Remote justice in urgent family hearings during COVID-19: climbing the ladder of legal participation*

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1. Introduction

As a result of COVID-19, digital court hearings emerged worldwide and replaced traditional, courtroom hearings. The Netherlands was no exception to this rule. On 17 March 2020, the Dutch judiciary decided to close all courtrooms in an attempt to minimize the costs of the coronavirus. This measure had immediate effect and resulted in judges resorting to digital hearings.[1] Judges would later describe this initial period as being 'full of improvisation' and 'chaotic' because not all hearings could change so rapidly to the digital format.[2] There was no digital infrastructure in place for all cases to continue online, and judges and other legal professionals had little to no experience with this new technology. Despite some occasional online hearings, the existing digital infrastructure was not well enough equipped to replace the scheduled hearings in all court cases. Consequently, the Dutch judiciary distinguished between 'most urgent cases', 'urgent cases' and 'other cases' and decided that after 17 March 2020 most urgent cases were prioritized to continue online. Urgent cases and other court cases were only allowed to continue if time and resources permitted, which meant that in practice, these hearings were postponed or replaced by written statements.[3]

Three types of digital hearings occurred in most urgent cases: telephone hearings, Skype hearings and hybrid hearings. In the first two weeks following March 17, judges resorted to *telephone hearings*: hearings in which the judge would contact all participants by phone and have their hearing via a telephone connection. Participants were unable to see the other parties in these telephone hearings and had to rely on the sound of the other participants. After two weeks of telephone hearings, hearings were organized via Skype.[4] In these *Skype hearings*, participants were able to both see and hear each other through an internet connection. In May 2020, after six weeks of telephone and Skype hearings, Dutch courts reopened

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1 'Vanaf dinsdag sluiten de gerechten, urgente zaken gaan wel door,' rechtspraak.nl, 15 March 2020.

2 Bauw et al. 2021, p. 93.

3 Ter Voert et al. 2022, p. 145.

4 'Antwoorden op Kamervragen over gevolgen coronavirus voor rechtspleging en rechtsbescherming,' rijksoverheid.nl; *Aanhangsel Handelingen II* 2019/20, 2226.

again for most urgent hearings to continue as before.[5] However, as the coronavirus was still spreading and quarantine obligations were not lifted yet, some participants were still unable to come to court. The court thus organized *hybrid hearings* when a litigant, lawyer, legal representative or judge would have to quarantine. During hybrid hearings, the quarantined person would participate from home, using a Skype connection while the other participants were present in the courtroom.[6] In addition to hybrid hearings, some courts still held Skype hearings (in which all participants would join via Skype), for instance, when a litigant would prefer this type of hearing to a hybrid one, or when there were multiple litigants in quarantine. This contribution will focus on telephone, Skype and hybrid hearings, with an emphasis on telephone and Skype hearings.[7]

Amongst the most urgent cases were 'urgent family hearings': hearings about the care and living situation of children.[8] Due to the importance of a (rapid) decision in these cases, as well as the vulnerable nature of the litigants involved, the Dutch judiciary decided that these family cases were most urgent. Even though these family cases were able to continue, the digitalization of its hearings posed new questions regarding the participation of litigants and their access to justice.[9] On the one hand, technical difficulties and a lack of technical devices hindered litigants to join their hearing and often rendered (effective) participation impossible.[10] On the other hand, digitalization created new possibilities such as joining a hearing from home and making legal procedure more flexible and accessible.[11] This tension between advantages and disadvantages of digital hearings makes digital hearings an interesting yet difficult application of digitalization to study. Existing research on this new way of communicating often summarizes a variety of pros and cons, without discussing the relationship between the two: When does one prevail over the other? How do the benefits relate to the disadvantages of digital hearings, in particular when it affects the participation of litigants?[12] This article aims to stir away from a summary of advantages and disadvantages by applying a remote

5 Not all courtrooms were able to reopen, because some of them were too small for court actors to keep a safe distance. As most urgent hearings were prioritized, only these hearings were held in the courtroom again. Urgent hearings and other hearings would only continue in the courtroom if capacity allowed so; 'Gerechtsgebouwen aangepast aan anderhalvemetersamenleving,' rechtspraak.nl, 11 May 2020.

6 Later in the pandemic, Skype was exchanged for Microsoft Teams; Ter Voert et al. 2022, p. 49.

7 Hybrid hearings continued shortly during (in the last weeks of May) or after this initial period. However, during the interviews, respondents were also asked about how they experienced hybrid hearings, information that was very helpful to distinguish the different participation stadia in the beginning of the pandemic (comparing real-life participants to an online participant).

8 In Dutch known as 'uithuisplaatsing' and 'ondertoezichtstelling', this article will refer to these hearings as 'urgent family hearings', see paragraph 3.

9 See for instance: Donoghue 2017, p. 998; Sourdin, Li & McNamara 2020, p. 447.

10 Mulcahy, Rowden & Teeder 2020.

11 See for instance on these efficiency benefits in family hearings: Meares 2021.

12 Often because the research was conducted and published rapidly during the early stages of the pandemic; Ryan, Harker & Rothera 2020 (September); Ryan, Harker & Rothera 2020 (April); Dunk & Droogleever Fortuyn 2020; Schmitz 2020; Sourdin & Li, McNamara 2020.

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justice framework to assess the participation of litigants during digital hearings.[13] Its objective is therefore two-fold. First, this article provides an insight into the experience of digital hearings during COVID-19 by presenting empirical data of several professionals who experienced digital hearings: judges, lawyers and legal representatives of childcare institutions. These professionals were involved in urgent family hearings during the first six weeks of the pandemic and interviewed shortly afterwards.[14] So far, there has been little empirical research on remote justice in Dutch legal procedures or empirical data on the experience of litigants in urgent family hearings.[15] Secondly, this research uses a remote justice framework to provide a more thorough analysis of participation in digital urgent family hearings, more specifically during the first stages of the pandemic. Additionally, it will evaluate the applicability of current theoretical frameworks on this matter.[16] This article uses the remote justice framework created by McKeever in 2020, as her framework is based on empirical research in family hearings and specifically designed for application in a digital setting. Furthermore, McKeever's framework allows for an analysis of both advantages and disadvantages of digital hearings, while maintaining a strong focus on the litigant's perspective.[17] McKeever's framework is called 'the ladder of legal participation', and distinguishes multiple participation levels during legal procedure.[18] Amongst these categories are three main ones: levels of non-participation, levels of tokenism and levels of (effective) participation. This research will use these participation levels, as well as international scholarship on this subject, to analyse the experience of Dutch litigants in the urgent family hearings and answer the following research question: *How and to what extent were litigants in digital, urgent family hearings during COVID-19 able to participate effectively according to McKeever's framework on remote justice?*

This research question will be answered using the following structure. First, the research method is explained in Section 2. Second, Section 3 sets out the main course of urgent family hearings. In Section 4, previous research on remote justice in family law is discussed, followed by an explanation of McKeever's ladder of legal participation. In Section 5, this framework is applied to the empirical findings of

13 Often because the research was conducted and published rapidly during the early stages of the pandemic; Ryan, Harker & Rothera 2020 (September); Ryan, Harker & Rothera 2020 (April); Dunk & Droogleever Fortuyn 2020; Schmitz 2020; Sourdin & Li, McNamara 2020.

