it was not sufficient for the purposes of Article 6(1) that T was represented by skilled and experienced lawyers.⁷² This was because it was unlikely that T would have been capable outside the courtroom of co-operating with his lawyers and giving them information for the purpose of his defence.

While it would be unrealistic to expect every represented defendant to be able to comprehend every point of law or evidential issue that arises at their trial, the right to hear and follow the proceedings should be a personal one which the defendant can exercise (see Trechsel, 2005: 253, fn 41 and 335, fn 34). When the defendant is in the dock, their lawyer does not have immediate access to them, meaning that direct communication between lawyer and defendant during the trial may involve significant disruptions to the proceedings. Obviously, it is even more difficult to communicate with a defendant who is involuntarily absent from court. To put the onus on the defendant's lawyer to explain to the defendant everything that has been done or said in court, after it has been done or said, acts to exclude the defendant from the proceedings and undermines their role as a participant. Moreover, defence counsel are supposed to speak and act not only on the defendant's behalf, but in accordance with their wishes (Duff et al., 2007: 97). This ordinarily requires that the defendant can personally hear what is being said in court, so that they can convey their wishes to their legal representative and provide instructions, as the trial progresses.

Unfortunately, difficulty hearing from the dock is not uncommon, and it is not a problem that is encountered only by defendants. Many lawyers find it difficult to hear the defendant from inside the dock, and interpreters and intermediaries have also reported hearing difficulties (Justice, 2015: 15). In practice, there seems to be no real expectation that defendants should be able to properly follow court proceedings, and defendants may just resign themselves to being unable to fully follow what is happening (Justice, 2015: 15-16). For defendants who are not legally represented, the prospect of effective participation is even more remote. Official figures indicate that, during 2016, seven percent of defendants in the Crown Court were unrepresented at the first hearing.⁷³ While there are no official figures for the number of unrepresented defendants in the magistrates' courts, it is likely to be much higher, due to the more onerous eligibility criteria for legal aid.⁷⁴ Unrepresented defendants often

⁷⁰ *Stanford v UK* App no 16757/90 (ECHR, 23 February 1994) at [30].

⁷¹ *R v Hamberger* [2017] EWCA Crim 273 at [44].

⁷² *T v UK* (2000) 30 EHRR 121 at [90].

⁷³ Ministry of Justice, *Criminal Court Statistics (Quarterly): January to March 2017*, p.15, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/623096/ccsq-bulletin-jan-mar-2017.pdf (accessed 27 April 2018).

⁷⁴ Magistrates' and district judges' estimates of the proportion of unrepresented defendants in non-traffic cases range from 15% to 40%. See Transform Justice (2016: 4).

have little prospect of comprehending all of the laws and rules on procedure, or presenting their case coherently. Some unrepresented defendants do not even understand what they are charged with (Transform Justice, 2016: 25-26). They must often rely on the skills and patience of the judge, prosecutor, and court officials (Transform Justice, 2016: 2). Yet, even with the empathy of an experienced court, they may find it particularly difficult to understand what is happening in court.

Determining capacity to participate effectively

It is for judges to decide whether the defendant is able (or was able) to participate effectively in their trial, and this has arguably contributed to a narrow application of the right to effective participation. Although the case law is limited, it shows that trial judges have a wide discretion where capacity to participate effectively is not obvious. The appellate courts have been slow to interfere with initial decisions that defendants can participate effectively, even where mistakes have been made.⁷⁵ Some judges have also demonstrated a willingness to reject medical evidence which suggests that a defendant cannot participate effectively. In *CPS v P*,⁷⁶ for example, the Divisional Court reviewed a decision to stay proceedings against a 12-year-old defendant on the ground that the defendant could not participate effectively in his trial at the youth court. A consultant clinical psychologist had taken the view that the defendant, who had a low IQ, learning disability, attention deficit hyperactivity disorder (ADHD) and a conduct disorder, would not have been capable of: understanding the nature of court proceedings; concentrating on the evidence and argument in a courtroom; understanding much of what was going on during the proceedings; or understanding the significance of his own behaviour.⁷⁷ In finding that the district judge had erred in staying the proceedings before the start of the trial, Lady Justice Smith stated that, 'The court must be willing, in an appropriate case, to disagree with and reject the medical opinion. It is the court's opinion of the child's level of understanding which must determine whether a criminal trial proceeds.'⁷⁸ She went on to state that:

