Nuffield Foundation

Why Justice Matters

The sweeping implications of the crisis in our civil courts, tribunals and legal advice services

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Foreword

Gavin Kelly, Chief Executive, Nuffield Foundation

A fair and functioning justice system is essential for our social and economic well-being - but do people truly have the access to justice they need, and that we expect, in a modern democratic state?

This question lies at the heart of the Foundation's *Public right to justice* programme. Building on our longstanding interest in justice as a cornerstone of a well-functioning society, the programme examines whether the system in England and Wales is working as it should for everyone who needs it.

In the best tradition of the Nuffield Foundation, this work addresses a big normative question in a robust empirical way. These essays – commissioned from leading thinkers across academia, policy, and practice - are intended as a primer for that work, sparking, we hope, wider discussion on why the justice system matters to us all and what we should be able to expect from it.

The publication of these timely essays chimes well with the launch of the Nuffield Foundation's new Strategic Review. The way in which the contributions explore what the justice system means for society and our economy ranges far beyond the confines of the administration of justice - vital though that is - and reflects our goal of bringing new perspectives to bear on some of the key issues of our times.

As many of the essays make clear, the role of the justice system is too often viewed as a specialist concern, of little interest to those who have no direct contact with it. Outside of the criminal justice system – and even then, only intermittently – justice attracts little public attention or political priority. Yet this belies its foundational importance, as the justice system underpins our everyday social and economic lives and upholds the very values on which a cohesive society depends.

The intention here is not to argue simply for more resources, although these essays make plain that a lack of investment underpins a number of the problems the justice system faces. Several authors also invite us to think more deeply about the implications of living in an increasingly 'law-thick' era – both what this means for our political, economic, and social structures and norms, and the potentially damaging consequences that arise when the system to enforce those laws is under-funded, deprioritised, or simply not understood.

The essay collection presented here offers compelling, accessible, and diverse insights into why justice matters. We hope they animate public debate about the justice system we need and should have a right to expect.

On behalf of the Foundation, I would like to thank all the authors for their thought-provoking contributions, former Nuffield Trustee Sir Ernest Ryder for inspiring this project, and the series editor Tom Clark for expertly overseeing the endeavour.

Introduction:
The strains on civil justice and its consequences

Tom Clark, journalist, and Rob Street, Director of Justice, Nuffield Foundation

Very slowly, a realisation is dawning on shrewder observers of – and practitioners within – the social policy scene. Namely, that the law is too important to be left exclusively to the lawyers. Parliament can pass statutes and ministers can draft regulations and even allocate public funds, but the translation of intention into outcome often plays out – or doesn't – through the justice system.

Legal rulings have always been the way in which public policy ultimately bites on individuals in some contexts – including crime, contract enforcement and property disputes. But law and justice loom far larger than they used to. The number and range of criminal offences has multiplied. Contracts have got ever-more complex. The courts have steadily got more deeply involved in traditionally private realms, such as the family. Meanwhile, the growth of judicial review and public law over 60-odd years, and then of human rights claims over nearly 30, has ramped up the potential to hold the state to account through the law.

But the rising importance of the justice system has not resulted in it being better understood. It still often seems like an incomprehensible, alien world to many of the people it notionally exists to serve. Outsiders have mostly continued to consider the courts as something of a black box. Latterly, however,

at the same time that our tribunals, courts and wider justice system have become so central, they have become less able to function in practice as they are meant to in theory. The implications of this mismatch are, as this collection of essays attests, now seeping out in all sorts of ways beyond the legal world. Unfortunately, politics has yet to really face up to this.

Justice budgets were firmly in the 'unprotected' category through the long austerity years: indeed, the big squeeze began before 2010, and has continued since. Budgets have risen in the last few years, but not sufficiently to undo earlier cuts.[1] The arrival of Sir Keir Starmer, a senior lawyer, in Downing Street has not fundamentally altered the pressures. Legal advice is massively unfunded, and sometimes hard to find at all. The courts estate is crumbling, and the operation of justice creaking, dogged by delays in the context of both crime (with some publicity) and civil litigation (with next to none).[2]

Against this backdrop, this collection convenes a broad conversation about what a modern society requires of a justice system – and how that compares to the justice system we've actually got. We do not pretend to offer an exhaustive examination of all the issues it faces. We mostly steer away from criminal justice, not because it isn't important, but precisely because it is already the most prominent part of the system. Crown Court delays, the consequential degradation of evidence, and the collapsing of prosecutions have started to get some serious media coverage. Politicians understand that such failings cannot be ignored and are on the hunt for radical fixes. The government commissioned a retired senior judge, Sir Brian Leveson, to review the criminal courts. His July 2025 report recommended a new type of court that would, contentiously, avoid the need for juries in trying many offences of middling gravity. But the same political urgency has not yet been mustered in the civil context, an imbalance we seek to redress.

Nor do we dwell much here on the family courts. They are a critical and often-neglected part of the system that makes momentous, life-changing decisions for young lives, but are something that Nuffield's own Family Justice Observatory now shines a bright light on. Instead, our main concern is the web of courts and specialist tribunals that deal with myriad other aspects of life, and indeed on the whole ecology of advice and support that can sometimes resolve problems less formally, and guide people through litigation if and when it is ultimately required. While some of the issues that the collection discusses are theoretical, and not restricted by territory, when our essays get into specifics and quote statistics, except where otherwise stated, these refer to England and Wales.

Very deliberately, we have sought out a wide range of perspectives. We have naturally included some lawyers, who know how the system currently does and doesn't work, but also many distinguished non-lawyers, whose day-to-day focus is on other social problems and whose interest in the law is about how far it can contribute to fixing these. Deliberately, too, we have mixed voices enthusiastic about pursuing broad social reforms through the justice system with sceptics, who think that – once we've

got the basics working – we would do better to confront deep political problems directly, rather than dress them up in legal arguments.

So this is a varied collection of contributions designed to kick off a conversation (as well as inform Nuffield's own *Public right to justice* project), not a series of premises marshalled towards a common conclusion or a particular set of reforms. Nonetheless, a couple of strong threads connect most of the pieces. The rest of this introduction canters through the contributions, then draws out those common threads, together with some important contrasts.

To ground the discussion firmly in the realities of the justice system of England and Wales, we start out in the county court with *David Allen Green*, a practising solicitor as well as a widely read legal commentator. He paints a picture of "chronic understaffing", endemic delays, "almost non-existent IT", and an unhappy mix of a stubbornly physical paper-chase with broken communications and unanswered correspondence. He doesn't stop at description, however, but also delves into the roots of the malaise – want of political leadership, as well as lack of funding – and then identifies the sweeping, yet little-understood, consequences.

When people no longer believe the courts are there for them as either sword or shield, an immediate toll is taken on public trust in the law and the rights it is supposed to enshrine. And that isn't the end of the trust problem. Doubts about whether the writ of regulators, the by-laws of councils or even the statutes of Parliament can be made effective cause knock-on damage to the standing of all these public institutions and their ability to get things done. Moreover, if – as Green suggests – consumers and smaller businesses have reached a pass where writing-off even sizeable debts can be more rational than embarking on a costly, slow and unreliable journey through the courts, then it's not hard to imagine profound implications for economic life.

The Cambridge economist *Diane Coyle* distils and elucidates these implications. Trust, she explains, is the fundamental precondition for commercial exchanges and business investments, and the civil justice system is the critical "social infrastructure" that has been developed to secure it. She highlights evolving private mechanisms for establishing trust, such as online rating and review systems, but also the limitations such alternatives have in terms of universality and authority – the attributes that mark the courts out as inherently public goods. Failure to maintain the public infrastructure could, therefore, jeopardise trust – and with it the Starmer government's much-vaunted 'mission' to raise the UK growth rate.

Another of the government's five 'missions' concerns health, and the building of a society where "everyone lives well for longer". It seems a long way off in a country in which life expectancy is stagnating, and in the poorest postcodes people are dying outright earlier. So we asked the two pre-eminent scholars in two different academic fields – the public health expert *Michael Marmot*, and the

pioneering access to justice researcher, *Hazel Genn* – to join forces and spell out, from their distinct perspectives, the connections that they see between the law on the one hand and tackling ill health on the other.

Decades of public health scholarship, a good chunk of it by Marmot himself, has uncovered cast-iron connections between social disadvantage and a host of maladies. Poor living conditions can very directly harm bodies (think of damp housing) and inflame anxiety, but can also – and more subtly – get 'under the skin' and, over time, ramp-up the risk of conditions including diabetes and ischemic heart disease. Marmot's "social determinants of health" school of scholarship has often framed the response required in terms of "social justice", but in this joint contribution he goes further, highlighting particular ways in which formal processes of law – including strengthening statutory rights to health-supporting entitlements – could advance this agenda.

From her vantage point, including as someone extensively involved with UK health–justice partnerships, Genn weaves into the piece compelling examples of the sorts of health-sapping problems of daily life – such as debt, bills and bad housing – which the right legal advice can help fix, and a taste of the academic evidence on the difference which providing that intervention can make. Another interesting takeaway is just how much time (and therefore NHS resource) family doctors can save, particularly in poorer neighbourhoods, if their patients are well-supported in securing their legal entitlements to benefits, housing and so on. When no such support is available, patients turn up with anxiety – and sometimes physical symptoms – that are palpably rooted in everyday problems which medics are not well placed to advise on fixing. A bit of time with a legal advice worker could be much more effective.

There is, according to the former inner-city MP *Karen Buck*, a clear parallel effect with the way our politicians are spending their time. Buck was one of Parliament's most dedicated constituency caseworkers, which was just as well because her west London seat had an exceptionally heavy load of immigration issues and housing problems that needed addressing. But a whole welter of recent factors has pushed up, and is continuing to push up, the number of problems coming the way of MPs, including rising needs for some services, and squeezed budgets for almost all. Within that general picture, maladministration by understaffed bureaucracies, delayed court and tribunal hearings, and – most particularly – a dearth of legal advice services leaves constituents in trouble feeling bewildered. Finding most doors are shut, ever-more of them divert to one that politics makes it impossible to slam: the surgery of the local MP.

The burgeoning casework may help root MPs in the real world. Unlike some parliamentary traditionalists, Buck believes this work usefully opens the eyes of MPs to the efficacy – or otherwise – of the laws that they pass. But that positive needs to be weighed against downsides, for both constituent and representative. Even the very best politicians can't give citizens in trouble the specialist advice that would benefit them most. A properly funded system of legal advice would, undoubtedly, serve citizens

better. Then there is a question for Parliament and the country as to whether it *wants* its very best politicians to be spending quite so much time on casework that it could impede on what they're able to achieve on the national stage.

One message bubbling up through these first four essays, then, seems to be that while politicians may have relatively little interest in the justice system except in its dealings with crime, that justice system has profound implications for them – affecting both their ability to pull off their big ambitions (such as the government's missions) and the whole way that they themselves have to work. The fifth piece comes from a rather different point of view: its thrust is to warn lawyers against imagining that their work can substitute for democratic politics.

Frederick Wilmot-Smith is a barrister himself and is in agreement with all our other contributors (and, avowedly, the current government) that the rule of law is a singular virtue, safeguarding freedom from arbitrary rule. He worries a good deal about it seeping away, not least because of the growing official push to steer citizens towards settling many civil issues.[3] And he is clear that there are times – the attempted subversion of the 2020 US presidential election being one case in point – when thwarting of the rule of law amounts to the thwarting of democracy. Beyond that, however, he urges all of us – and particularly his fellow lawyers – to think of the ideals of law and democracy as distinct stars in a constellation of values, pointing to all sorts of cases where they might tug us in different directions. The justice system certainly needs some attention for its own sake, but when it comes to the risk to democracy, for Wilmot-Smith the things to worry about much more than the law are our underlying social norms and political culture.