14 More on this qualitative method in paragraph 3.

15 Besides the ZonMw research, which uses a more general and fundamental rights perspective rather than remote justice, other empirical research focused on criminal law and the perception of lawyers and the judiciary; Van Wingerden & Vanderveen 2020; Vanderveen 2022; Dunk & Droogleever Fortuyn 2020.

16 Legal participation in a non-digital context has been extensively researched, see for instance the recent study of Jacobson and Cooper, combining legal-doctrinal knowledge with empirical data and sociological insights on legal participation; Jacobson & Cooper 2020, p. 103-104. McKeever's ladder of legal participation is part of the body of knowledge on this subject, however, its application to digital hearings has not yet been analysed before.

17 McKeever 2020.

18 McKeever 2020.

legal professionals in urgent family hearings. Finally, the research question is answered and recommendations for further research are discussed in Section 6.

2. Methods

This research is based on literary review and a qualitative analysis of 15 semi-structured interviews with Dutch legal professionals, all involved in digital and hybrid urgent family hearings during the pandemic.[19] The interviews were conducted as part of a research project on the impact of COVID-19 measures on vulnerable litigants funded by the Netherlands Organization for Health Research and Development (ZonMw).[20] This project consisted of three empirical studies, each focusing on the impact of corona measures on a different area of law with vulnerable litigants: family law, immigration law and criminal law.[21] The research project was conducted by Radboud University, Leiden University and Utrecht University. Utrecht University conducted the research on urgent family hearings, the data of which is used for this contribution.
Respondents were contacted by email and asked to fill in an informed consent form prior to the interview. The interview questions were based on a topic list, which matched the explorative nature of this research and allowed for follow-up questions (if needed). Topics included: types of hearings during the pandemic (telephone, Skype or hybrid hearing), the (legal) position and experience of the litigant within these hearings, difficulties and advantages of digital hearings.[22] All interviews followed a similar structure and, depending on the role of the respondent, the focus of the interview shifted. For instance, in the interviews with judges, more questions were asked about their approach to a digital hearing and organizational issues that occurred in the beginning of the pandemic. The interviews with lawyers and legal representatives were concentrated more on the experience of the litigant prior to and after the hearing, as they were able to elaborate more on this subject.[23] Interviews were recorded with permission of the respondent, anonymized and transcribed. The transcriptions were analysed with a code manual consisting of codes which matched several aspects of effective participation (such as the main

19 I familiarized myself most with literature on family court procedures in the UK, US and Australia, as the majority of contributions in international journals had both family procedures and remote justice as its focus. The qualitative research consists of interviews with five judges, five lawyers, five legal representatives from Dutch childcare institutions (William Schrikker Stichting and Raad voor de Kinderbescherming). Professionals were selected based on the judicial district they work in, to establish a general picture of what legal practice looked like during the early stages of the pandemic.

20 I was part of this research as a student-assistant (as the research progressed I became a junior researcher) at Utrecht University. As a research assistant I conducted, transcribed and analysed all the interviews, together with Prof. Eddy Bauw and Dr. Marc Simon Thomas; 'Rechtbanken moesten improviseren tijdens de coronacrisis,' uu.nl.

21 Also considering litigants are not involved by choice but due to some form of state intervention: intervention from the Department of Immigration, a childcare institution or the Dutch public prosecutor's office; Ter Voert et al. 2022, p. 17.

22 Ter Voert et al. 2022, pp. 151-152.

23 Ter Voert et al. 2022, p. 20.

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categories: participation, tokenism, non-participation, and engagement, emotion, participation barriers).[24]
In addition to interviews, a survey was set out amongst litigants in family hearings during the pandemic. However, the survey response remained very low and contained incomplete and inconsistent answers, making it impossible to draw any meaningful conclusions.[25] These results did give a valuable insight into the vulnerability of litigants involved in urgent family hearings. The overall impression was that litigants did not want to take part in research about their experiences in family court, as this event in itself was considered a very emotional experience.[26] Unfortunately, this makes this research a product of indirect observations of litigants. Professionals might interpret litigants' actions and experiences differently and are only able to do so based on very distinct communication by litigants (both verbally and non-verbally). This article should therefore be read with these restrictions in mind, in particular the section on tokenistic experiences that are very much related to the internal experience of litigants. Several measures were taken to overcome these limitations. First, the indirect observations of this article are supported by international scholarship on digital family hearings.[27] Secondly, the main conclusions were presented at an expert meeting held on 26 November 2021. This expert meeting consisted of 10 professionals: 4 legal representatives, 2 judges, 2 lawyers, a professor and assistant professor of family law. Their feedback is included in this research.[28] Lastly, this article aims to paint a general picture of digital hearings and litigant participation in urgent family cases during the midst of the pandemic. Further research is required to present a more specific analysis.

3. Urgent family hearings

Amongst the most urgent hearings that continued during COVID-19 were urgent family hearings.[29] Judges in these hearings decided whether a child should live at home with their parents, should (temporarily) live somewhere else or should receive support of a childcare institution.[30] These hearings are similar to British Family Court hearings about the supervision and care of a child,[31] parenting

24 Similar approach as in the ZonMw research; Ter Voert et al. 2022, pp. 20-21; Atlas.ti was used for coding.
25 Ter Voert et al. 2022, pp. 151-152.
26 Ter Voert et al. 2022, p. 152; Currently, urgent family hearings are subject to profound criticism from both the general public and legal practitioners in the Netherlands. This overall impression of respondents and low response rate fit within this broader context.
27 Ryan, Harker & Rothera 2020 (April); Ryan, Harker & Rothera 2020 (September); Ryan et al. 2021; Porter et al. 2021; Lynch & Kilkelly 2021.
28 Ter Voert et al. 2022, p. 153.
29 In Dutch law referred to as 'civiele jeugdzaken' (civil youth procedures). This contribution will use the term 'urgent family hearings' instead to prevent any misreading of the term. Youth procedures, for instance, refer to criminal youth procedures in common law countries such as the UK, US and Australia.
30 'Uithuisplaatsing,' rechtspraak.nl; 'Ondertoezichtstelling,' rechtspraak.nl.
31 'The Family Court,' judiciary.uk.

proceedings at the Australian Family Court[32] and child support cases at U.S. Family Courts.[33] Contrary to the UK, US and Australia, all Dutch family hearings are subject to civil law, including the hearings on the care and living situation of a child.[34]