Accordingly, it is my view that, in most cases, the medical evidence should be considered as part of the evidence in the case and not as the sole evidence on a freestanding application. Although the medical evidence might on its own appear quite strong, when other matters are considered the court might conclude that the defendant's understanding and ability to take part in the trial are greater than were suggested by the doctors and that, with proper assistance from his legal adviser and suitable adjustments to the procedure of the court, the trial can properly proceed to a conclusion.⁷⁹

While a defendant's actual capacity to participate in their trial may differ from what was predicted during medical assessments, it is not clear that judges are better placed than doctors to determine the defendant's ability to play a meaningful role. Nevertheless, in the recent case of *R v Rashid*,⁸⁰ the Court of Appeal rejected an argument that the trial judge was wrong to substitute his own views on the need for an intermediary for those of the experts. The Court held that the trial judge 'was not in any way bound to accept the conclusion of the experts' in respect of the applicant's level of mental capacity.⁸¹ The trial judge had been entitled to determine the mental capacity of the applicant on all

⁷⁵ See, for example, *R v H* [2006] EWCA Crim 853; *R v D* [2013] EWCA Crim 465, discussed below.

⁷⁶ [2007] EWHC 946 (Admin).

⁷⁷ *Ibid.* at [10].

⁷⁸ *Ibid.* at [52].

⁷⁹ *Ibid.* at [53].

⁸⁰ [2017] EWCA Crim 2.

⁸¹ *Ibid.* at [71] per Lord Thomas of Cwmgiedd, CJ.

the evidence before him, including the applicant's educational background, his own observations of the applicant and video of the police interview.⁸²

Even more recently, in *McGill, Hewitt and Hewitt*, the Court of Appeal refused the applications of three children (aged 14 and 15 at the time of trial) for permission to appeal against their convictions for murder. As well as rejecting the submission that the trial judge had misdirected the jury on joint enterprise, the Court rejected the submission that the applicants had been unable properly to participate in the trial. As noted above, this decision was made without reference to the definition or necessary criteria for effective participation. The Court refused to admit fresh evidence from a consultant in adolescent forensic psychiatry who, having interviewed McGill post-conviction, concluded that he had been unable to participate effectively in the proceedings.⁸³ The Court criticised the consultant for basing his view on 'inaccurate, incomplete and partisan accounts' that had been provided by McGill.⁸⁴ The Court also dismissed the concerns of an intermediary who had assisted Hewitt at the trial. The intermediary had made a number of criticisms of the way in which Hewitt was questioned.⁸⁵ Having reviewed the trial transcript, the Court of Appeal took the view that the intermediary's memory was 'not reliable' and that she had become 'less than objective in her assessment of how she was treated and the applicant questioned'.⁸⁶ Although the Court raised specific concerns about the evidence of the consultant and the intermediary, the case nonetheless supports the proposition that there may be some scepticism towards outsiders' views of defendants' lack of capacity to participate.⁸⁷

It is likely that most judges accept the conclusions and recommendations of experts (see Johnston et al., 2016). Clearly, however, this is not always the case, and the contention that judges are better able to assess effective participation than trained medical or communication experts is weak. While it could be argued that judges are most familiar with criminal proceedings and the demands of the trial process, this familiarity could result in judges underestimating the difficulties faced by lay people in court, or overestimating the effectiveness of special measures, as discussed below. Given the uncertainties inherent in diagnosing and predicting the effects of particular communication problems, learning disabilities and mental conditions, a more cautious approach would routinely attach great weight to expert opinions in support of the defence. This is not to say that medical evidence should necessarily be taken at face value,⁸⁸ but a more medicalised approach to determining whether a defendant can participate effectively could assist in ensuring that trials are fair.