By contrast *Shameem Ahmad*, who runs the Public Law Project, argues that legal processes and challenges are integral not so much to the procedures of democracy, but to what we might call a democratic society. Through effective and accessible justice, she insists, a Goliath-like state can "rearm David" – that is, the individual citizen – handing her or him the power of legal challenge to keep the state in check and working for the good of all. It is often said that the first duty of the state is the security of its citizens, and yet Ahmad details a pertinent case where – until litigation put things right – the state failed to respect the independence of domestic abuse victims from their abusers, a telling exemplar of just how important the civil justice system can be in allowing many citizens to live free from fear. Her stark conclusion is that in a world where authoritarian extremism is on the rise, shoring up the justice system now is especially urgent; because, with an ill political wind, it could soon enough become the last defence of *all* citizens against forces which aspire to do away with democratic rights entirely.

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After six pieces by seven serious thinkers working in the UK, all more or less directly considering the justice system of England and Wales from distinct perspectives, it is useful to zoom right out and locate

the discussion in a wider context. We asked *Judith Resnik* – Yale University's leading theorist on the courts and citizenship – to help us do that. She opens her summative contribution with the various political shock waves rolling out at the time of writing from Washington and into American society, and the importance of the courts in containing them (or at least trying to). Without in any way disagreeing with the case for accessible justice made by Ahmad – about protecting citizens against the state – Resnik is most concerned to stress the contrary effect, whereby the courts are "resources" that democratic states themselves need to be effective. Why? Because their distinctly "structured interactions" are practically useful for all sorts of things – reconciling interests, managing social change, forging law-bound relationships – and also give rise to discourse that can often advance shared understandings and identities.

While this is a high-level, philosophical argument, Resnik also engages with some of the more practical concerns aired by our UK contributors. On a long view, she notes, a lot of the 20th century was about previously excluded people becoming entitled to the effective protections of the courts, and that more recent decades have been marked by policies that have restricted this, including the squeeze on legal aid resourcing in the UK and the drive for "tort reform" in the USA. She worries – in much the same way as Green and Wilmot-Smith – about what the reduced accountability and growing power imbalances create when open legal processes are replaced by "privatised" or hidden means of dispute resolution. And, just like Ahmad and Buck, she also worries a good deal about poor and harsh outcomes for individuals in relation to housing, work and social entitlements when legal support is not available and public services are in retreat.

We end the series with a stirring closing piece, a contribution drawn from a Spring 2025 lecture, delivered in Oxford, by the former Senior President of Tribunals, and, until recently, long-term Trustee of the Nuffield Foundation, *Ernest Ryder*. This is a valuable coda to the set in several respects. It confirms, from the point of view of one of the country's most senior retired judges, that the justice system is in decline. It develops the argument – which dovetails with some of Green's points, and makes for an interesting contrast with and challenge to the analysis of Wilmot-Smith – that the stricken condition of the courts has grave implications for the rule of law, and even more adverse potential knock-on effects on society's values and even cohesion, as well as on the nature of our politics. Ryder also gives forensic attention to one particular root of current problems, quite distinct from the more general complaints about the lack of resources and political respect for justice: specifically, the constitutional muddle that was – as he sees it – created by New Labour reforms in the 2000s. The effect was, from his perspective, to downgrade and entirely politicise the old office of Lord Chancellor, and to pile managerial responsibilities on a set of senior judges and the courts service without entrusting them with the true managerial powers they would need to improve delivery.

We won't dwell on describing the problems of the civil justice and tribunal systems in detail here. The pieces that follow amply document that. But having edited this collection of contributions as a whole,

a few overarching thoughts are worth registering. While the first image brought to mind by the word 'justice' is often a prosecution in front of a jury, and while there are undoubtedly current problems in the criminal courts, the civil justice system exhibits equally serious problems that barely register in public debate. Many individuals – whether trying to secure welfare entitlements or simply seeking to redeem debts or achieve other private redress – are making the lonely discovery that a system they'd always assumed they could rely on doesn't work as expected.

For those individuals, the immediate costs are obvious enough. Less obvious, and the thing this set of essays draws new attention to, is the shadow that faltering justice casts on other aspects of collective life – the toll on the economy, on public health, and on the work of our political representatives and institutions. On top of all this is the wider spread across society of dangerous understandings – that notional rights can be impossible to cash in, and that various public authorities we imagine to be 'in charge' lack the ability to make regulations and decisions stick. If such ideas become entrenched, society's integrity and shared values are in jeopardy.

While the justice system is creaking, it is of course important to acknowledge it has not collapsed, and (mostly) continues to deliver justice, even if it does so slowly. Increasingly, though, lack of access and lack of speed combine to raise the question of workarounds and alternatives. Whether it is giant corporations' algorithms substituting for legal process in consumer matters, or MPs' offices doing what legal caseworkers might once have done, the combined effect of these pieces is to show that something important can be lost.

To appreciate this, one does not have to say that a legal approach, still less an actual 'day in court', is the best way to resolve every problem. The formal justice system isn't everything. One reason there is such a crying need for the remedies of civil law just now is that many other important things – such as good public administration – seem to be in such short supply. Even when the courts are working well, they are expensive for the public, and often tiring and confusing for the individual. Careful balances need to be struck when it comes to managing resources for the courts themselves and the services that might reduce the need for using them.

Nonetheless, right throughout history, legal systems and courts have been one of the first and most foundational establishments that emerging states have devised. Other means of dispute resolution are perfectly valid. But to the extent that they are effective, it is often because all parties understand that the alternative of litigation is available if ultimately needed. The briefest thought experiment about what would happen if the justice system were to lurch from creaking into outright collapse – cue visions of endlessly unresolved disputes or even conflicting citizens taking disputes into their own hands – is enough to establish how badly we would miss what we've still just-about got.

Along with the frail condition of our justice system, what percolates through this collection of essays are the values and benefits that the system embodies and also does so much to embed across society. There is no reason why a society that was once moving towards increasingly open, effective and accessible justice cannot begin to steer towards it again. It is, as this collection of essays suggests, high time for a little respect and whole lot of repair.

Endnotes

1 Domínguez, M, & Zaranko, B. 2025. Justice spending in England and Wales. *Institute for Fiscal Studies*. Available from: https://ifs.org.uk/publications/justice-spending-england-and-wales.

2 Some of the worrying numbers are quoted and discussed throughout this collection, for example in Diane Coyle's essay. For direct access to the official statistics on delays between the filing of cases hearings in civil courts, see *Civil justice statistics quarterly*, which is updated regularly at: https://www.gov.uk/government/collections/civil-justice-statistics-quarterly. Equivalent criminal justice statistics are collated at: https://www.gov.uk/government/collections/criminal-court-statistics, and for the Tribunal service at: https://www.gov.uk/government/collections/tribunals-statistics.

3 For example see: CPR 1.1 - Civil Procedure (Amendment No. 3) Rules 2024

The civil courts and public confidence

David Allen Green, lawyer and journalist

England was once a country of counties. And in these counties there were county courts, where local people and businesses could go to assert their private law rights and defences against other people and businesses. These civil law courts complemented the criminal courts where prosecutions were brought.

The stuff of the county courts was the various types of mundane private law that binds communities, societies and economies together: contract law, negligence and other torts, property and housing law, family law, and so on. The county courts provided the means by which disputes would ultimately be resolved, and where damages and other court orders were granted to compensate or protect injured or otherwise wronged parties. As such the county courts were a fundamental and essential part of our everyday civic order. They were a social glue.

But now that glue is dissolving. The notion of a county court in every sizeable town is as quaint as a red telephone box or blue police lamp. Up to and including the 2010s there were mass closings, in the name of efficiencies, by governments of all parties. They were seen as an easy target within the budget of the Ministry of Justice (MoJ), a 'super' department founded in 2007 by bringing together the old Lord Chancellor's department (which looked after courts) and the prison and probation parts of the Home Office. This new ministry was to provide a coherent and indeed 'holistic' approach to the administration of all justice in England and Wales.

Instead, in civil justice and other areas of its responsibilities, the MoJ has ended up presiding over a legal system in decline. In the headline areas of criminal justice, probation and prisons there are constant problems and crises. Criminal justice is plagued by delays and underfunding, probation is close to collapse, and the prisons are in chaos. These are the areas that command political and media attention in a society fearful of crime and social disorder.

But it is in the remaining county courts – which were 'nationalised' under the Conservatives in 2016 to be a national 'county court', effectively with local branches – where the ragged effects of austerity and lack of investment are most stark. Their desperate state was picked up in the last Parliament by Conservative MP Robert Neill, the lawyer who then chaired the Justice Select Committee in the House of Commons. At a liaison session of committee chairs, with the prime minister, Neill devoted half of all his available questions to the topic.[1] After the general election, in which Neill sadly stood down, his Labour successor as Justice Committee chair, Andy Slaughter MP, moved to reopen the inquiry into the troubles of the county courts that Neill had been overseeing until the election intervened.[2]

The evidence provided to the select committee is dismal and depressing. There is chronic understaffing. Correspondence routinely goes unanswered. It is almost impossible to communicate with the staff at most county courts, either by email, telephone or even in person. Court orders are sent out months after any deadline. And this is not because of choice, but the lack of resources. The few resilient individuals who do work there are keeping the courts working by goodwill and ruthless prioritisation.

The IT is almost non-existent in county courts – and it has become a standing, if unfunny, joke among lawyers and other court users. Nearly all county courts are, internally, paper economies, with bundles of documents being shuffled from shelf to shelf, often getting lost or mislaid. No useful electronic information is available to the parties. Barristers are instructed to attend hearings which the parties have properly agreed should be vacated, because nobody knows if the court itself has read the relevant notification. (These are the problems euphemised by the MoJ as "technical debt",[3] which the National Audit Office only half translates for us as "suboptimal digital systems".[4])

There are not enough judges. Adjournments and postponements because of a lack of judicial availability are a norm. Indeed, as I type this I have heard of a case where there has been an adjournment of a preliminary hearing that was due tomorrow (in early 2025) relating to a claim that had been brought back in 2021. None of this will surprise any court user. It would have instead been more astonishing had the case had gone ahead. There will probably be many more adjournments.

There are some litigants for whom this dire situation is fine or even provides opportunities. The pile-them-high bulk litigation law firms can happily go on their automated way. They don't care because the efficiency of scale means they keep some profit margin, regardless of the system failures. And a certain type of litigant in person (those navigating the justice system without legal representation) can keep their worthless claim or defence going for years because there is no means or will to bring such things to any end.

But for any normal person, the county courts are increasingly, as one organisation of court users called them, a "nightmare".[5] They are the sort of thing which an English Kafka and a provincial Dickens would concoct together. They combine the horrible faceless uncertainties of *The Trial* with the all too familiar human follies of the Victorian Court of Chancery.

If you are, say, a local business owed substantial sum of less than £100,000 then it would be more sensible and rational to drop any legal action than fight a contested case. The benefits for peace of mind and the savings on management time would be worth it. And even if the claim is uncontested then actual recovery will be difficult if not impossible. The only hope is that the threat of a county court judgment is enough. It is only the prospect of an adverse entry on a credit file that means county courts are taken seriously by many debtors, not the legal process itself.

For many the notion of civil justice is now a fiction. The court fees – which are effectively non-refundable – now are beyond what many people can afford. There is almost no legal aid. There are fewer and fewer courts, and the delays now last for years. And even if one gets judgment the stress begins afresh with seeking to enforce the decision of the court.

Loreless realm

As the knowledge of the inefficiencies of county courts becomes widespread, there is danger. This is because the way that law works practically in society is as lore. In day-to-day life, the law is what people believe it to be – and what they believe will actually be enforced. Many people have a good working knowledge of what they (think they) can and cannot do, "within their rights". But over time this working knowledge will evolve to discount any threat of local court action – just as people 'know' what the police will and will not be bothered with if a report is made. The loss of popular credibility to a court system would then be a serious, potentially irreversible, problem.