Urgent family hearings have the following structure. Court procedures always start with a childcare institution or a national certified body (the local authority in charge of child intervention) sending in a judiciary request. This request will entail a measure 'in the best interest of the child' such as a request to place a child under the supervision of the childcare institution or to place a child out of their home.[35] When the request is submitted, both the childcare institution and the parents or guardians of the child are invited to a court hearing. The parents or guardians are not obligated to have a lawyer as the informal set-up of (urgent) family hearings should allow litigants to follow these procedures without legal aid.[36] During the hearing, both parties will be enabled to present their (counter)arguments and a judge will test whether the submitted request by a childcare institution meets the criteria required by law.[37] The hearing will usually start with the arguments of the childcare institution, explaining their request, followed by the parents or guardians of the child presenting their arguments. After both parties share their perspective, the judge will ask questions and decide whether the request is granted and for how long.[38] Urgent family hearings often follow this structure, but can deviate, depending on the course of the hearing. Because of its informal character, judges prefer hearings to proceed as if it were a conversation between all the parties and ask questions when they come up.[39]

4. Remote justice and effective participation as a theoretical framework

4.1 Remote justice in family law

There is no uniform definition or terminology in international literature for 'remote justice'. A common demeanour in remote justice research is that it assesses whether remote procedures are a welcome alternative to more traditional legal procedures: are these *remote* procedures, in fact, doing litigants *justice*?[40] Remote procedures can have all kinds of forms. Research of Susskind focused, for instance, on the digitalization of administrative mechanisms in court procedures (starting court procedures, filing complaints, filing motions, contact with the court

32 'Family Law Practice Direction – Parenting proceedings,' fcfcoa.gov.au.
33 'Supporting & Preserving Families,' childwelfare.gov.
34 As the court normally starts with a request of a public institution in the interest of a child, these types of family court procedures are for instance in the UK subject to public law; 'The Family Court,' judiciary.uk; 'Family Law Practice Direction – Parenting proceedings,' fcfcoa.gov.au; 'Supporting & Preserving Families,' childwelfare.gov.
35 'Uithuisplaatsing,' rechtspraak.nl; 'Ondertoezichtstelling,' rechtspraak.nl.
36 'Uithuisplaatsing,' rechtspraak.nl; 'Ondertoezichtstelling,' rechtspraak.nl; Verkroost 2019, p. 17.
37 'Uithuisplaatsing,' rechtspraak.nl; 'Ondertoezichtstelling,' rechtspraak.nl.
38 Verkroost 2019, p. 18.
39 Verkroost 2019, p. 18.
40 For instance: Susskind 2019, p. 13.

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administration),[41] whereas research of Rowden and Wallace focused on digital hearings.[42] Other remote justice scholars focused on formulating the right theoretical framework for assessing digital hearings,[43] and which adjustments would help remote procedures to improve.[44] Empirical research on remote justice in family law, in particular concerning the effects of COVID-19, has been relatively scarce. The most profound empirical research has been conducted using family hearings in England and Wales, Scotland, New Zealand and Ireland.[45]

The Nuffield Research presents the results of questionnaires with over 1000 parents, carers and professionals in the family justice system in England and Wales: during the pandemic (14 to 28 April 2020),[46] after the first wave (10 to 30 September 2020)[47] and after the pandemic (10 to 27 June 2021).[48] One of its main conclusions was that in the beginning of the pandemic, there were significant concerns about the fairness of remote hearings and the (technological) circumstances in which they took place. Throughout the pandemic, technical issues remained because of technology malfunctions, a lack of technological expertise amongst legal professionals and ineffectively informing non-legal actors about digital hearings.[49] In the second consultation of the Nuffield Research, professionals were reported to be more satisfied with the fairness of family proceedings, but remained unsure whether the parents would agree.[50] In the last consultation, professionals concluded that in a post-pandemic world, digital hearings bring a certain flexibility which makes them a valuable alternative to traditional hearings. However, judges should be able to decide on a case-to-case basis whether a digital hearing is appropriate, considering the vulnerability of the litigants involved.[51]

The research of Porter (et al.) studied digital hearings in Scottish family cases and their justification from a children's rights perspective. Porter's research was based on an online survey amongst 270 professionals, volunteers, children and families who were involved in digital hearings during the first few weeks of the pandemic.[52] Similar to the Nuffield Research, Porter concluded that digital hearings were justified and might even present advantages for future family hearings. However,

41 See for instance: Susskind 2019; Susskind 1996.
42 Rowden & Wallace 2018.
43 McKeever 2020; Donoghue 2017.
44 Sourdin, Li & McNamara 2020, p. 452; Legg & Song 2021, p. 166.
45 Ryan, Harker & Rothera 2020 (April); Ryan, Harker & Rothera 2020 (September); Ryan et al. 2021; Porter et al. 2021; Lynch & Kilkelly 2021.
46 Ryan, Harker & Rothera 2020 (April).
47 Ryan, Harker & Rothera 2020 (September).
48 Ryan et al. 2021.
49 Ryan, Harker & Rothera 2020 (April), p. 3; Ryan, Harker & Rothera 2020 (September), p. 3; Ryan et al. 2021, p. 3.
50 Ryan, Harker & Rothera 2020 (September), p. 2.
51 Ryan et al. 2021, pp. 2-3.
52 Both direct and indirect experience with virtual hearings were researched. Most of the surveys were filled in by legal professionals: from a total of 276, 13 responses were filled in by young people, parents and other family members. The other surveys were filled in by legal professionals involved in different stages of family hearings, such as foster carers, residentials carers, social workers; Porter et al. 2021, p. 432.

due to technical issues, these hearings present new issues as well concerning the participation, privacy and representation of children.[53]
Similarly to Porter's research, the research of Lynch and Kilkelly also focused on children's rights during the pandemic. This research studied the participation of defendants using several case studies of digital criminal procedures in New Zealand and Ireland.[54] Lynch and Kilkelly came to the similar conclusion that digital hearings were necessary during the first stages of the pandemic, but need technological improvements to continue in the future.[55]
The Dutch ZonMw project aimed to evaluate urgent family hearings during the first stages of the pandemic, by means of interviews and a human rights analysis. Interviews would allow for a more specific understanding of what happened during the first weeks of the pandemic than, for instance, a quantitative study would. Without many publications on this subject, it was not yet clear what kind of legal practice transpired during the beginning of the pandemic and how it impacted the litigants who were involved. Professionals were therefore asked very general questions during the interviews, such as what type of digital hearing they experienced (telephone, Skype or hybrid hearings) and how this digital hearing affected the litigants and other court actors.[56] Additionally, a human rights analysis would indicate if any violations occurred. Both analyses show similar results to the above-mentioned research, with technological difficulties presenting the most profound obstacles for litigants in digital hearings. However, the different research methods, different number of respondents and different research scope (all of family law vs. urgent family hearings) make a one-on-one comparison between previous research and the ZonMw study difficult to establish. This contribution thus aims to complement previous empirical studies on digital family hearings by providing a more in-depth analysis of Dutch urgent family hearings. Both the qualitative research method and the lower number of respondents fit this more specific focus on litigant's effective participation. Additionally, McKeever's remote justice framework zooms in on what constitutes effective participation in a digital environment, helping this research to identify more specific participation barriers than technological difficulties.