It has already been argued that there is a need for a clearer and more comprehensive definition, or test, of 'effective participation'. This could be developed with the assistance of experts and specialists,

⁸² Ibid. at [71].

⁸³ *R v McGill, Hewitt and Hewitt* [2017] EWCA Crim 1228 at [148].

⁸⁴ Ibid. at [156].

⁸⁵ Ibid. at [175]-[176].

⁸⁶ Ibid. at [198].

⁸⁷ Notably, in relation to intermediaries, the Court stated that they are 'instructed to provide advice and guidance to the judge (and to the advocates), not to dictate to anyone what is to happen. ... It does not follow from the fact that a judge does not adopt every one of their suggestions or uphold every one of their interventions that a witness or defendant has been treated unfairly. Ultimately the burden rests on the trial judge to ensure the effective participation of a vulnerable person, not on the intermediary.' Ibid. at [199].

⁸⁸ There is unlikely to be much support for completely eliminating judicial discretion. By way of comparison, in relation to fitness to plead, it has been held that the court must rigorously examine and scrutinise the medical evidence against the criteria for fitness to plead. See *R v Walls* [2011] EWCA Crim 443 at [38]. However, this may be necessitated by the fact that the legal criteria for determining fitness to plead are not consistently understood or applied by clinicians.

such as psychiatrists, psychologists and registered intermediaries, many of whom are speech and language therapists. The Law Commission's proposed test of 'capacity to participate effectively in a trial' provides, at the very least, a good starting point, as it was developed in the light of responses from a wide range of consultees, including academics, legal professionals and medical professionals (see Law Commission, 2013). It not only covers the abilities set out in *SC*, but also explicitly includes decision-making capacity, defined by reference to the Mental Capacity Act 2005 which concerns capacity in relation to civil matters and is well-known to clinicians. Alternatively, the Grisso framework for assessing competence of young defendants could be adopted as a test of effective participation (see Grisso, 2000). The Grisso framework sets out a detailed list of criteria which covers: understanding of charges and potential consequences; understanding of the trial process; capacity to participate with a lawyer in defence; and potential for courtroom participation. It forms the basis for several standardised assessments of competency in the US, and is also used by some psychologists to assess the capacity for effective participation of young defendants in England and Wales (Johnston et al., 2016).

The new test of effective participation, in whatever form it takes, could be used by medical experts and communication specialists to form an opinion on the defendant's ability to participate effectively, which the courts could then treat as persuasive. The Court in *CPS v P* took the view that medical evidence may be important, but must almost always be set in the context of other evidence, which may bear upon the issue of the defendant's ability to participate effectively in a trial, such as evidence of what the defendant is said to have done, how the defendant reacted when arrested, and how he behaved and what he said when interviewed.⁸⁹ These factors could be taken into account by the experts. Further details would need to be worked out, including: the most appropriate stage at which to determine the issue of effective participation; the number of expert opinions required; who should instruct the experts; and how to proceed if the experts do not agree.

At present, there is no standardised guidance or criteria which experts must use to assess the specific issue of a defendant's ability to participate effectively in criminal proceedings. Thus, even if the judiciary is not willing to attach greater weight to expert opinion, a more comprehensive and medicalised concept of 'effective participation' could lead to more consistent recommendations and outcomes.

The relevance of special measures

With the future of the concept of 'effective participation' in mind, it is worth considering a case that not only highlights the restrictive way in which the right to effective participation has been applied, but also demonstrates the significant role which trial adjustments and special measures play in determining whether a defendant can participate effectively in their trial.