To grasp the nature of that problem, it is worth pausing on those two forms in which law exists. There is what can be called the technical, Black-letter law – the sort of law that is studied in universities and is practised by learned professionals in offices and court rooms. It is also the law of unread terms and conditions, privacy policies, and council notices of by-laws. This is the official law which only a few obsessives would care about if it were not part of certain people's jobs.

And then there is the law in practice – more lore than law – which is what people in the street and in their homes, in shops and workplaces believe the law to be. This is a mix of substantive rules ("that is against the law" or "I know my rights") and an understanding of how the law is and is not enforced ("I will call the police" and "see you in court").

But as people's experience of the courts declines, the mismatch between law and lore becomes dangerous. People will lose confidence that they can enforce the law – or no longer believe that the law can be enforced against them. They may even come to believe that compliance with the law served no purpose. And they will get used to their interests being protected by other means. Instead of there being a single open standard of legal fairness, we will become familiar with lots of private devices to determine disputes.

In commercial matters the lack of confidence in civil law is already giving rise to many other forms of adjudication: arbitration, mediation and so on. In consumer matters, many websites now have their own forms of dispute resolution which are funded by purchasers or vendors as part of their fees. Deposits are demanded and 'escrows' (or bonds) provided. There are scores of ways emerging by which parties engaged in trade can allocate risks between themselves rather than use the legal process to protect their rights.

But the risks of no realistic court enforcement are then priced into premiums and other costs of insurance, which might end up being paid by traders or instead passed on to their customers. Moreover, the specifics of these risk-reallocation arrangements are imposed by terms and conditions that overwhelmingly go unread. Such standard terms can, depending on the circumstance, be challenged – at least in theory. But in practice, unfair contract terms and unreasonable exclusions and limitations of liability are rarely litigated.

A question of leadership

Where is this heading? Towards a world in which, unless something exceptional has happened, then the old adage of caveat emptor – let the buyer beware – prevails. It will be a less secure world for most of us, and also a world in which terms of trade are prescribed by those with market and technological power. People will still believe in the law, but there will be less and less public confidence in the courts to enforce the law. And this may, in turn, create new legal, social and economic problems when the full effect of unfair terms, and of unreasonable exclusions and disclaimers, come to be seen.

As things stand, there is no real prospect of improvement. The MoJ is not a well-funded department, and the priorities of that department are prisons, probation and criminal legal aid – all of which have their own severe problems. The only way to restore the courts themselves and the trust they support involves political leadership. That means politicians individually and political parties generally making a positive stand on having a functioning civil court system. It means being weaned off easy jibes and jeers about judges and the legal system. This is unlikely to happen. Even those lawyers who get to the top of the 'greasy pole' like Tony Blair and Keir Starmer have not and will not offer such leadership. It is just not seen as politically advantageous.

And so we are looking at continuing drift. There will not be a sudden dramatic collapse. Instead, what will happen is that over time the general lack of availability of the courts will become an accepted part of everyday life. There will be exceptions for certain major matters, but the routine daily work of courts will become slower and more distant.

There is an old phrase that possession is nine points of the law. Depending on the property lawyer you speak to, that may or may not be a sound phrase. But it could also be said that public confidence is nine points of a legal system, and when that public confidence goes – and there is little now on which it can rest – it may not be easy for it to be restored.

Politicians and pundits will one day regret this ongoing collapse of the justice system, and wonder how on earth we ended up in this predicament. Perhaps they will blame the courts.

Endnotes

1 UK Parliament. 2024. Liaison Committee – Oral evidence: Work of the Prime Minister, HC 572. Available from: https://committees.parliament.uk/oralevidence/14571/pdf/.

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The law's singular role in trust, trade and investment

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In old spy movies, the exchange of agents across the Glienicker Bridge in Cold War Berlin is a moment fraught with tension, as the two walk towards each other through swirling fog and darkness, then cross halfway. Will the deal be honoured by the other side?

It's an apt metaphor for economic transactions in the absence of trust, trust that depends on the enforceability and the enforcement of deals. Economies are systems of exchange, and they cannot go much beyond person-to-person barter or face-to-face transactions in small communities without a functioning legal system that ensures people can trust whoever is on the other side of the transaction.

In the law we trust

How the law functions is a crucial issue for economic growth, a key priority for the current government. The UK exports legal services, but much more important is the role that Britain's highly reputed system of laws and justice plays in creating the environment of trust that is a precondition for commerce, investment and growth. With the civil courts in a state of neglect, that trust may well start to crumble.

In previous centuries – before modern legal systems fulfilled their crucial trust-building role – personal reputation within institutions such as guilds, or trade networks[1] formed from specific communities, provided some assurance that contracts or transactions would be honoured. Rulers have always proclaimed standards for weights and measures to ensure trade in local markets can take place. But in today's globally extended, impersonal, large-scale economies, only the law will do: a predictable system of administrative, civil and criminal law, impartially and rapidly applied, with the enforcement of legitimate remedies and sanctions when required.

The legal system is part of the institutional environment that the latest Economics Nobel winners, Daron Acemoglu, Simon Johnson and James Robinson, found to be associated with long-term economic development. The causal relationships are, as they acknowledged, hard to untangle. In particular, richer

economies can support and sustain more effective legals systems, so there is two-way causality. But the evidence is clear that the legal system positively influences the economic environment in many ways, from personal security (in poor countries where violence is rife), through checks and balances on arbitrary government actions or corruption, to clear property rights, the enforcement of contracts, and tort law that awards compensation for harms to the victims.

Many economists consider property rights and contracts to be the essential foundation for trade and growth that the law provides. Anything other than barter or personal relationship requires the making, keeping and enforcing of promises over time and space. Without reliable contracting, the scope for exchange is limited. As economies grow in scale, formal legal institutions play an increasingly essential role in sustaining the trust required for transactions.

In Britain and other advanced economies today, we are in the position of generally being able to take for granted the assurance our legal framework gives us – whether in shopping online for goods at the other end of a supply chain across the world on the assumption they will turn up, investing in financial products advertised on the train with reasonable confidence the scheme is not a fraud, or even in trusting the food and drinks we buy not to make us ill. As Paul Seabright wrote in his wonderful 2010 book, The Company of Strangers, any one of us may "nonchalantly step out of the front door of a suburban house and disappear into a city of 10 million strangers" with scant worry about relying on a complex network of economic transactions in every aspect of daily life. It's hard to imagine the Merchant of Venice being set in a supermarket, he adds.

For all the current strains on the courts, at some level people seem to intuit how much we continue to rely on justice system. The judicial system and courts are – even now – the most trusted of UK institutions according to the annual ONS survey:[2] nearly two thirds (62%) say they trust them (compared to the 70% who say they trust "people in general", and is five times more than the mere 12% who trust political parties).

However, from this impressive starting point, there could be a long way to slide. As an OECD study points out,[3] survey evidence is typically based on perceptions rather than personal experience, and there are increasingly reasons to be concerned about the quality of that experience in the UK for those who need recourse to justice.

The state of civil justice

The criminal justice system attracts most attention and has experienced a growing backlog in the criminal courts;[4] prisons are full, and public trust in policing and criminal justice is in decline. And yet criminal justice is probably the least relevant area of all the many ways in which the justice system touches on economic activity. Many of the multiple bodies and processes involved in civil and administrative law, or employment law, tax law or corporate law, also show signs of strain, reflecting the long underfunding of public services in general. The Ministry of Justice (MoJ) budget – current and capital – started to decline in real terms in the 2011/12 financial year; justice is an 'unprotected' area, a low priority compared to health and education for any Chancellor. The Autumn 2024 Budget included additional funds for the MoJ, but the overwhelming focus is on criminal rather than civil justice.

For individuals and businesses alike, the forum for finally resolving disputes and securing rights against one another or the state will sometimes be a specialist tribunal (such as an Employment Tribunal), but will often be the county courts, which handle all residual civil matters. Both individuals and businesses

would also generally prefer to avoid the cost, time and distraction of going to court. Bodies such as Acas[5] (Advisory, Conciliation and Arbitration Service) in the employment sphere, or the Financial Ombudsman Service[6] in consumer finance, have an important role to play. So too do effective complaints systems, administrative appeals and reviews, and a variety of dedicated ombudspersons in disputes involving the state and public services.

The key question with all of these (often publicly funded) systems – as well as the courts themselves – is whether they are fast, fair and predictable. It would today be hard to answer positively. For example, when it comes to civil claims in the courts, aside from the very smallest, the average time from a claim to a hearing is now 77 weeks,[7] more than ample time for a small business or start-up to go under while trying to reclaim a debt. Not only is this a long wait but is it one that has been getting longer. A decade ago, it was only 56 weeks. Go back another five years to just before austerity bites, and the wait was only around 48 weeks[8] – appreciably under a year, as opposed to around a year-and-a-half today.

There will be plenty of businesses that have bitten the dust while waiting for settlements they needed. There will likewise be some unknown amount of investment that was not made because the companies reasoned that if they ran into difficulties in being paid what they were due they could not count on the courts to adjudicate in a timely fashion.

The position in the tribunals is not much better, with clear signs of relatively more cases dragging on unresolved. According to the latest MoJ statistics, the backlog of open tribunal cases rose by 4% overall in the quarter to June 2024, to 668,000.[9] There was a 17% jump in Employment Tribunal open cases, and a huge surge in appeals to the Special Educational Needs and Disability (SEND) Tribunal. Even though a record number of cases (4,500) were dealt with during the quarter in the SEND Tribunal, another 5,800 appeals were lodged taking the backlog up 61% to 9,200.

While employment rulings are of obvious and immediate economic import, something like special educational needs may appear less so, but that will not necessarily be true. Some of the parents stuck in this backlog, very likely with inadequate support and perhaps no realistic schooling for their children, may have to give up work to care for them during the long delay. All of these backlogs imply lengthyhold-ups for claimants or appellants, many months of waiting for resolution regarding issues central to their lives or livelihoods.

Another example is the 79,000 appeals outstanding at the Social Security and Child Support (SSCS) Tribunal, where much of the action is concerned with determining eligibility for Personal Independence Payments for disabled people. This was up 12% on the year in mid-2024; to the extent that it represents a large group of mostly hard-up people waiting longer than they should have to for the money they are due, it will exert a drain on spending power in the very local economies most in need of it.

In combination, all such tribunal delays are affecting hundreds of thousands of people, a non-trivial chunk of the workforce. Why has justice in England and Wales got so sclerotic? Ongoing under-resourcing, underequipping and understaffing are part of the issue, but so is historic underinvestment and ongoing mismanagement of change. According to the National Audit Office, the MoJ and the courts that it runs have a "significant technical debt"[10] – in other words, out of date and non-functional IT – but the process of implementing new digital systems is not creating the expected operational efficiencies.

So much for speed. What about whether businesses and individuals can rely on justice that is fair and predictable? Unfortunately, the tribunal statistics themselves contain worrying signs that this is not reliably happening. For instance, with the SSCS Tribunal, three fifths of hearings resulted in administrative decisions being overturned in favour of the claimant. Such figures imply plenty of need for formal justice, but inadequate capacity. While it is not easy to come up with an analogous measure of the need for courts to secure just dealings between private individuals and businesses, it would be complacent to assume they are any less necessary. But a lack of both fairness and predictability is surely indicated by the fact that only in just under half (49%) of all civil claims defended do both sides of the argument enjoy legal representation.[11]

The costs of a fracturing system

The economic impact of such generalised fraying of civil justice is hard to discern, as the academic and policy literature alike tend to focus on the high-profile areas of law that affect corporations, such as property and contract disputes. Yet there are assuredly costs across the system: employers unable to recruit staff until a tribunal case is settled; employees who can't find a new job meanwhile; small businesses unable to get bills paid even for large amounts well in excess of what their cashflow can sustain.