4.2 McKeever's ladder of legal participation

In 2018, McKeever created a framework to measure whether litigants are able to effectively participate in court procedures, court hearings in particular: the so-called 'ladder of legal participation'.[57] She based this framework on her extensive research of unrepresented litigants in civil and family courts. The ladder of legal participation consists of seven participation stadia, with the lowest levels representing non-participation and the top levels representing effective

53 Porter et al. 2021, pp. 442-444.
54 Including various children detention hearings; Lynch & Kilkelly 2021, pp. 292-297.
55 Lynch & Kilkelly 2021, pp. 299-300.
56 More detailed information on what legal practice looked like during COVID-19 was very welcome as there was no other empirical data in the field of family law on this matter; Ter Voert et al. 2022, p. 17.
57 McKeever et al. 2018.

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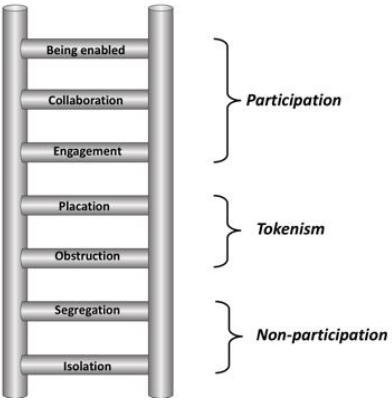
participation (see Figure 1). McKeever based her findings on interviews, observations or questionnaires of 224 self-represented litigants in civil and family court procedures and 59 interviews with court actors, including court staff and legal representatives.[58]

Figure 1 Ladder of legal participation of McKeever 2020 (p. 4)



According to McKeever, legal participation is

> not a binary process, whereby a litigant either participates or does not participate. Rather, there are different types of legal participation, defined by the extent to which the intellectual, practical, emotional and attitudinal barriers to participation can be managed or overcome.[59]

McKeever thus argues that the less barriers exist during court procedure, the more likely someone is to participate effectively, and the higher this person will place on the participation ladder. The seven participation stadia are to be divided into three main categories: non-participation, tokenism and participation.

4.2.1 Non-participation

The first steps of McKeever's participation ladder describe situations of non-participation. The first and the lowest place on the participation ladder is isolation. Litigants who are isolated feel completely excluded, unable or unwilling to engage with legal proceedings and McKeever argues that this is caused by practical barriers (lack of assistance, lack of information on the procedure). These practical barriers may result in emotional and attitudinal barriers as well.[60] In

58 A total of 179 litigants were interviewed and/or observed and/or filled in a questionnaire by McKeever or another member of her research group, 25 litigants were interviewed and/or observed and/or filled in a questionnaire by members of the Northern Ireland Human Rights Commission clinic. The analysed procedures included procedures about divorce, ancillary relief, domestic violence and more general family proceedings; McKeever et al. 2018, p. 44.

59 McKeever 2020, p. 4.

60 McKeever 2020.

McKeever's research, litigants who were isolated felt so removed from the procedure and the understanding of other court actors that they were convinced to never be capable of participating in the legal system.[61] Besides isolation, McKeever distinguished segregation, a similar situation in which litigants felt powerless compared to the other court actors, because of their lack of knowledge. However, contrary to isolation, segregated litigants did not believe they had no right to be part of the legal system, but just that they were unable to be part of the system because of the barriers and lack of recognition of those barriers by other court actors.[62]

4.2.2 Tokenism

According to McKeever, tokenistic litigants believe they are participating in legal procedure when they are actually not, making the participation merely symbolic. McKeever compares this tokenistic level of participation to what minority groups often experience: being able to participate on paper, whereas legal practice shows a different reality.[63] This tokenistic experience may include litigants who experience obstruction during the legal procedure, caused by delays, inadequate information or fatigue (as a result of a constant search for legal assistance) or situations of placation: litigants who do receive support during legal procedure, but ineffective in assisting them. Examples of ineffective support are limited sources of information (practical barriers) or information so difficult that it is impossible for more vulnerable litigants to comprehend (intellectual barriers).[64]

4.2.3 Participation

Finally, litigants who are able to participate effectively in legal procedures reach the top levels of McKeever's participation ladder: being engaged with the legal procedure. According to McKeever, engagement includes being able to navigate through legal procedure by understanding the applicable law and actively communicating with the other participants.[65] An even higher level of participation is collaboration, which means that litigants are supported during the legal process by understanding it fully and having any difficulties during the procedure dealt with immediately.[66] At this level of participation, any attitudinal barriers of litigants (for instance directed at the other participants) are taken away and litigants see the parties as 'honest brokers': a collaborative partner who has a similar experience of the legal process. The final stage of effective participation, according to McKeever, is when the litigant is being enabled. Litigants are not only

61 McKeever 2020; Experiencing practical, intellectual and emotional barriers to effective participation; McKeever et al. 2018, p. 162.

62 McKeever 2020; Experiencing practical, intellectual, emotional and attitudinal barriers to effective participation; McKeever et al. 2018, p. 31.

63 McKeever 2020; Experiencing merely practical and intellectual barriers, sometimes resulting in emotional ones; McKeever et al. 2018, p. 158.

64 McKeever 2020.

65 McKeever 2020.

66 And thus being only minor practical barriers, such as not knowing where the mute-button is, how to share their screen. Litigants will overcome these barriers immediately.

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supported and equipped to engage in the legal procedure themselves (as an equal to more experienced parties) but also feel empowered to understand or present their case in a meaningful way.[67] McKeever stresses the importance of the judge to reach this level of participation, as the judge is often able to empower the litigant by, for example, explaining or clarifying certain parts of the procedure during the hearing.[68]

4.3 How to climb the participation ladder?

In order to apply McKeever's participation ladder to the digital participation of litigants, it is necessary to analyse the differences between the participation stadia McKeever distinguishes. McKeever does not define these differences as such and argues that

> legal participation … covers a range of experiences, none of which are static, in that individuals can move from one form of participation to another within the dispute resolution process.[69]

Her main objective of the participation ladder is to define the nature of a litigant's participative experience and, by doing so, reflect on what effective participation actually looks like from a (self-representing) litigant's perspective.[70] However, this fluid interpretation of the various participation levels makes an application of McKeever's framework challenging. It is for instance not specified how many barriers each participation level requires and whether there is a hierarchy between certain participation barriers (do some barriers obstruct participation more than others?).[71] Because legal participation is not binary, it is impossible to calculate the 'amount of participation' a litigant enjoys. Consequently, McKeever's definition of legal participation and the distinction between her main participation categories (non-participation, tokenism and participation) become rather arbitrary. For a situation to fit within one category, a match with McKeever's description seems to be enough.[72] Only effective participation in its ultimate form, the highest step of McKeever's participation ladder requires the absence of all barriers. Only then, litigants are able 'to present their case properly and satisfactory, as a means of ensuring that the court can make a decision'.[73]

67 McKeever 2020; McKeever et al. 2018, p. 31.
68 McKeever 2020.
69 McKeever et al. 2022, p. 78.
70 McKeever et al. 2022, p. 78.
71 Her most recent article suggests that it is most important to remove the attitudinal barriers of litigants, but does not specify how it will affect a litigant's position on the participation ladder; McKeever et al. 2022, p. 91.
72 Less or less intense barriers. When there are for instance only a few practical barriers, these barriers are very fundamental (such as having no access to court because the technology does not work), situations of isolation may occur, whereas when there are only a few practical barriers (the mute button does not work, one of the litigants received the wrong Skype-invite), there is still a relatively high level of effective participation.
73 European Court of Human Rights (1979) 2 EHRR 305 (*Airey v. Ireland*); McKeever et al. 2022, p. 72.