In *R v D*,⁹⁰ the appellant had been convicted of murder as part of a joint enterprise. He was 17 at the time of the offence and had a number of conditions which affected his communication skills, including: ADHD; a full scale IQ of 68; low non-verbal abilities; a limited vocabulary and semantic knowledge; a severe stammer; and the language levels around the equivalent of a seven to eight year level. Additionally, he did not know the meaning of 'jury', 'defence', 'evidence', 'oath' or 'alleged'.⁹¹ Although D had an intermediary for the majority of his trial, it was argued on appeal that he had been

⁸⁹ *CPS v P* [2007] EWHC 946 (Admin) at [52].

⁹⁰ [2013] EWCA Crim 465.

⁹¹ *Ibid.* at [13].

unable to participate effectively. The Court of Appeal recognised that errors had been made. In particular, a ground rules hearing had not been held before the trial and there had been no adjustment to the language normally used in court.⁹² Ultimately, however, the Court held that, despite D's serious communication problems, there had been no violation of Article 6. D 'was able to participate meaningfully in the trial.'⁹³ The Court also rejected the submission that D's conditions made it undesirable for him to give evidence and that the jury should not have been permitted to draw an adverse inference from his silence in court.

In finding that D could participate effectively, the Court took account of the fact that it had been a relatively simple case and that D had been able to give an account of the events to his legal representatives and to others. Significant reliance was also placed on the fact that an intermediary had been appointed to assist D's communication and understanding. In recent years, increasing attention has been paid to the need to assist young and otherwise vulnerable defendants (see, for example, Jacobson and Talbot, 2009; Stone, 2010; Talbot, 2012; Cooper and Wurtzel, 2013; McEwan, 2013; Jacobson et al., 2014; Kirby et al., 2014; Arthur, 2016), and the use of special measures has been encouraged.⁹⁴ However, it is concerning that the availability of special measures, including intermediaries, may overshadow the problems faced by those who would struggle with participating.⁹⁵ Eligibility for special measures should signal that a defendant will have particular difficulty following and engaging in proceedings. Yet, in practice, the availability of special measures has not only contributed to findings that defendants with severe communication problems can participate effectively,⁹⁶ but also that they *should* actively participate in their trials, and that adverse inferences may be drawn against them if they do not give evidence.⁹⁷ There is, thus, an expectation of defendant participation, despite the difficulties in securing effective participation (Owusu-Bempah, 2017: 131).

While special measures and trial adjustments, such as those set out in the Criminal Practice Directions,⁹⁸ can no doubt assist participation in many cases, there is a lack of empirical research as to their effectiveness. Thus, the value of trial adjustments and special measures in individual cases may be speculative, as evidenced by the fact that experts do not always agree on which adjustments or measures, if any, will enable effective participation.⁹⁹ More generally, there is a lack of agreement as to whether procedures in England and Wales sufficiently accommodate the needs of defendants, particularly children (see, for example, Justice, 2017: para 4.11). In *McGill, Hewitt and Hewitt*, however, the Court of Appeal rejected the assertion that 'the general consensus is that the measures currently deployed are simply not good enough to ensure effective participation'.¹⁰⁰

⁹² Ibid. at [82]-[84].

⁹³ Ibid. at [95] per Lord Justice Treacy.

⁹⁴ See, for example, The Advocate's Gateway toolkits, particularly, *Toolkit 8: Effective Participation of Young Defendants*. Available at www.theadvocatesgateway.org/toolkits (accessed 27 April 2018).

⁹⁵ This concern could be extended to the use of special measures to render a non-defendant witness competent to give evidence (see ss 53 and 54, YJCEA 1999). If the court makes a mistake about (or overestimates) the effectiveness of special measures to attain competency, the parties might not be able to effectively examine the witness, and the experience of giving evidence might be detrimental to the witness.

⁹⁶ See also *R (TP) v West London Youth Court* [2005] EWHC 2583 (Admin).

⁹⁷ See, for example, *R v D* [2013] EWCA Crim 465; *O'Donnell v UK* [2015] ECHR 16667/10; *R v Mulindwa* [2017] EWCA Crim 416.

⁹⁸ On the assistance available to vulnerable defendants, see CPD, 3G: Vulnerable Defendants. See also Cooper and Norton (2017).