One obstacle in the way of a reckoning is that issues facing tribunals or 'small' civil claims come to public attention bit by bit, or even case by case, if at all. The creaking structure of everyday justice is rarely seen in the round. Yet for countries where slow and unpredictable justice has long been acknowledged as a problem, there is solid evidence of its detrimental effect on the economy. For example, Italian growth has been shown to be hampered by the uncertainty around civil law processes increasing the risks involved in business decisions.[12] A recent study of 169 countries over the period 2004–2019 finds strong evidence that slower enforcement of contracts through the justice system increases uncertainty and prompts opportunistic behaviour in business relationships,[13] while another concludes that across the EU an operationally inefficient justice system (measured by clearance rate and timeliness of decisions) undermines economic growth.[14]

The legal system is part of the national infrastructure, just as much as the rail, electricity or broadband networks, or other types of social infrastructure such as the health and education systems. And, just as there has been sustained underinvestment in most infrastructure, so too has there been in the justice system.

The concept of social infrastructure[15] – and indeed infrastructure in general – has gained traction in academic and policy debates during the past few years. Originating in late 19th century engineering as a descriptor for the physical structures that literally underpin other activities, infrastructure, an apt metaphor for the role of the law in relation to the economy, refers to the systems and networks without which the economy cannot function.

Perhaps just because a post-war cycle of massive infrastructure investment has been followed by four or five decades of living off those assets without reinvesting enough, the importance of physical infrastructure is now coming back into sharp focus, and so too are aspects of social infrastructure, although not yet the justice system. This omission makes no sense. People do not want courts any more than they want cables for their own sake, but for all the indispensable activities they enable. So,

the value of the courts is indirect but fundamental; if they crumble, the economic transactions and investment enabled by a predictable, rapid justice system are held back.

Justice front and centre

The justice system is arguably the top priority for public investment among all the categories of social infrastructure because it is – by definition – not something that individuals can provide for themselves. The legal system only functions if almost everybody recognises its legitimacy and effectiveness.

Increasingly, corporations are stepping in for the state. A dispute over an e-commerce transaction is more likely to be appealed to Amazon than to the courts. Unions and individuals concerned over employment conditions will likely negotiate directly with Deliveroo. Many digital platforms have set up rating and review systems to help build trust between suppliers and users.

But there are limits to this 'private government', which is inherently lacking in accountability and legitimacy, and in any case always limited in its reach – just like medieval guilds or traders' networks. It cannot substitute for an efficient justice system.

That system is a collective arrangement of institutionalised trust. It is most effective when it is least used, because it gives clarity about the rules of the economic game and assurance that the rules will be enforced: the more trustworthy and effective the courts and tribunals, the less they will actually be called upon to settle cases, because of people's confidence that the opportunistic behaviour they judge and sanction will be averted. Conversely, the less timely and predictable the legal system, the more people will behave in opportunistic ways.

As in any situation where the dynamics are self-fulfilling, the system can flip relatively quickly from good to bad outcomes. To date, the consequences of sustained underinvestment in the UK's legal infrastructure have been counted in individual pain, of jobs lost or businesses gone bust. But there will eventually come a tipping point when the aggregate costs soar as trust in the system itself disappears – just as a bridge can suddenly collapse when it has not been adequately maintained – and the friction this adds to commercial relationships of all kinds limits everybody's economic opportunities.

In justice, as in so many areas, the new government has a difficult inheritance. Nor does civil and administrative justice leap to mind when contemplating the demands of the growth mission: battery factories, graphene labs and building sites all provide ministers with more obvious photo-ops. But unless there is improvement in the timeliness of decisions by courts and tribunals, growth in the UK will be facing yet another powerful headwind. Without the confidence in a legal and administrative framework that is impartially and speedily administered, economic decisions are freighted with unpredictability. As Adam Smith put it, the "tolerable administration of justice" is essential not only to create an incentive for individual productive efforts and adjudicate disputes, but also to ensure the very integrity of society.

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Health and justice: A fundamental connection

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One of the rationales for the long neglect of our justice system is that, in a tight fiscal environment, it just doesn't rank as one of 'the people's priorities' in the way that, say, health does. Certainly, if one looks at crude polling questions and reflects no further, one would form that view: a lot of voters would rank the NHS as their top priority, whereas virtually none would name, for instance, the civil courts. But as two experts on, respectively, health outcomes and the justice system, we both see fundamental connections between the two things, and reject any claim that public health can be advanced by neglecting justice: the opposite is true.

Despite, or perhaps more precisely because of, our very different professional backgrounds, we judged that it would be useful for us to come together for this piece and explain just how important the health/justice link looks when viewed from both sides. One of us chaired the World Health Organization (WHO) Commission on Social Determinants of Health, whose starkest conclusion was that social *in*justice is killing people. From this point of view, as the place where many of society's problems have to get resolved, the justice system is a revealing crucible of many of the forces that drive health inequality; moreover, the law itself is an instrument that can ameliorate or exacerbate those forces' power. The other one of us is a scholar of access to civil justice, whose keen practical interest in the workings of the system include serving on the Judicial Appointments Commission. From this perspective, what's most striking are the many ways, for good and ill, that the legal and broader justice system shapes our well-being and our health. Get the system working well, and law and justice can be an efficacious health intervention.

A public health perspective: justice gaps and health divides

A child dying because of mould in the house. A child with special educational needs that are not being met. Youngsters in a gang engaged in anti-social behaviour, locked up as a result. An office cleaner

paid less than the minimum wage with a zero–hours contract. Rough sleepers. A lonely pensioner, who scarcely ventures out because of fear of crime in the neighbourhood, whose main social contact is the care worker whose visits to attend to leg ulcers have become shorter and less regular. A young man stopped by the police because of the colour of his skin. Snacks of biscuits and crisps because anything healthier is too expensive.

These are all examples of the social determinants of health. These are, in turn, major causes of inequalities in health and all require social action. The two dominant reactions to inequalities in health are to exhort people to behave better and look after themselves, and to fix problems with the healthcare system. It is possible that the first might have a marginal impact, and the second is necessary. But neither will do much to reduce inequalities in health. Look at the UK over the last 15 years. Life expectancy did not improve, health inequalities increased, and health for the poorest people got worse. These alarming patterns could not be explained by people suddenly deciding to behave in unhealthy ways. Lack of access to healthcare may have made some things worse but is unlikely to be the root cause of the problems.

Inequalities in the way society is organised and operates are the real issue. After assessing and marshalling all the most instructive evidence, we emblazoned a bold summary statement on the back cover of the final report of the WHO Commission on Social Determinants of Health: "Social Injustice is killing people on a Grand Scale."[1] In parts of the world, bad laws sometimes play a part in cementing that injustice. Conversely, it is difficult to imagine that social justice can be achieved without the state operating, in some measure, to achieve the public good. A lot of the social welfare and other laws we have in Britain are (at least in theory) designed to secure that good by giving people important rights and entitlements. More generally, positive public actions often require legislation – and the law then becomes a mechanism to hold actors, public and private sector, to account.

Three examples of different sorts – covering virus control, criminal justice and day-to-day living conditions – all illustrate how the law and broader justice system are connected to health outcomes.

The global HIV/AIDS community has long recognised the importance of respect for human rights as fundamental to controlling infection and disease. Indeed, a global commission on HIV and the law reported in 2012. A 2018 supplement confirmed that AIDS remained a disease of the vulnerable, marginalised and criminalised.[2] In general, laws that fail to protect sexual and reproductive rights, that fail to protect people with HIV and fail to protect the rights of women and girls were all antithetical to control of HIV and AIDS. Targeting of LGBT people and banning, harassing or vilifying relevant civil society organisations hindered efforts to control the virus. The Commission was especially critical of anti-sex work laws and laws perpetuating the war on drugs. The Commission saw the law as fundamental to meeting universal human rights obligations. Countries that did not have, and implement, laws that met human rights obligations made slower progress.

All sorts of channels between health and the law flow through the criminal justice system. It has been shown globally that mental illnesses feature prominently among prisoners, as do infectious diseases.[3] A meta-analysis showed that mental illness is at least twice as common among prisoners as among the general population.[4] Of course, prison may cause, or make worse, mental illness. But the review found that a quarter of people who *enter* prison have alcohol use disorder and nearly 40% a drug use disorder. These problems are, themselves, strongly related to adverse childhood experiences which are, in turn, far more prevalent among those raised in deprivation.[5] These findings should lead in two linked directions: preventing mental illness in children as a step towards prevention of both crime and

incarceration; and reducing the discrimination that leads to some groups being singled out for harsher treatment by the criminal justice system.

Deprivation is also more likely to put young people in contact with the police and the criminal justice system, as is membership of a minority ethnic group.[6] In the USA, Black Americans make up 37% of the population in jails or prisons, against 13% of the general population.[7] A study in California used the excess incarceration rate of Black Americans, compared to White, as an indicator of structural racism – a force for health inequalities. In geographical areas with high structural racism by this measure, maternal morbidity after birth was high in Black and Hispanic or LatinX mothers.[8]

The conditions of daily life were addressed in the 2010 Marmot Review, *Fair Society Healthy Lives,* and the *Marmot Review 10 Years On.*[9] We had initially six areas of recommendations, to which we have since added two. They are: give every child the best start in life; education; employment and working conditions; minimum income for healthy living; environmental conditions in which to live and work, including housing; taking a social determinants approach to prevention; tackling discrimination, racism and their health outcomes; pursuing environmental sustainability and health equity together.

In 2013, the English city of Coventry declared themselves a Marmot City.[10] They took our, then, six domains of recommendations and made them the basis for planning in the city involving local government, the health and care sector, voluntary and community services, other public services and the private sector. Greater Manchester followed to become the first Marmot City Region. We now have 50 Marmot places in England, Wales and Scotland.[11] Scotland is developing a national strategy based on Marmot Principles.

Social justice is at the heart of all this activity, but it does not explicitly focus on the law. It could. The first case alluded to at the head of this section – the coroner declaring that two-year old Awaab Ishak died of a respiratory condition linked to black mould in his house – is a case in point. His parents, both immigrants from Sudan, had complained to their social landlord and had been told simply to paint over the mould. This tragedy garnered national headlines and led to change in the law around the responsibilities of social landlords to remedy hazards in their properties.[12]

Each of our domains of recommendations could involve the law in implementation and in holding those responsible to account. A recent international analysis shows how that could relate to work, focusing on workers in health and care.[13] WHO has developed a care compact for health and care workers. It includes, among many other things: protection against violence and harassment; protection against attacks in situations of war/vulnerability; and whistleblower protections. The care compact is not itself a legal document, but the authors of this study examined, for 182 countries, how well national legal frameworks aligned with the dimensions of the care compact. The study concluded that alignment is indeed possible, but there is some distance still to travel to use legal frameworks to protect workers in health and care.

Reduction of health inequalities is a matter of social justice.[14] There are alternative ways to think about this ideal – as discussed, for example, by the Harvard philosopher, Michal Sandel.[15] The most pertinent concept is defined in terms of optimising freedoms. The freedom that matters for health is not the libertarian notion, but rather that version which Amartya Sen has championed: creating the conditions under which people enjoy the agency they need to live lives they have reason to value. A legal framework can be a guarantor of this sort of freedom – see the example of the care compact in the previous paragraph.

The justice system has much to offer in addressing the social determinants of health. Sadly, as Shameem Ahmad's piece in this collection of essays eloquently testifies, one further casualty of a decade and more of austerity in the UK is erosion of the justice system's capacity to perform this vital function. And yet not all is lost. Even in these difficult times, there are examples of pioneering practices in pursuing health through justice. And there is ample evidence that – with a little more focus, a few repairs and some extra investment – an awful lot more could be done.