Yet barriers in digital hearings are quite different from intellectual, practical, emotional and attitudinal barriers, a difference McKeever acknowledges too.[74] Sometimes knowledge and skills are required to overcome these barriers (the ability to install a new digital program on a computer, such as Skype or Microsoft Teams) or assistance is needed (someone who points out that your microphone is broken). But the barriers litigants experience are often related to the experience of a digital hearing, feeling more distant and less engaged behind a camera compared to a real-life court hearing.[75] This type of disengagement is not entirely grasped by the barriers McKeever distinguishes. McKeever assumes that the framework she created for self-representing litigants in traditional court hearings directly applies to digital hearings, because the barriers are similar.[76] Emotional or attitudinal barriers are for instance always a product of practical or intellectual barriers, and can be overcome when litigants receive the right support.[77] However, translated to a digital environment, these emotional or attitudinal barriers may still be there even when all practical issues are not. The need for extra support is thus not the essence of the barriers litigants experience in digital hearings. It is the digital environment itself that litigants experience as a barrier, apart from any technological issues that may occur. Measuring digital barriers therefore requires a more sociological understanding of participation that is reflected in every level of the participation ladder, for instance, one that encompasses elements of procedural justice: the experience of being part of a procedure, taken seriously by the judge and able to voice your opinions.[78] McKeever's ladder of legal participation only allows for such an interpretation of emotional barriers in the top levels ('engagement', 'collaboration' and 'being enabled'; see Figure 1).[79] The discussion section of this article further analyses the application of McKeever's framework to digital hearings.

To avoid these application difficulties, this article will only put the main concept of McKeever's ladder of legal participation, namely her three main participation categories (non-participation, tokenism and participation), to the test.[80] The extent to which the levels within one category apply, such as isolation and segregation within the category of non-participation, will be reflected on along the way. These

74 McKeever 2020; McKeever 2020 (CJC Rapid Consultation), pp. 5-6.

75 McKeever 2020 (CJC Rapid Consultation), p. 6; Mulcahy 2008, p. 487; Rowden & Wallace 2018, p. 505.

76 McKeever 2020 (CJC Rapid Consultation), p. 6; McKeever 2020; McKeever et al. 2022, p. 91.

77 McKeever et al. 2022, p. 78.

78 Grootelaar & Van den Bos 2018; Tyler 2006; McKeever might see the absence of certain procedural justice elements as emotional or attitudinal barriers. However, without a clear definition of these barriers (which remains purposefully an open definition, considering McKeever's wide and still explorative definition of effective participation), the specific nature of digital barriers is not acknowledged as such.

79 Which McKeever does refer to, but without explaining how it is integrated in her theory; McKeever et al. 2022, p. 78.

80 Because applying these sub-categories requires a framework that incorporates the specific barriers of digital hearings, which McKeever's framework does not entirely allow for. This will be further discussed in the discussion section.

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sub-categories are predominantly mentioned to indicate why certain situations fall within one of the participation levels.[81]

5. Effective participation in Dutch urgent family hearings

The interviewed professionals gave several examples of participation, tokenistic and non-participation situations of litigants during digital hearings. These situations will be discussed in this section, following the structure of the participation ladder.

5.1 Situations of non-participation

Similar to previous studies, all Dutch professionals experienced many technical difficulties during the first weeks of the pandemic (when the courts just closed) which made participation often impossible.[82] In these telephone hearings, litigants were not able to see each other and hearing became difficult too, with everyone talking at the same time.[83] These situations are considered situations of non-participation because there was hardly any hearing to participate in, and if there was, litigants were not able to participate effectively at all.[84] One of the legal representatives described these situations as follows:

> In the beginning of the pandemic, when we did hearings on our phones, it was a cacophony of sounds and voices. (Legal representative 5)

Another legal representative said something similar:

> I found it very difficult that you did not know who was talking, you had to really concentrate on who was saying what. (Legal representative 1)

Several interviewed professionals mentioned that during these first few weeks, but later on in Skype hearings as well, there was limited to no information available for litigants to prepare them for their digital hearing, resulting in several practical barriers. Both litigants and professionals sought information on starting a digital hearing, inviting others to participate and what to do when someone's microphone or video connection faltered. Sometimes the opponent was not present because judges were unable to add other participants to the same telephone hearing.

> What I really missed was a piece of paper with an overview saying 'these are the digital possibilities and this is how you should use them'. (Judge 1)

81 McKeever 2020, p. 3; subtitles 'intellectual barriers', 'practical barriers', 'attitudinal barriers' and 'emotional barriers'.

82 Similar to: Mulcahy, Rowden & Teeder 2020, p. 4.

83 As both parties were not able to respond to each other (and each other's arguments), these situations were violating the rules of a fair hearing according to Article 6 ECHR. Judges therefore often rescheduled the hearing; Ter Voert et al. 2022, p. 281.

84 Similar experiences with telephone contact in family hearings: Burton 2018, p. 195.

Other technical difficulties resulted in practical barriers as well, such as camera, microphone and internet malfunctions. These issues were often embedded in the digital infrastructure used by the court or the inexperience of participants with this new technology.[85] A judge shared his experience with a litigant who joined the hearing from the construction site where he was working:

> Then I got on the phone with the dad, who was working at a construction site and was standing somewhere very windy. I said: 'You should stand somewhere else', and asked: 'Is someone else listening as well?' and: 'I cannot hear you because of the wind.' (Judge 1)

In addition to these practical barriers, some litigants did not have the necessary means to enter their hearing effectively. Professionals expressed they often found out during the hearing. Lawyers expressed to be unaware of these obstacles because most of the communication with their client occurred online during the midst of the pandemic. Litigants were for instance not in the possession of a laptop (with camera) or shared their device with several others, unable to use it for the hearing. A lawyer referred to a client who had to knock on his neighbour's door to get access to the hearing:

> What I also experienced were parents who did not have a laptop with a camera. In these cases, the judges decided to do a telephone hearing instead. The participants with a camera would then be able to see each other and hear the sound of the litigant without a camera. What I experienced as well, was a litigant who would sit down at some stranger's place, like his neighbors, so he could use their camera. (Lawyer 1)

Such situations were detrimental for the participation of the litigant. Being unable to speak freely, without knowing your neighbour is listening, on the very personal merits of your court case is no effective participation. Even more so, situations like these affect the feeling of being (an important) part of a court procedure, with the procedure designed in such a way that it does not take a litigant's personal situation into consideration. This may cause feelings of isolation (completely excluded from the procedure) or segregation (feeling powerless, one step behind the others), in particular when other participants are not hindered in participating.[86] Lawyers explained that they were able to remove some technical obstacles by having the litigant join the hearing from their office. However, as this may sound encouraging, it shows the intellectual and practical barriers litigants may face in digital procedures even more: assistance will become a requirement for litigants to join the digital hearing.[87] A judge gave an example of a litigant who became so angry

85 Similar problems occurred in other justice systems as well. For instance, Gerstein 2020; Reynolds 2020; Schmitz 2020.

86 McKay 2018, p. 170; Legg 2021, p. 184.

87 Even more so for litigants in urgent family hearings, as they are not obligated to have a lawyer; Schmitz 2020; Reynolds 2020. This situation might lead to conflicts of equality of arms; Ter Voert et al. 2022, pp. 274-275, 281; McKay 2018, pp. 313, 319.