⁹⁹ See, for example, *O'Donnell v UK* [2015] ECHR 16667/10; *R v Rashid* [2017] EWCA Crim 2.

¹⁰⁰ *R v McGill, Hewitt and Hewitt* [2017] EWCA Crim 1228 at [224]. The Equality and Human Rights Commission provided submissions as an Intervener which also expressed concern about the failure to provide support to young and vulnerable defendants.

Even if we could be confident that special measures and trial adjustments enable effective participation of defendants in their trials, defendants have limited access to certain special measures. The criteria for vulnerable defendants to give evidence by live-link, for example, are much more restrictive than for non-defendant witnesses.¹⁰¹ Also, defendants are excluded from the ‘registered intermediary’ scheme, meaning that, where the court appoints an intermediary for a defendant,¹⁰² the intermediary is not quality-assured in the same way as intermediaries for non-defendant witnesses.¹⁰³ Moreover, following an amendment in 2016, the Criminal Practice Directions stipulate that appointment of defendant intermediaries while the defendant gives evidence should be ‘rare’, and appointment for the duration of a trial should be ‘extremely rare’.¹⁰⁴ This position was confirmed by the Court of Appeal in *Rashid*.¹⁰⁵ The Court took the view that, in the overwhelming majority of cases, competent legal representation and good trial management is sufficient to assist participation and ensure a fair trial.¹⁰⁶

The current approach of relying on special measures to facilitate effective participation poses a challenge for defendants. If the court finds that the defendant’s difficulties do not warrant special measures, the court is likely to be satisfied that the defendant can participate effectively. At the same time, where the defendant qualifies for special measures, the court is likely to find that the measures are sufficient to enable effective participation. Consequently, few defendants will be able to satisfy a court that they are unable to have a fair trial on account of inability to participate effectively, despite mental health problems and learning disabilities being disproportionately high among those who come into contact with the criminal justice system (see, for example, Loucks, 2007; Talbot, 2010; Talbot, 2012; Wigzell et al., 2015; Justice, 2017), and despite many defendants being unable to play a meaningful role in their trial (see, for example, Jacobson and Talbot, 2009; Jacobson et al., 2016). Johnston *et al.*, for example, carried out an audit of 20 consecutive effective participation assessments which were conducted by a specialist adolescent forensic service. Out of the 20 adolescent defendants who were referred to the service by their solicitors, only four were judged to be able to participate effectively at trial with few or no modifications. The audit also shows a very high level of disability, with the majority of the young defendants having IQ or Verbal Comprehension Index scores in the ‘extremely low’ range associated with a learning disability. Also, 55 percent of the assessed defendants had at least one neurodevelopmental disorder which is likely to impact upon their ability to understand and effectively participate in trial proceedings (see Johnston et al., 2016). The findings from this small-scale case series are consistent with previous research (see, for example, Lord Bradley, 2009).

Relying on special measures and trial adjustments, particularly in cases where their effectiveness is open to question, carries the risk that trials will be continued where the defendant’s level of understanding is so low that they should not be tried at all (McEwan, 2013: 108). Again, a more rigorous and medicalised approach to determining effective participation, based on a more

¹⁰¹ YJCEA 1999, s 33A. See generally Fairclough (2017a).

¹⁰² As explained above, the statutory provision for defendant intermediaries is not in force (YJCEA 1999, s 33BA). However, judges have used their inherent powers to appoint intermediaries to assist defendants.

¹⁰³ See *R (on the application of OP) v the Secretary of State for Justice and Others* [2014] EWHC 1944 (Admin), where exclusion from the registered intermediary scheme was successfully challenged. However, there has yet to be a change in practice.

¹⁰⁴ CPD, 3F.13. For a critique of this direction, see Hoyano and Rafferty (2017).

¹⁰⁵ [2017] EWCA Crim 2 at [84]. See also Wurtzel (2017).