A civil justice perspective: the law as a health intervention

The UK invests in a universal health service because it is understood that the health of citizens matters. Yet despite free and accessible treatment there are gross inequalities in the UK in health and well-being related to socio-economic status – the so-called 'social gradient'.[16] People at the bottom of the pile die earlier and have more disability than those with higher status. There are well-documented explanations for this gradient – including income, housing, employment and education – which have a greater impact on health than individual biology or clinical care.[17]

What is urgently needed is evidence about the sort of interventions or innovations that might be effective at the individual level in mitigating the damage done by structural inequalities. To the extent that the mechanisms of intervention at the individual level are considered in public policy, they are too often focused narrowly on modifying health (or perhaps more precisely unhealthy) behaviours. From our respective perspectives of public health and justice research, we are both striving to get beyond that, to consider other measures that can be called in aid of improved health and well-being of individuals who are often at the sharp end all sorts of adverse social processes beyond their control.[18] The vast range of social protections and entitlements provided by law gives the civil justice system – which activates those entitlements – an important, and sometimes underappreciated, role to play here.

Law as a determinant of health

Law is a crucial social determinant of health, critically influencing the framework in which individuals and populations live, face disease and injury, and eventually die.[19] Practitioners are often ahead of the policymakers in getting on and fixing the missing link, by forging health–justice partnerships, often to impressive effect. One study of the roots and workings of such partnerships concluded that "Legal issues are embedded in most social determinants of health, making lawyers a necessary part of any strategy to address them, whether at the individual, local, or national level," and insisted, too, on the need to deploy the law as a "lens" through which to make sense of "health promotion, disease prevention, and overall well-being".[20]

Public health theory highlights causal connections between social problems with a legal dimension and morbidity and mortality.[21] The Pan-American Health Organization Commission on Equity and Health Inequalities (which one of us, Michael Marmot, chaired) took the next logical step for the field, stressing the role of legal and human rights mechanisms to safeguard health. As that Commission's final report argued: the law can be a "counterbalance" to unequal power, and consequently, "legal redress provides a vital pathway to correct policies and practices that result in or deepen health inequities".[22] And yet legal remedies are not yet routinely considered by the medical sector as a vehicle for solving problems. By reaching across specialist silos, we can accelerate the change that's needed.

If public policy has sometimes been slow to grasp the importance of justice in the protection of health, that reflects a far wider social lack of consciousness about law beyond crime and the criminal justice system. Representations of law in popular culture focus overwhelmingly on the drama of criminal, not civil, law and "for many people the law *is* the criminal law. Ordinary people do not routinely carry a distinction in their head".[23] It is easy for everyone, including those working in healthcare and public policy, to forget how far the tentacles of the law reach into every aspect of social and economic life.

In reality, a vast range of social welfare law provision prescribes protective rights and entitlements to shield people facing challenging circumstances from precisely the sorts of factors known to harm health and well-being. Legal practitioners deal with individuals facing almost the full range of problems and crises that can affect health, including inadequate income, dangerous housing conditions, homelessness, debt, access to educational opportunities, threats of unemployment, family breakdown, discrimination, and more.

Law and legal services influence health at three different levels. At the national level, law-making can promote public health by measures such alcohol pricing and sugar tax. This is the level in which the public health world has most enthusiastically grasped the potential of law so far. At local level, a wide range of institutional and business policies and practices affect health through, to give just a few of many potential examples, the approach that is taken towards pollution, product standards and the treatment of staff. The law can make requirements in respect of such policies and practices, requirements which it then falls to the justice system to enforce. For example, the broad justice system ensures that public bodies comply with statutory responsibilities in relation to decision-making around health-promoting entitlements to services for poorer and vulnerable groups. Moreover, individual cases can act as a diagnostic tool for failed institutional policies, as exemplified after the death of toddler Awaab Ishak from the effects of unhealthy housing, a case already referred to above.[24] Note that these important and varied mechanisms will not work as they should unless underpinned by a courts system in which rights can be secured, disputes settled, and remedies imposed. In other words, the unhealthy figurative health of our tribunals and courts could have repercussions for the literal health of the community.

Then thirdly, at an individual level, the law and justice system affects personal health in myriad ways. For starters, the law 'prescribes' the individual basic entitlements (in respect of income support, housing and so on) that should guard against social exclusion and destitution. It may also 'prescribe' additional support (in terms of care, say, or disability benefits) to those with the greatest burden of ill health. But vulnerable individuals will often fail to receive such entitlements. Legal advice and support is crucial in ensuring they get what they are due. This makes provision of that advice an important intervention. This form of intervention can have a **preventative** impact: when, for example, cancer patients are automatically offered legal advice on financial issues and employment rights, this can both support patients to work productively, when that might not otherwise have been sustainable.[25] But law importantly has **remedial** impact, too, in seeing off individual immediate crises such as imminent eviction, loss of income, threatened job loss, family breakdown, domestic or elder abuse. In such ways and many more, law and legal services can be regarded as a health intervention: principally by improving the material well-being that supports physical and mental resilience.

Law as a remedy for poor health

We now have two decades of 'access to justice' research from around the world, which has elucidated many two-way links between citizens' experience of legal issues and their health. Particular health-

harming effects have been traced to unresolved socio-legal issues.[26] Every problem along the line of the justice system – lack of knowledge and understanding of rights, lack of advice about how to secure them, lack of avenues for resolution short of going to court, then heavy costs and long delays when a day in court is sought – will directly aggravate these effects. Moreover, individuals living with poor mental or physical health, as well as those who are poor or otherwise socially excluded, are more exposed to all sorts of problems, including difficulties navigating access to the benefit system; long-term indebtedness;[27] and adverse housing circumstances.[28] They are also more likely to have difficulty accessing support and advice for such issues.[29]

From such research we have learned about the causal connection flowing from legal problems towards long-term illness or disability: the results can include acute and chronic stress, physical ill health and a cascade of social, family and employment crises in previously healthy people.[30] Stressors experienced repeatedly or over a long period of time, including stressful living and working conditions, are associated with high blood pressure, development of diabetes, and ischemic heart disease. In cases such as asthma caused by poor social housing, legal services might be able to secure improved conditions and thereby exert a direct power to improve health that medical services cannot.

Also pertinent is the increasing attention rightly being paid to the impact of early life experiences, both in creating ill-health and in perpetuating cycles of deprivation. Children and adolescents exposed to adverse experiences run into many more physical and mental health problems as adults.[31] The kind of adverse experience that matters here could be something direct, like abuse, but can also be the toll that is taken by living in poor or insecure living conditions. Children growing up in chronically stressful environments can suffer harm to the development of their nervous, endocrine and immune systems, ultimately leaving them more susceptible to illness and more prone into engaging in health-harming behaviours, such as substance abuse. Early information and advice about entitlements to services and benefits and, for example, employment protection for expectant mothers within maternity services,[32] can break cycles of deprivation by ensuring that the conditions into which children are born support healthy development and positive life chances.

However, 'legal needs' are not currently part of the routine language or practice of healthcare. This position could usefully change – and indeed, imaginative practitioners on both the legal and medical side are not waiting for scholars and theorists to tell them how, but getting on and showing how it can be done.

A holistic therapy: health-justice partnerships[33]

Given the links between civil justice and health it does not take a big leap of logic to imagine that collaboration between health services and social welfare legal advice could be valuable. Such health–justice partnerships have grown up at the grassroots in the UK, USA, Australia and Canada [34]. [35]Such partnerships embed free legal advice in primary and acute healthcare settings with lawyers integrated into, or co-located with, the healthcare team: free legal advice is provided in healthcare settings to poor and vulnerable groups, with the express aim to address the social determinants of ill health.

The benefit of such partnerships includes solving immediate health-harming socio-legal crises; mitigating health-harming individual circumstances; and improving capability to deal with future problems. One study of such collaborations has argued that, when it comes to important determinants of health, "The most powerful lever at our disposal... is the law."[36] Taking a holistic approach to

healthcare, these partnerships draw on legal practitioners with the skills to address the many health-harming social and economic needs.[37] They are a promising practical means for making social welfare law part and parcel of the approach to improving the health of citizens. There is ever-more evidence and anecdote about the value of such partnerships not only to patients, but also to health professionals, such as GPs dealing with social problems.[38],[39] The words of one GP in a partnership elucidate:

> "We see a high proportion of social problems... I'd say there's a social element to at least a third of the consultations that I deal with... It's a lot easier to medicalise problems than to address social determinants... We have 10 minutes. We often have multiple problems to deal with... and sometimes it's easier to ignore a problem than to try to take it on. ... The co-location element [of the health-justice partnership] is important... Patients are really delighted when you say 'We've got this service and it's in the next room or it's one floor up'. Patients really like that." [40]

The development of health-justice partnerships in England can be traced back to the mid-1980s, when it was first suggested that GPs were well-placed to spot patients in financial difficulties but not to give them the advice on things like benefits that they needed to overcome these.[41] But such progress as there has been has grown up from local initiatives and enterprising experiments. There has never been any concerted national policy or funding dedicated to this field. While there are now policies to encourage NHS collaborations with the voluntary and community sector aimed at addressing the social determinants of health,[42],[43] we have not yet seen the same recognition for role of the legal advice sector. The arts, exercise and all manner of community activities and groups loom larger in the 'social prescribing' discourse than legal advice.

Financial support for health-justice partnerships comes from various sources including charities, local authorities and the NHS, but such funding streams as exist are mostly short-term and unreliable, affecting the stability and longevity of the partnerships. A common reason for these partnerships to close is the money running out.[44]

Civil justice as medicine for struggling health services

It is now generally accepted that an overwhelming proportion of health problems trace to social roots, rather than depending only on the biology of the individual in isolation. Exhausted health service staff need not fear being asked to fix social problems in isolation: only society as a whole can do that. And here's the thing. If we can factor the law and justice system into our thinking about health in the right way, there should be less for medics to do, rather than more. Going right back to those crude polling questions about voter priorities which we invoked at the top of the paper – on which GPs and hospitals always rate highly, but courts and legal advice never register – recognising the damage that the inadequacies of legal support are doing to health service could be a way to reset the political discourse (or rather the lack of it) around civil law.

While NHS GPs struggle to meet the increased demand of an ageing population and rise in multi-morbidity,[45] a lot of their time is being consumed by non-medical social problems or medical problems with a social cause. Even a decade ago, the time GPs spent on social issues that are not principally about health were already estimated at a cost to the health service of almost £400 million a year. The top categories of non-medical issues involved were found to be personal relationship problems, housing, unemployment/work related issues and welfare benefits.[46] Patient demand for such 'non-health' work places extra strains on GPs and their practices, particularly in deprived areas, and so

exacerbates health inequalities.[47] GPs report that patient health, GP workload and practice staff time have been adversely affected by greater patient financial hardship.[48] Recent data collected directly from GPs suggested one in five GP appointments (amounting to 200,000 consultations every day) are taken by 'patients' with non-medical issues such as seeking advice about debts, relationships or housing.[49] And the issues for the NHS don't stop with family doctors' surgeries. In 2024 the Red Cross published a report on high intensity users of A&E departments and concluded that deprivation was driving repeat emergency hospital visits.[50]

Conclusion: a silo that cannot stand

Having examined the gap between justice and health from both sides, it is plain that the traditional division between them is damaging and confusing and cannot be allowed to stand. One of the central lessons of public health scholarship is, as we have explained, that social injustice is making people sick and ultimately costing lives. The right framework of laws and social entitlements, together with effective and accessible courts and tribunals that empower citizens to secure their rights, is one important means of moving towards social justice and thereby bolstering health. From the point of view of civil justice practice and advice, we can see that the law touches upon virtually every imaginable health-harming social problem – from poor housing to debt, to unfairly withheld medical services. To optimise population health, reduce health inequalities and relieve the crisis in primary care, something more than increased expenditure on treating disease is needed. The need is for a truly strategic approach addressing all the social causes of health problems.[51]

The Labour government's talk of making a "pivot" towards prevention in the NHS could be taken as a nod in that direction. But many other governments have made similar noises before. If this is to become a real shift backed by serious interventions and a suitably rewired health service – the sort of shift that might stand a real chance of making the health service work better – then the law and justice system will need to be a big part in making it happen.