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during the digital hearing that, when the technique was failing yet again, he needed to calm down before being able to participate again:

> At one point I heard a furious dad say: 'Well Jesus Christ,' and so on. It was a real challenge trying to manage that over the phone. (Judge 1)

Moreover, a lawyer similarly described a litigant who imploded during the hearing, 'opting out': becoming very silent, unable and unwilling to participate.[88] A legal representative shared the following example:

> Digitally, both via telephone and Skype, it is almost impossible to do a hearing. You don't know who is talking and who says what.... Without a screen, I can hardly follow [the hearing], let alone somebody with an IQ of 60. He doesn't understand it one bit. ... And suddenly you hear: 'I'm out,' 'I don't get it anymore,' 'I'm switching off my phone,' and you lose them during the hearing. (Representative 2)

According to professionals, the emotional nature of urgent family hearings and the vulnerability of its litigants also contribute to situations of isolation and segregation. International scholarship on remote justice confirms this as well: digital hearings, when organized in sensitive matters, in particular, are not capable of replicating the atmosphere of a real-life court procedure. Digital or hybrid hearings may therefore never do litigants justice in these types of remote procedures.[89] Some of the professionals shared similar perspectives during the interviews, arguing that digital or hybrid hearings should not continue in the future:

> It would not do them justice, having such an important matter being discussed digitally. (Lawyer 4)

> Are you going to sit at home with a camera on your face, really? Those hearings [urgent family hearings] are too emotional for that! They are about very sensitive issues. That's why you just want to see the parents. You want to taste the atmosphere at a hearing and that's gone. (Representative 3)

Professionals shared that several litigants wanted to look the judge in the eye, even more so because of the sensitive nature of the hearings.[90] This became impossible in digital hearings with always one of the parties (or all of them) having to look to a computer screen.

Another factor contributing to non-participation situations in digital hearings was the power imbalance between the litigant (the parent or guardian of a child) and the legal representative from the childcare institution, something McKeever

88 Litigants then have to storm out, which is not as easy as leaving a Skype meeting or ending a phone call.

89 Rowden 2018, p. 263; Mulcahy 2008, p. 487.

90 Rowden 2018, p. 263; Mulcahy 2008, p. 487; Rowden & Wallace 2018.

mentions in her research as well. Power imbalances may also create situations of segregation, leaving the litigants feel so segregated from its procedure compared to more experienced court actors (such as the childcare institution) that effective participating becomes difficult. In urgent family hearings, this imbalance is embedded in its form: the hearing is initiated by the childcare institution, who is represented by a legal professional and familiar with the rules of the procedure, whereas for litigants it is often the first time they set foot in a (digital) courtroom.[91] What these last examples show is, despite similarities to situations of isolation and segregation McKeever describes, these non-participation examples are not so much caused by practical and intellectual barriers of litigants, but by the digital environment itself. In a digital environment, litigants become one step further away from the legal process, strengthened by a general assumption that they are perfectly capable of joining, similar to more experienced actors (and McKeever's barriers). However, it is this assumption that makes litigants to feel more isolated and segregated from the procedure itself, which is again difficult for the other actors to repair, as they communicate through a computer screen or telephone.

5.2 Tokenistic situations

Tokenistic situations show that a functioning digital environment does not guarantee the effective participation of litigants and therefore supports the conclusion drawn from the non-participation examples above: the digital environment may form a barrier in itself. Even without any technical difficulties, professionals stated that litigants would still face various barriers that withhold them from participating effectively. One of these barriers was having the hearing from their own home, where the (former) spouse or child often lives as well. Other living situations, such as a litigant having roommates and/or having people over, would also limit the ability of litigants to participate fully.[92] Considering that urgent family hearings are normally behind closed doors, this is in particular obstructing litigants' participation.[93] A judge stated that she was never entirely sure whether a litigant was alone in the room, even when she specifically asked the litigant beforehand:

> I started the hearing by saying that it was a closed hearing and that it was not allowed to record the hearing. This information was also in the letters the litigants would receive…. I also asked: 'Are you alone? Are you the only one in the room?' (Judge 3)

Professionals described a digital hearing in which all technical conditions were met, but litigants would still feel disengaged because of the digital environment.[94] Some professionals referred to the limited time available for digital hearings, which

91 Verkroost 2019, p. 18; Similar to imbalances in other civil procedures with repeat players; Galanter 1974, p. 179; Resulting in possible conflict of equality of arms; McKay 2018, pp. 313, 319.
92 See also: Kitzinger 2020.
93 Verkroost 2019, p. 18.
94 Mulcahy 2008, p. 487; Rowden & Wallace 2018, p. 505.

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makes it impossible to create certain moments of engagement. Other professionals referred to the limited concentration span of participants (both litigants and professionals) in digital hearings.[95] Professionals agreed that both the duration and virtual environment of a digital hearing would leave no (or not as much) time for the experience of the litigant.[96] It also requires (new) competences of the judge, similar to those proposed by procedural justice theory and the importance of which McKeever stresses in her research.[97] Applying certain competences, such as using (non-verbal) communication to ensure litigants to express their voice, was not always possible in digital and hybrid hearings.[98] During the first weeks of the pandemic, all parties would be content if they made it all the way through the end of the hearing without any issues. As a legal representative said:

> [A digital hearing] takes so much energy, so much of everybody's concentration. That's why I kept it [my statements] very brief as well, to help the attention span of others. (Representative 2)

Research on courtroom architecture further supports this argument. Such research suggests that creating a less formal, more engaging experience for litigants requires a different courtroom set-up in family hearings than an adversarial one, for instance, a courtroom with all parties sitting at the same table instead of facing each other. A set-up without all parties present, because some of them are joining online, makes these more engaging courtroom settings impossible.[99] Legal representatives also mentioned that they missed the hallway of the court in digital hearings. This hallway gives them the opportunity to have a short moment with the litigant before and after the hearing, in which they can make them feel more comfortable or explain what just happened.