¹⁰⁶ *R v Rashid* [2017] EWCA Crim 2 at [73]. See also CPD, 3F.12, which states: ‘The court should adapt the trial process to address a defendant’s communication needs ... and will rarely exercise its inherent powers to direct appointment of an intermediary.’

comprehensive statement of the capabilities required for effective participation, could result in fairer and more appropriate outcomes.

Conclusion

This article has examined the legal definition and uncertain scope of the right to effective participation and has demonstrated the narrow way in which the right has been applied. A doctrinal examination of the right to effective participation raises a number of questions which warrant consideration. For example: What capabilities should be deemed necessary for effective participation? Who should determine whether a defendant can participate effectively? What role can special measures play in attaining effective participation?

This article has not sought to provide a new legal test or procedure for determining whether defendants can participate effectively in their criminal trials, as that is best left to more suitably qualified experts. As such, it has not been possible to provide complete answers to all of the above questions. However, suggestions have been made. It has been argued that there is a need for a clearer and more comprehensive definition, or test, of 'effective participation', so as to ensure compliance with Article 6 and create legal certainty. The test could be based on the Law Commission's proposals for reform to fitness to plead and could clarify the extent to which quality of evidence is relevant to effective participation. The test could be developed with the assistance of medical experts and communication specialists who would be tasked with applying the test and determining whether a defendant is capable of participating effectively. It has also been suggested that expert opinions should be treated more persuasively than is presently the case. This would reduce judicial discretion and, so long as assessments are made on the basis of standardised criteria, could result in a more consistent and less restrictive application of the right to effective participation, thus ensuring that only those who can have a fair trial are tried in the criminal courts. Additionally, while the availability of trial adjustments and special measures should be taken into account, a more cautious approach should be taken, particularly where there is conflicting expert evidence or expert opinion doubting the effectiveness of special measures.

The current reluctance to find, or accept, that defendants cannot participate effectively in their trials may stem, in part, from the consequences of such a finding. A broader notion of 'effective participation' would likely result in an increase in applications to stay proceedings as an abuse of process. As explained above, following a stay of proceedings, the court has no disposal powers. It is understandable that there may be objection to allowing people to escape criminal liability on the basis that, while fit to plead, they cannot sufficiently engage in the criminal process. To allow the defendant's health, development, or other needs to go unaddressed is more objectionable. Consideration could, therefore, be given to the implementation of new disposal options where proceedings are stayed on the grounds that the defendant lacks capacity to participate effectively, such as referral for education or therapy, or to a social worker (see Arthur, 2016: 236). However, given the defendant's lack of opportunity to participate in a trial or test the accusations against them, any disposal should be for the purpose of addressing the defendant's needs, and must not be imposed as a punishment for unproven criminal behaviour.

Alternatively, consideration could be given to diverting defendants who cannot participate effectively out of the criminal justice system into health or other community services, particularly where they are charged with minor offences. There is some judicial endorsement for such an approach in respect of children. In *CPS v P*, Lady Justice Smith was critical of the current procedures in the youth court and

suggested that 'It may, particularly in the case of a young child with mental health or disability problems, be thought preferable to proceed by way of civil proceedings seeking a care or supervision order under the Children Act 1989, rather than to embark on a prosecution.'¹⁰⁷ However, again, where the charge is contested, diversion should be intended to address the reasons why the defendant could not participate effectively at trial, rather than their alleged offending.

In addition to the above suggestions, rather than a shift to 'virtual hearings' in which defendants may not even be in the same room as their lawyer, let alone be able to effectively communicate or interact with other court participants, further effort should be made to create a more inclusive and hospitable environment in which all defendants can play a meaningful role in their trial. Where the defendant takes an active role, the court and decision maker must listen to the defendant and take seriously whatever they have to say. In short, there is little value in equipping defendants with a right to effective participation if the right is to be construed and applied narrowly, and if the court culture and processes do not lend themselves to involvement by the defendant.

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¹⁰⁷ *CPS v P* [2007] EWHC 946 (Admin) at [35].

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