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Why MPs are a flawed substitute for legal advice

Dame Karen Buck, former MP

Time was, MPs attended upon their constituencies for the most important civic occasions and to seek re-election. The very concept of 'constituency casework' and 'advice surgeries' would have been alien. In his (rather wonderful) autobiography, Roy Hattersley recounts his first election hustings in 1951, during which George Darling responds to his predecessor's reputation as an absentee MP by "making a solemn promise to return to the constituency every three months and, during the Saturday of his visitation, make himself available for assistance and advice". Yet heaven now help those parliamentarians who do not take this aspect of work seriously. Responding to the concerns of individual constituents has become as central to the role as the more traditional functions: legislating, scrutiny and forming the pool from which government ministers are drawn.

The sheer weight of casework on MPs' time has inevitably triggered a backlash. It's said that they "are now little more than glorified social workers", distracted from the serious business of law-making. And yet if there is one thing constituency casework offers, beyond satisfaction and potentially some electoral benefit, it is insight into the efficacy – or lack of it – of the laws Parliament passes. To that extent, it may increase the aptitude for making laws, at the same time as eating into the time available for doing it. In terms of what we should want from our Parliament and our MPs, the casework question is a delicate balance. But it is balance that is – as I will show – liable to get out of kilter when the (broadly defined) justice system isn't working as it ought to.

From the vantage point of the citizen in difficulty, by contrast, excess reliance on busy and generalist MPs will rarely be optimal, at least when compared to the alternative of dedicated and specialist advice. Yes, the MP may have some clout, but they very often won't have the know-how to get a particular problem resolved. And there will be wild variation in their personal inclination and electoral motivation to go the extra mile for their constituents. It is, in other words, a lottery as to how much help citizens can expect.

So, what signs of excess reliance are there? The casework role has increased exponentially – it rose 8- to 10-fold during my 27 years as an inner-London MP, between 1997 and 2024. Admittedly, the decline in the number of local councillors, from around 75,000 before 1974 to 18,000 today, must have had some effect, leaving MPs to pick up some of the casework they used to do. The bigger story, though, starts with the pressures on, and complexities of, the welfare state which mean that citizens need ever-more advice and legal support to secure their rights – at the same time as precisely this sort of support has been restricted. Moreover, the fall-back of recourse to the courts has got costlier and more restrictive too. The upshot is that MPs nowadays see many people who would ideally either have resolved things through specialist advice without having to go to court, or else gone ahead to a tribunal, and achieved a timely resolution there. When those routes are closed off, a lot of traffic is diverted to the door of the constituency surgery, which can be relied on to open, even if it's not the most suitable port of call.

At some point, there will be a price to pay in terms of our political processes too. Even with the most committed local MP, there will be a point of overwhelm, where the volume of cases reduces how much attention can be given to each, and impedes their hopes of achieving anything on the national stage. If we don't want our politics to end up in this place – where it fails the constituent and frustrates the effectiveness of their representative – then we need to dig into what exactly has driven the explosion of casework, and ask what can be done to contain it.

Needs for surgery

Four drivers of casework are worth disentangling. Firstly, amid a prolonged squeeze on living standards and funding for most public services, the rising needs of citizens have far outstripped the capacity of public agencies. More and more 'gatekeeping' has come into effect, with additional decision-making and appeals and delays at different levels of the process. This is frequently complicated by greater localism, as in the case of some parts of the benefit system since 2013. Second, with all this rising complexity, the level of functional and particularly digital literacy required to navigate the system has risen. Digitalisation has been a benefit for many but a massive additional barrier for many others.

Third, expert and especially legal advice have been cut. There was the squeeze on legal aid, consequent upon the 2012 Legal Aid, Sentencing and Punishment of Offenders Act, and then the assault on local authority budgets, after which access to advice and advocacy fell sharply. As Chair of the All-Party Parliamentary Group on Access to Justice, I helped lead the inquiry into the state of Legal Aid, which highlighted the alarming spread of "advice deserts" across the country, a phenomenon that the Law Society has recently mapped.[1] Taking evidence from lawyers and clients, our cross-party panel heard compelling stories of where the right help at the right time changed someone's life – in some cases changing the law and public policy – yet at the same time, heard about a system in crisis.

As part of the process, we surveyed MPs, partly to get a sense of the effect upon their work. That 2018 snapshot revealed the sheer scale and variety of casework, and how inextricably linked it was to the condition of legal and advice services:

> "Half of the 249 MPs responding to the survey believed that the volume and complexity of casework had increased in the previous year... Over the course of a month, four out of five MPs refer a case to Citizens Advice, five in ten to a Law Centre and four in ten to a local solicitor. Almost one in three said they refer to the Bar Pro Bono Unit or an equivalent."

> "Nearly 90% of those MPs surveyed were dealing with benefits issues, almost 75% with housing (rehousing, possession, homelessness, repairs) on a weekly basis... Without swift and early intervention such problems can escalate to the point where people are destitute or at risk of losing their homes, and all too often by the time the constituent reaches their MP the problem has become more acute, complex and expensive to resolve."[2]

My inner-London constituency was not, like some, an advice desert: both Paddington and North Kensington have Law Centres, Citizens Advice Bureau – plus more specialist advice agencies on housing and benefits, and (still, just...) some firms actually taking Legal Aid clients. Yet despite this relative advantage, advice services scarcely touch the sides of demand, for a variety of reasons. Squeezed rates have rendered Legal Aid cases unviable for many providers; at the same time, the wholesale removal of Legal Aid from some fields of work has shrunk the areas within which they can operate. As local authority budgets have come under pressure, funding for the advice sector has become increasingly unstable, unreliable and tightly targeted. My local Law Centre had no support at all from the council for many years, and while the legal team punches well above its weight, there is no escaping the fact that there is only one housing lawyer!

The fourth and final big factor – after overwhelmed substantive services, the rising challenge of accessing them, and squeezed legal and advice services – is creaking and sclerotic public administration. The time it takes to resolve complaints or challenge bad official decisions has risen significantly. And when more people are dissatisfied with administrative decisions, more may seek redress at a tribunal. When the tribunals are themselves pressed for resources, the upshot is the growing backlog evident in the official statistics, which represents another group of citizens stuck in limbo.[3] All these delays have a catastrophic impact upon the most vulnerable, including, but by no means limited to, many with poor mental health, ranging from psychosis and PTSD to severe anxiety and depression. In my constituency office, expressions of suicidal ideation – frequently backed by medical evidence – were so common that the toll on staff was impossible to ignore.

Home truths

I'm very aware that what I saw in Westminster North saw was not necessarily the same as colleagues in other parts of the country. The overall volume of casework was higher than in many places, the content was also different.

Throughout those years, immigration ran second in the table of constituency issues, an element of the caseload initially dominated by asylum applications. With substantial Iraqi, Sudanese, Kosovan and Lebanese communities among others, we were soon dealing with thousands of appeals for help a year, often via legal representatives of variable quality, but almost completely unable to get any response at all from a beleaguered Home Office. As the context shifted, with dispersal systems put in place, the emphasis moved towards visa queries, but successive crises still required my committed team of four and I to burn midnight oil. The invasion of Ukraine brought an emergency temporary resettlement scheme; the fall of the Afghan government saw no equivalent scheme – but still led to local hotels and schools suddenly accommodating hundreds of refugees, and required a level of support which fully occupied our office.

Delays were baked in to every level of the system, to the point where a substantial part of our work involved responding to applicants' legal representatives frustrated at not being able to get a response or a hearing date. The government engaging efficiently with legal representatives and legal processes is, in itself, an important feature of a well-functioning justice system. When it doesn't happen, local MPs end up becoming an imperfect way to attempt to fix that missing link. But there are limits on how much advice and support they can offer in guiding constituents through complex systems that cannot efficiently resolve problems and uncertainties.

However, it has not been immigration but the housing issues that have – consistently, year on year – dominated the caseload. Basic needs (homelessness, overcrowding, disrepair), the problems associated with my seat having the largest proportion of private rented accommodation in the country (insecurity, affordability, disrepair again), and the complex interaction between housing and social security restrictions combined to generate several thousand cases a year.

Housing law is well-defined, especially in respect of homelessness duties, and my tribute to the housing lawyers who have responded to my pleas over many years is heartfelt. Despite their efforts, in any average week, my office could receive anything from 30 to 100 new housing-related cases, requiring some urgent assistance – an imminent possession hearing or discharge of housing duty, a bailiff quite literally on the doorstep... any of these would demand that other work immediately be put on hold.

Many of these emergencies would not arise if citizens could rely on early access to legal and other specialist advice – or indeed efficient public administration. On one occasion in 2023 I stayed on the phone for most of a morning with a terrified tenant whose landlord was, as we spoke, attempting a wholly illegal eviction – while at the same time trying to reach the council's Tenancy Relations Officer and getting the police to attend. Via a local school, I had to head off an eviction for arrears of a family where, it transpired, all the information from housing to benefits, was still registered in the name of a father who had been absent for more than five years. The council had been told, but never seemed to update its records, and continued to try and communicate through him: word of the family's true situation had not reached the court.

Sometimes the strained housing system simply cannot provide even the essentials, despite the best efforts of everyone working within it. In my final spell in Parliament, my office was called by a tenant who had had a possession order made, in a hearing where she wasn't present. There should have been a duty solicitor present at the court but on this occasion, there wasn't – and my constituent was terrified of losing her home. My senior caseworker helped with a hearing to set aside the previous order, explaining how the last hearing had been missed due to ill health and poor communication. He also found deficiencies in the so-called Section 21 'no fault' eviction notice, and happily, at the 'set aside' hearing, the substantive possession order was also dismissed. Things worked out that time, but they don't always. No-one should have to rely on their MP happening to have a good caseworker, and a lucky day at a hearing, to keep a roof over their head. And this is true even when notional rights are getting stronger. It's good news that the current Renters' Rights Bill is abolishing Section 21 evictions, but tenants need to be able to know about – and enforce – their new rights. And that takes a strong advice and justice sector.

A striking proportion of homeless families in recent years have included at least one child with special needs – something which, even if monitored, is not analysed or factored into decision-making. As the housing crisis escalated, ever-more families would approach my office for assistance because frequent moves, first from a private rental to emergency housing, then from emergency housing (usually a

hotel or hotel annexe room) to what could be the first of many Temporary Accommodation homes, often some distance away. One family with an autistic child with an Education, Health and Care Plan (EHCP) had long been in temporary accommodation out of borough, in North London. They received a letter telling them that they were required to move to alternative Temporary Accommodation with a week's notice. This would involve starting the EHCP again mid-term in GCSE year. Another family were relocating from a hotel having become eligible for housing assistance. This required either finding a new school (again, mid-term, with no notice, and all for the sake of totally insecure, nightly paid new accommodation) for a child with paraplegia, or else transporting that child for an hour-and-a-half each way to her current school. If you were a parent in this situation, you would surely need advice – proper, expert advice.

Toothless rights

Supporting homeless households with suitability reviews became the single biggest demand on my caseworkers' time – whether this was something we did ourselves or, where a practical means for doing so existed, referred on. And it is a telling example of what you might hope the justice system would do (and perhaps used to do) and what it actually offers today. For while many decisions are or could be challengeable in principle, the length and uncertainty of the legal process was a profound deterrence for many homeless households.