> After an online hearing, everybody leaves and then it's done. Whereas, in a courtroom you just talk a little bit afterwards, you do that automatically. For the litigants in these types of hearings you really need that extra time to check whether everything is clear, if they understood what you said. (Representative 4)

A lawyer also mentioned that these moments are important to gain the trust of a litigant:

> A hearing via a telephone connection, that does not work. You cannot gain their trust within half an hour. You can do that in real life.... Normally, we

95 It forced judges to speed up, with little time left to focus on the experience of the litigant.
96 Legg & Song 2021, p. 164.
97 McKeever 2020.
98 Smilde 2019, pp. 31-32; Legg 2021, p. 184; Denault & Patterson 2020, p. 4; Ryan et al. 2021, p. 3; Lynch & Kilkelly 2021, pp. 299-300; Porter et al. 2021, p. 434. McKeever also argues that those competences are necessary for (successful) fact finding in first instance courts, particularly as litigants in these procedures often represent themselves; McKeever 2020.
99 Lynch & Kilkelly 2021, p. 296; Porter et al. 2021, p. 434.

> would all go to the court house together. I would be there even a little bit early and have a quick conversation with the litigant, prepare them before they go into the hearing. Now I'm trying to do that via a telephone connection, but you really miss the interaction, to build a certain level of trust with them. (Lawyer 4)

The importance of real-life encounters (and its non-verbal communication) became particularly clear in hybrid hearings. While the participants in the courtroom were able to join procedures like normal, with all its (non-verbal) advantages, the digital participant is not able to do so. A few lawyers stated that this inequality is imbedded in hybrid hearings, making it unfair for them to continue in the future.[100] A lawyer expressed her struggle with hybrid hearings in the following manner:

> I think hybrid hearings are even more difficult [than Skype hearings] considering the principle of equality of arms. I think it's fine when everybody is projected on a computer screen, like it is now in this interview, or when everybody is present in the courtroom … because in the courtroom, it is a different form of contact. It is easier than seeing someone on a computer screen or on your phone. When everyone sees each other on a computer screen, it is fair. (Lawyer 3)

A legal representative gave another example of feeling less engaged in a hybrid hearing. She was joining the hearing digitally and, although she was the professional party (whereas it was the first time for the litigant), she felt disengaged with the procedure as the judge let her join digitally only halfway through. The legal representative explained not to be sure whether the other parties already started or just exchanged some formalities (such as their names, how they were feeling today, what the weather was like), but the fact that the hearing already started made her feel not engaged and even unequal to the other parties. The representative stated:

> When I found out halfway through, I was shocked and thought, well the hearing already started for them, there is no point in objecting now. But afterwards I felt like no, I wanted to object to that. (Representative 4)

The interviewed professionals also mentioned the importance of certain courtroom rituals for feeling engaged and being part of the legal procedure. Holding on to certain rituals, even in digital or hybrid hearings, improved the participation of litigants,[101] for example, by changing the background in the Skype meeting to a courtroom and by wearing a robe during the hearing. International research notes that even little phrases, such as the judge opening the hearing with the phrase 'The hearing is now open, please be seated,' makes a difference and gives litigants an

100 Similarly to U.S. attorneys described in: Reynolds 2020; Schmitz 2020.

101 See also: Mulcahy 2008, p. 487; Rowden & Wallace 2018, p. 522; Rowden 2018, p. 263; Lynch & Kilkelly 2021, p. 296; Porter et al. 2021, p. 434.

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understanding that they are part of 'something serious'.[102] A lawyer described the importance of certain courtroom rituals as follows:

> Going to court is something special, something that you hopefully will not experience often in your life. That means that certain rituals come along with it. For instance a picture of the king hanging on the wall.... That's also why the judge wears a robe ..., it's a ritual. (Lawyer 3)

Judges describing their surroundings during digital hearings were also received well by the interviewed lawyers and legal representatives, in both telephone and hybrid hearings, where one (or more) of the participants would be limited in their non-verbal communication. A judge gave an example of describing the court scene:

> I tried to maintain control during the hearing, by saying for example: 'I am sitting in an empty courtroom. I am wearing my robe because I believe it is important that at least I have a feeling that I am doing an "official" hearing.... The law clerk is sitting next to me, he is also wearing a robe.' That's how I tried to explain. (Judge 3)

These descriptions would make litigants seen and more a part of the procedure, taking away some of the obstructions that characterize tokenistic participation situations.[103]

5.3 Situations of effective participation

In addition to situations of non-participation, professionals gave some examples of effective participation. An important condition for effective participation was again the absence of any technical issues or having only minor ones which the litigant (sometimes with the help of a lawyer) would be able to navigate through. In examples of effective participation, litigants were able to enjoy some of the efficiency advantages of digital hearings,[104] such as the ability for litigants living abroad or litigants with special health conditions (including COVID-19) to join urgent family hearings.[105]

Even though these examples show signs of engagement, the interviews did not have as many examples of 'collaboration', or litigants who were 'being enabled', in digital urgent family hearings. Professionals suggested that effective participation would be more likely in simple legal procedures: legal procedures about (legal) technicalities of the case, procedures with only few people involved (such as witness statements, expert statements) or procedures in which both the litigants and legal representatives would agree about the request. The need for digital procedures in

102 Licoppe & Dumoulin 2010, p. 213; Rowden 2018, p. 276.

103 Denault & Patterson 2020, p. 4.

104 Similar to situations described in other literature on the possibilities of digital hearings during COVID-19: Gerstein 2020; Ibrahim 2020; McLachlin 2020; Legg & Song 2021, p. 162; Ryan, Harker & Rothera 2020 (April), p. 43.

105 Abruzzese 2020; Kitzinger 2020.

these types of hearings has also been expressed in international literature and legal practice.[106] One of the legal representatives said:

> It [digital hearings] brings more flexibility. Normally, it is very common the hearing is postponed when one of the parties cannot come. Whereas right now, there are other possibilities as well. It is possible to bring somebody in on a tv-screen with a technician who knows how everything works. I believe that it is a huge advantage and hope we can keep that in the future. (Judge 5)

Some professionals were unsure whether 'collaboration' or 'being enabled' would ever be possible, giving the nature of urgent family hearings which require a more relational approach, even in a regular (non-digital) hearing.[107] A lawyer said:

> I personally believe that when your hearing is about children, everybody is vulnerable. That is often forgotten. Even parents who are educated: they are vulnerable as well when it is comes to their family and their children. Some litigants can mask that very well, for instance by talking properly and wearing a suit. (Lawyer 3)

Moreover, a legal representative mentioned:

> I believe that it is different seeing somebody's face than hearing someone talk, someone you don't even know: a total stranger who is going to tell you that your child needs to be put on child support. I should say that the litigants in these types of hearings are very emotional and therefore may not be bothered that the hearing is online. However, I believe that afterwards, when they think on the hearing, that it must have irritated them. (Representative 3)

As mentioned in the previous section about non-participation, judge's behaviour is extremely important in a digital hearing for the engagement of litigants. Situations of effective participation would thus involve an active judge, able to communicate very well in a digital environment and keep the attention of the litigants during the whole Skype meeting.[108] Professionals gave several examples of what this type of active behaviour would look like, all including a 'hands-on' approach, clear communication (both prior and during the hearing) and making the most of the limited non-verbal communications in a digital hearing. For instance, a judge pointing out certain behaviour of the litigant:

106 Rowden & Wallace 2019, p. 699; Legg & Song 2021, p. 162; See also literature on Online Dispute Resolution (ODR), which focuses on these types of cases; Legg 2016, p. 277; Wing 2016, p. 12.