As we tried to step in and provide some of what the law either didn't or wasn't felt to offer, we were always conscious of a very real dimension that shows nowhere in any official statistic – the emotional dimension. Anxious people, at a time of crisis, often need a real investment of time: time to explain the options, the sharp constraints and the painful trade-offs. "Don't leave your tenancy before the bailiffs are due, however traumatic their arrival may be, and however much the eviction is without fault on your part," we would have to explain, "because it can damage your homelessness application." Or: "Please don't refuse the offer of Temporary Accommodation, even if it is the other side of the city from your children's schools, because then we have to face an intentional homelessness decision." Committed constituency offices will gradually absorb these sorts of maxims from experience, but without expert training they can never be sure they are giving all the right advice, particularly for constituents in more unusual circumstances.

Alongside the urgent cases there would be several hundred important, but less-urgent cases, in such areas as disrepair and overcrowding. Poor housing conditions have been a long-term preoccupation – again, not surprisingly given a local history which has encompassed the slums Dickens described and Booth mapped, and then the tenements in which Rachman and Hoogstraten defined bad landlordism. Under-recognised in the aftermath of the horrors of the Grenfell disaster (just beyond the borders of my constituency) was that inner-West London already had the dubious distinction of being the site of several of the worst residential fires in post-war Britain. But when families raised a concern about unsafe or unhealthy conditions, all too often they landed up with a new worry: the fear of retaliatory eviction, which can often be the most pressing worry of all. This shouldn't happen, and where householders were well-advised on their rights, and everybody was confident in their ability to enforce it, it wouldn't happen. But with the advice and justice sector in its present condition, that is not the world we are in.

But of course, the law itself also needs to give the system something to enforce. On this count, the position varied. For many years, a strong working relationship with the Residential Environmental Health team paid real dividends in private and Housing Association properties. An inspection under

the Housing Health and Safety Ratings system, underpinned by the threat of enforcement, was often sufficient to deal with a problem of disrepair (even if it was sometimes followed up with a Section 21 eviction).

Where it ceased to work was in the council's own properties, where no enforcement power existed. Mrs B was one such council tenant, where my representations simply failed to generate a response. When I knocked on her door during an election campaign, I found the ceiling down across two rooms thanks to leaking from a privately owned flat upstairs. As so often, unresponsive private owners, not infrequently based abroad, prolong the process of securing repairs beyond tolerable limits. I found Mrs B an excellent lawyer. She was well, and ultimately successfully, represented. Even so, the process took so long, her husband died in the meantime, never seeing either the repair completed, or compensation paid.

I had a similar experience with Mr C, who was wheelchair reliant, in an adapted flat that would have been perfect for his needs were it not, again, for a missing ceiling. By now deeply sceptical about how long a legal case would take – bearing in mind any less-formal representations would be shut down for the duration, as no housing provider will talk to the MP while a legal case is pending – I ended up with the time-honoured fall-back of getting a TV camera in to name and shame. The job was done. Time to start immediately on the disrepair to the wheelchair ramp leading to the front door, and another year of correspondence.

Spiral of strain

Inevitably, financial distress and housing issues feed off each other, just as both interact with poor health. Sorting out a debt problem or a benefit entitlement can be the key that unlocks a housing problem. Legal and other expert advice, and ultimately the courts themselves, should be accessible to resolve any one of these problems, and thereby kick off a virtuous cycle in which other issues might then be resolved. But when they are not, a vicious cycle becomes more likely. And this is true in spades in an environment where underlying entitlements are being cut back.

A raft of measures in the 2011 Welfare Reform Act and subsequent 2015 legislation – restricting Local Housing Allowances, imposing the Benefit Cap and the "bedroom tax" on social tenants with a spare room – had a direct impact on housing in my own borough. Together with the charity Z2K, I soon found myself working on hundreds of cases where benefit restrictions had led to arrears and landlords seeking possession.

Such restrictions then placed an ever-greater premium on those benefits – specifically Disability Living Allowance, and its successor Personal Independence Payments (PIP) – which conferred exemption from some of the harshest cutbacks, generating vast additional demand for advocacy in this area. With an increasing proportion of these applications turning on the client's mental health conditions, it would have been valuable to have had more support with initial form-filling and attendance at tribunal hearings, but this was rarely the case; the lack of such support inevitably ended up creating more work down the line. One constituent was refused PIP for her non-verbal adult son, who had constant fits and insufficient risk awareness to cross a road. Another was initially awarded no PIP 'points' for her PTSD which, after her trauma of seeing her children killed in front of her in a war zone, left her almost unable to carry out everyday functions. The justice system needs to be there to put these things right in an

accessible and timely manner, but it will itself be strained when too many problems of this sort are piling up on it at once.

The fact is, when so many components of the machine are under stress at the same time, something has to give. One the one hand, swathes of the welfare state now feel as if they are in a constant condition of emergency. Employment, incomes and housing are precarious, adding to the pressure on already vulnerable communities who have other problems to cope with – poor mental and physical health, language and communication barriers. An ever-rising number seek help only at the point of crisis, not least because the system lacks capacity to intervene earlier, as any time spent in either a county court housing possession hearing or an MP's surgery attests. And at that point what people need is good representation, which in turn relies on there being the time to put the case together, sometimes in the face of absent, confused and chaotic evidence.

It is a demand that asks a lot, and all too often a demand that goes unanswered. MPs' surgeries are often a last-gasp place to try when other, more suitable help is nowhere to be found. But as the caseload numbers rise, even dedicated politicians with superlative staff can't give every case the attention that it needs. Politicians know this. The good ones, at least, surely worry about it. Which might make you wonder why more of them don't campaign vocally for a well-resourced and accessible justice and advice sector.

The mostly young and far-from-well-paid caseworkers who helped me over many years have my unbounded admiration, as do those amazing people who continue to operate legal aid services on a shoestring. I'm awed by what they do in the face of the storm of need and desperation. I'd be happier still if it were less essential.

Endnotes

1 The Law Society. 2024. Legal aid deserts. Available from: https://www.lawsociety.org.uk/campaigns/civil-justice/legal-aid-deserts/.

2 All-Party Parliamentary Group on Legal Aid. 2018. MP Casework Survey – Findings – September 2018. Available from: https://www.apg-legalaid.org/sites/default/files/APPG%20on%20Legal%20Aid%20-%20MP%20casework%20survey%20findings%207%20Sept%202018.pdf.

3 Ministry of Justice. 2024. Official Statistics – Tribunal Statistics Quarterly: April to June 2024. Available from: https://www.gov.uk/government/statistics/tribunals-statistics-quarterly-april-to-june-2024/tribunal-statistics-quarterly-april-to-june-2024.

The law and democracy: Cherish both, but keep them distinct

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In his *Discourses on Livy*, Machiavelli claimed that "[w]here a thing works well on its own without the law, the law is not necessary; but when some good custom is lacking, at once the law is necessary."[1] What about where the 'thing' is democracy? Can a democracy work well without the law? And if a democracy is not working well, can the law help?

A popular view holds that law and democracy are entwined. Lord Bingham, for example, the senior Lord of Appeal in Ordinary[2] from 2000 until 2008, contended that democracy was a precondition of the rule of law.[3] In an October 2024 lecture in Bingham's honour, the Attorney General, Richard Hermer KC, reversed the order of priority. He claimed that "the rule of law – both domestically and internationally – is the necessary precursor to … democratic values".[4] These claims suggest a way of approaching the questions I have posed. Before we can assess them, we need to know more about the constituent parts: the rule of law and democracy.

A singular virtue

The rule of law is a virtue of a legal system. In an account owed to the legal philosopher Lon Fuller, for a regime to achieve that virtue its laws must be general, publicly promulgated, non-retroactive, sufficiently clear, consistent, possible to comply with, and relatively constant through time.[5] Yet even these features would do little good if officials disregarded the law. A further important condition emerges: officials' actions should be congruent with the law.

Compliance with the rule of law can be valuable in various ways. A society which complies with the rule of law can, for example, secure a kind of freedom for citizens which no other regime could give: it is only if we have legal rights, protected by a system which complies with the rule of law, that we can be free from arbitrary and dominating influence. For the same reason, the rule of law may ensure a kind of equal standing between citizens. And the ideal may also contribute to good government: it reduces arbitrariness and may lead to better decisions. So there can be a lot to celebrate in a system which complies with the rule of law, and a lot to fear about its loss.

I have argued elsewhere that there are reasons to be concerned, on rule of law grounds, about the changes made to the legal system in recent years and decades.[6] Two threads are particularly apparent. The first is the policy movement, increasing in prominence since perhaps the 1980s, which characterises litigation as a failure and proposes settlement of claims (especially through mediation) as a better solution. This movement stems from a deep but ancient problem with legal systems: they are very expensive to use. But it reacts to that problem with a solution antithetical to the rule of law: mediation itself does not seek to resolve cases justly according to law; it tries to get parties to negotiate a compromise. A vivid recent acceptance of this is the statement of a judge, when ordering parties to mediate, that the process leads people to "recognise the desirability of settling for less than their strict legal rights".[7]

The second thread is the attendant downgrading of legal disputes with a lower value, and prioritisation of those where more money is at stake. Consider, for example, the Ministry of Justice's report from December 2023 that the average time for a claim for less than £10,000 to come to trial is now over a year. That is almost 20 weeks longer than the same process took in 2019. These legal processes do not need massive investment, but they are not a priority, it seems, because (unlike the high-value claims) they do not make money for the state. Such claims can be steadfastly denied right up until the eve of trial, and no sanction will be incurred; the unscrupulous can therefore delay the day of reckoning, or avoid it altogether if people give up or are bought off along the way. This is a rule of law concern because facts other than the legally relevant ones – who is legally obliged to whom, and for how much – become material.

Tempting tangles

Are these rule of law concerns also democratic concerns? I have written elsewhere that there is a danger in assuming that those two ideals march hand in hand: not every rule of law problem is a democratic problem, and vice versa.[8] Hermer's account gets this wrong. He claims that we should endorse a "substantive" account of the rule of law pursuant to which "the law must afford adequate protection of fundamental human rights"; and he condemns accounts like Fuller's as the "purely procedural and formal conception that populists and authoritarians can themselves so often use as a cloak of legitimacy". There are a few errors here.

The first mistake is to think that it is profitable to distinguish between 'formal' and 'substantive' accounts of the rule of law.[9] Accounts like the one I have presented place substantive constraints upon the content of a polity's laws, and there is no helpful sense in which they are described as merely 'formal'. The next mistake is larger. The claim that the protection of human rights is part-constitutive of the rule of law reveals an attempt – pervasive among lawyers – to try to stuff all the political values of a society

into the concept of the rule of law. This makes it harder to keep separate the different political values a community should promote and is therefore an intellectual mistake.[10]

Even so, some stains on the rule of law are also stains on democracy. To see which, and to know when a rule of law problem is also a problem for a democracy, we need to know more about what democracy is. A democratic regime is, roughly, one where the governed are themselves the governors; it is a regime of self-rule.[11] A representative democracy is one where the rules which determine who is entitled to govern incorporate the voice of the governed. Yet to keep the link with the basic regime of self-rule, it is not enough that the governed are merely consulted: they must be able to influence the outcome (that is, who is to govern), and the opportunity to influence must (across at least some dimensions) be equal. The customary way of exercising democratic influence is through a vote, where each vote counts equally.

Hermer talks, though, of democratic *values*, not democracy itself. 'Democratic value' is most naturally understood as referring to the intrinsic goods a democratic political arrangement constitutes or promotes, or to the norms that support democratic political arrangements. Whether there are such goods is a massive and urgent question in a contemporary society with remarkable discontent with democratic methods of governance.