107 Such a relational approach includes making 'greater use of their personal and interactional skills', as described by Rowden & Wallace; Rowden & Wallace 2018, p. 506; Roach Anleu & Mack 2017; Reynolds 2020; In particular in Family Court hearings; Abruzzese 2020; Showing similarities to judge's behaviour favoured by procedural justice theory; Ansems Van den Bos & Mak 2020, pp. 657-658; McKay 2018, p. 170.

108 Research of Rowden and Wallace also refers to the contribution of an active judge to a more positive experience of litigants; Rowden & Wallace 2018, pp. 521-522.

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> At one of the hearings, something happened during my conversation with the litigant, something that he might not have liked and I heard it in his response and said: 'I cannot see you but I hear that something just happened. What is it that I hear? Is that anger or disappointment?' And then you notice that you can pull someone in again by saying something like that. It really depends on the type of judge though, and how open the judge is to signs like that. (Judge 3)

Several professionals argued that litigants felt more engaged when the judge would make explicit what he or she observed during a digital hearing. Respondents noted that such actions could prolong the hearing, as the focus on the experience of the litigant was often not related to the legal merits of the case but considered important for the litigants (and even the judge themselves) to feel like they mattered and were part of the procedure, particularly telephone hearings as the judge depended on the verbal communications of a litigant, making explicit that a litigant sounded irritated or angry was very beneficial for the engagement.

> I believe that whether a digital hearing works, especially telephone hearings, really depends on the judge. There is of course a lot of emotion, people talking over each other. When there is a translator, is it even worse. A hearing therefore requires a lot of structure … There were many differences between judges, one does it better than the other. (Representative 4)

Lawyers revealed that they preferred judges who gave clear instructions before the hearing (e.g. via email), so they could discuss those with their clients, providing effective support and taking away any practical barriers. During telephone hearings, it was necessary for judges to discuss the course of the hearing prior to its start. Litigants would particularly appreciate judges who ensured everybody's chance to speak during the hearing and who would announce the speaking order ('You go first and then you may speak'), providing the hearing with a clear structure.

6. Discussion and conclusion: a variety of legal participation

To answer the research question of this article: *How and to what extent were litigants in digital, urgent family hearings during COVID-19 able to participate effectively according to McKeever's framework on remote justice?*, this article concludes that legal participation in digital, urgent family hearings during COVID-19 varied widely. Technological issues and inexperienced court actors posed the most profound participation challenges in the beginning of the pandemic, as they created both practical and intellectual barriers for litigants to access digital procedures. In this regard, Dutch family hearings were no different than other digital family hearings in, for instance, England, Wales, Scotland, Ireland and New Zealand.[109] Such

109 Therefore, in line with previous remote justice research of Ryan, Harker & Rothera 2020 (April); Ryan, Harker & Rothera 2020 (September); Lynch & Kilkelly 2021; Porter et al. 2021.

technological difficulties resulted in emotional and attitudinal barriers as well, for instance, litigants 'opting out' of their hearing, feeling isolated or even segregated. Power imbalances between litigants in urgent family hearings and their opponent (the childcare institutions) may also contribute to these barriers: making litigants feel more distant from the procedure and emphasizing the inability of vulnerable litigants to participate. Furthermore, digital hearings constitute tokenistic situations, which leave litigants unable to engage, for example, because digital hearings require a long attention span and a privacy-proof home environment. The lack of courtroom rituals, the specific character of urgent family hearings, combined with an absence of non-verbal communication from other participants contribute to creating such tokenistic situations. Lastly, professionals shared a few examples of participation, but stressed that situations of 'collaboration' and 'being enabled', McKeever's highest participation levels, were not met. Professionals argued that these highest levels of participation are impossible to reach in urgent family hearings, both in a digital and non-digital setting, because of their sensitive nature and the vulnerability of the litigants involved, notwithstanding that judicial behaviour enhances the chances of effective participation. Such behaviour includes vocalizing certain observations, applying a 'hands-on' approach and maintaining a clear structure throughout the digital hearing.[110]

This variety of participation examples (with an emphasis on situations of non-participation) also shows the limitations of McKeever's framework. Although the participation barriers are similar, her framework cannot grasp the specific participation difficulties of litigants in digital hearings. In several non-participation examples, professionals shared participation problems related to intellectual and practical barriers, such as not having a computer or the right technology for joining the hearing, but explained that it was not only these barriers that caused litigants to not participate, but more so the disengagement they came with. For instance, litigants felt so frustrated they were unable to join their own digital hearing that this emotion caused all kinds of participation barriers to arise. A digital setting also reveals how essential non-verbal elements are to establish an engaging atmosphere, such as the brief interaction between litigants and court actors in the hallway.

Other than what McKeever argues, digital hearings show that participation does not only require knowledge of the law and the ability to find the right assistance, but also a courtroom setting that makes them feel engaged. This sociological element is only part of McKeever's higher participation levels but can also be recognized as essential in the lower participation levels. Additionally, the interaction with other barriers (practical, emotional, intellectual, attitudinal) and the difference amongst digital participation barriers distinguish them from the ones created by McKeever. The interaction of digital barriers differs because these barriers can consist of practical barriers (microphone malfunctions), intellectual barriers (not understanding the digital environment), attitudinal barriers (opting out) and emotional barriers (feeling isolated), or just one of those, with these different types of barriers being able to influence each other in multiple ways (other

110 Similar to some of McKeever's own recommendations for self-representing litigants; McKeever 2018, p. 203; McKeever 2020 (CJC rapid consultation), pp. 6-7.

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than only practical barriers creating emotional barriers). Secondly, the effects of digital barriers may vary from a minor inconvenience (faltering internet connection) or even advantages (more efficient, preferred procedure) to making litigants feel not part of a court procedure anymore. An application of McKeever's framework, in particular to a digital setting, thus requires a closer look to the operation of participation barriers and a more nuanced, sociological understanding of all participation levels. Such an approach will allow more insight into what constitutes effective participation and why.[111]

Additionally, the application of McKeever's framework reveals how difficult it is to climb the participation ladder. Litigants, in particular in urgent family hearings, may never be able to reach the final steps of the participation ladder because even without any (digital) barriers, they may still face emotional, practical and intellectual barriers inherent to the procedure itself. Changing the procedure or a judge's behaviour will therefore not resolve these barriers completely, but may soften them.

All in all, this article further stresses the importance of non-verbal communication, the courtroom setting and judge's behaviour on the experience of litigants in family hearings. Even though this analysis is not based on the direct experience of litigants themselves, its claims are supported by international literature on remote justice and studies of digital family hearings. Additional research on remote justice in this area of law which includes the direct experience of the litigant is recommended. Such research may include a comparison of both digital and traditional court procedure, which may provide new insights into how to climb the ladder of effective participation in digital hearings, instead of reaching only the first few steps.

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