At least one important promise of democracy is that it avoids the ills of oligarchy or authoritarianism. Many such ills are instrumental: oligarchic regimes tend to be corrupt, and corrupt regimes govern poorly. Democracy promises a better form of government (though it is ultimately an empirical question whether it keeps its promise). Another vice of oligarchy or authoritarianism, which democracy promises to cure, is that it is inherently inegalitarian: the governed do not stand in relations of equality to one another because there is an asymmetric power between the governed and the governors.

Why think that compliance with the rule of law is a necessary precondition of the promotion or constitution of that kind of equality? This is rarely spelled out explicitly. But here is a tempting argument: certain types of legal rules are necessary foundations of a democracy (and therefore of democratic value); and adherence to the rule of law in respect of those laws is therefore necessary for democratic value. Let me develop that argument – and explain why even this attempt to sustain a necessary connection between law and democracy fails.

The rules and who rules

Any political system must have rules to determine who governs. The distinctive feature of such rules in a democracy, as I have said, is that they must provide a mechanism for the voice of the governed to be expressed – and to allow that expression to influence political outcomes. Let us, therefore, consider how the rule of law might promote (or undermine) democratic values in respect of two sets of rules that are necessary for a democracy to function: the rules which determine the distribution of power to would-be rulers; and the rules which govern who is entitled to participate in that distribution, and on what terms.

To illustrate my first category, consider the distinction between presidential or parliamentary systems. Both such regimes must have systems for the counting of votes, but votes are counted (and outcomes therefore determined) differently depending on the rules setting up the system. Similarly, any system with multiple voting districts must establish how those districts are delineated. All such rules constitute the 'rules of the game', defining how power is allocated to rulers.

Democracy is not possible if such rules are not enforced. This is a manifestation of the last condition of the rule of law, the requirement that laws be followed by officials. The events in Washington DC on 6 January 2021 illustrate the point. Donald J. Trump and his supporters sought to have the vice president of the time refuse to count electoral votes certified and submitted by several states. Success would have entailed the seizure of power by those unauthorised under existing laws. This would have been an undemocratic event. Concerns that votes be counted are not ones we have had to contend with in this country. But perhaps few in the United States had thought, prior to January 6th, that it remained a concern in that country.

This shows a contingently necessary connection between the rule of law and democracy. That phrase might look paradoxical. How can something be contingent and necessary? My point is that compliance with the rule of law is necessary to realise democratic value only if the underlying rules promote democracy. Consider, to illustrate, gerrymandering (manipulating electoral boundaries in an attempt to influence the outcome of elections) in the United States.

Sophisticated computer models can draw electoral districts designed to perpetuate the ruling party's success. An election held pursuant to grossly gerrymandered districts results in a less democratic outcome, and less democratic value, because the basic equality that democratic systems aim to constitute is not achieved. Yet elections held under such districts may adhere scrupulously to the rule of law. And adherence to the rule of law does not guarantee the promotion of democratic values when the laws themselves are undemocratic.

The second category of rules includes who is entitled to vote, and the conditions under which they are entitled to do so; it also includes matters such as the funding of political campaigns. Rules like these are necessary for a democracy: one cannot have a system of voting without some rules on who is entitled to vote.

When such rules are not enforced – when, for example, eligible voters are denied access to the polling station – that is undemocratic. But the connection, again, is not a necessary one. Imagine a society where women are not entitled to vote, or which requires voters to present an identification card inaccessible to most citizens if the voter's ballot is to be counted. Those rules might be laid down in advance, very clear and properly enforced. The system might comply with the rule of law. But there would still be a profound democratic deficit. If the votes of women were – contrary to law – counted, that would be a democratic advance (but a deficit in terms of the rule of law).

Arguments about campaign finance exemplify the challenges faced in practice. In the United States, the Supreme Court has held: the expenditure of money is speech, restrictions on campaign finance are therefore an interference with freedom of speech, and therefore that certain kinds of campaign finance laws are unconstitutional.[12] It is a matter of dispute whether that is a democratic advance (though the answer to that question is, by the Supreme Court's fiat, not a matter of *democratic* debate). Absent some restriction on the financing of electoral campaigns, there is a risk that money (not votes) buy influence; and this worry is especially acute where there are drastic inequalities of wealth. These concerns are not local to the United States. Elon Musk's flirtation with Reform UK – rather belatedly – aroused political interest in the risks posed by the lax regulations on foreign business donations to political parties.

If such rules are to succeed in their aims, the system to enforce the rules must also be just; otherwise the rules can be ignored with impunity. This requires a court system with adequate resources and

staffed with willing and able judges; it also requires that there be a system to enable litigants to enforce the rules in question.

These reflections reveal a few points. First, certain legal rules are conceptually indispensable for democracy. Second, compliance with the rule of law in respect of those rules does not ensure democratic value. The democratic value promoted by compliance with the rule of law depends on the content of the laws it upholds.[13]

A third important point is that a focus on laws that are conceptually necessary for democracy risks neglecting other laws that contribute to democracy's functioning and flourishing. For example, freedoms of expression and assembly, though not conceptually necessary for democracy, are crucial for its effectiveness and for its value to be realised. There must be protections, for example, to ensure that voices are not silenced; it may also occasionally be possible to justify limits on expression in the name of democracy. Restrictions on exit polls, for example, may justifiably be imposed to prevent voter behaviour from being influenced during elections by arbitrary facts.

Laws are conceptually necessary to establish democracy, but the connection between the rule of law and democratic value is limited. For this reason, the philosopher Jeremy Waldron aptly described the rule of law as "but one star in a constellation of political ideals", a constellation that also includes respect for human rights and democracy.[14] Each star burns its own light and we should therefore see each light separately. One reason that clarity is important is that these different values can conflict. Adherence to the rule of law might promote democracy – but it might also impede it. Political values, including the rule of law, may sometimes need to be balanced or even traded off with one another. The need to do so is one reason why democracy is necessary: to decide, in a manner which experts cannot, how to balance such values.

I want next to consider how good custom relates to democratic value, and how the intrusion of law can promote (or undermine) that value.

Over-ruled?

In 2019, Prime Minister Boris Johnson advised the Queen to prorogue Parliament for five weeks. This was the longest prorogation since 1930 following the longest session of Parliament since 1653. It was widely believed that Mr Johnson sought an unusually long period of prorogation to negotiate an agreement with the European Union without the scrutiny of Parliament. The Supreme Court held in the case of *R (Miller) v Prime Minister* that his advice to the Queen was unlawful and that the prorogation was, as a result, "unlawful, null and of no effect".[15]

The prerogative to prorogue Parliament was, historically, insulated from judicial review. Its proper use depended on conventions requiring prime ministers to act responsibly. Mr Johnson had resolved to use the prerogative for an improper purpose – to help him to escape political scrutiny. It is possible that the Supreme Court felt obliged to intervene for that reason, to prevent Mr Johnson's abuse of his own discretionary power. If that is the right diagnosis, it is a regrettable turn of events. What was previously a matter of political convention became governed by legal rules. And there is an anti-democratic concern with any society where 'the law rules'. Since the law cannot rule without humans to interpret and apply it – in this case, the eleven Supreme Court judges who heard the case – the 'rule of law' can mean the rule of those officials charged with enforcing the law (rather than those with democratic legitimacy).[16] That is in obvious conflict with the egalitarian nature of democratic value.

Some might respond that this criticism is a travesty, the stuff of tabloid hyperbole. The court held that the advice to prorogue was unlawful because it had the "the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive".[17] The judges were, the objection might run, acting to safeguard democracy.

Any such retort is wrong on the facts. The relevant order in council, approved at the Privy Council meeting held by the Queen on 28 August 2019, stated that Parliament would be prorogued "no earlier than Monday the 9th day of September".[18] Parliament returned from summer recess on 3 September 2019. It follows that Parliament could have intervened to reverse the prorogation. It chose not to. It chose, instead, to use its legislative time to pass a different Act, the European Union (Withdrawal) (No.2) Act 2019 (the so-called anti-no-deal Act). As Timothy Endicott explained, the Supreme Court "nullified a prorogation that Parliament did not choose to nullify".[19] Rather than rescuing parliamentary democracy from executive fiat, the court sought to rescue parliamentary democracy from itself, a different proposition.

Machiavelli's observations about law and custom suggest a tension at the heart of democracy. Laws are indispensable to the establishment of democracy, and certain laws are necessary for the flourishing of democratic value. Yet democratic value may at times be promoted by the absence of law, and the advance of legal governance can undermine democracy and democratic value. A proper balance is difficult to sustain, requiring as it does that political leaders act only for certain reasons and purposes – including where that is not in their immediate interests. It can seem an impossible ask.

Our legal system has many defects and needs our attention and support. Done well, that may strengthen the justice system and improve the rule of law. Whether it would strengthen our democratic institutions is another matter. We cannot save our democracy through the accretion of rules. And the rule of law is no substitute for the cultural norms that allow democratic systems to thrive. It is important to defend and promote the rule of law, yet the increased prominence of that value in our societies, and the expansive claims sometimes made about it, should be treated with regret and caution.

Optimism is hard. But in a world of increasing democratic discontent, it is democracy, not law, which most urgently needs our support.

Endnotes

1 Machiavelli, N (trans Mansfield, H, & Tarcov, N).1531 [1996]. Discourses on Livy, Book 1, Chapter 3, p.15.

2 The formal name of the Law Lords, who carried out the judicial work of the House of Lords in an Appellate Committee. In October 2009, the Appellate Committee was replaced by the Supreme Court as the highest appeal court in the United Kingdom.

3 Lord Bingham. 2007. The Rule of Law, 66 CLJ 67, 84.

4 Attorney General's Office and The Rt Hon Lord Hermer KC. 2024. Attorney General's 2024 Bingham Lecture on the rule of law. Available from: https://www.gov.uk/government/speeches/attorney-generals-2024-bingham-lecture-on-the-rule-of-law.

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7 *DKH Retail Limited & Ors v City Football Group Limited* [2024] EWHC 3231 (Ch) at [39] (Bright J).

8 Wilmot-Smith, F. 2024. Good Vibrations. *London Review of Books* 46. Available from: https://www.lrb.co.uk/the-paper/v46/n17/frederick-wilmot-smith/good-vibrations.

9 The best discussion is Gardner, J. 2012. 'The Supposed Formality of the Rule of Law' in *Law as a Leap of Faith: Essays on Law in General*.

10 As well as my piece at note 5, see Tasioulas, J. 2021. The inflation of concepts. *Aeon*. Available from: https://aeon.co/essays/conceptual-overreach-threatens-the-quality-of-public-reason.

11 It is a difficult question in democratic theory, which I here sidestep, how the relevant class of persons within 'the governed' is to be delineated.

12 *Citizens United v Federal Election Commission* 558 US 310 (2010).

13 This second point is sometimes hard to see because compliance with the rule of law does ensure a kind of liberty between citizen and the state. I regard this as a separate value to democratic value: a regime without voting rights could grant that form of liberty. Pursuing this point in detail, however, would require a separate essay.

14 Waldron, J. 2023. Thoughtfulness and the Rule of Law, p.2.

15 *R (Miller) v Prime Minister* [2019] UKSC 41 at [69].

16 This worry can be traced to Aristotle but is most famously expressed by Thomas Hobbes in his *Leviathan*. See Malcolm, N (ed). 1968 [2012]. The Clarendon Edition of the Works of Thomas Hobbes, vol 4: Leviathan, p.429.

17 *R (Miller) v Prime Minister* [2019] UKSC 41 at [50].

18 Privy Council. 2019. Orders approved at the Privy Council held by the Queen at Balmoral on 28th August 2019.

19 Endicott, T. 2020. Making constitutional principles into laws. *Law Quarterly Review* 136. 175–181, p.176.

How the justice system can build a fairer society

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Access to justice is not only a fundamental principle, but also a beautiful one. All the more so in the context of what is known as public law, the rules which govern what the state can and cannot lawfully do. It is in this area that we most often see Davids, individuals, taking on Goliaths, apparatuses of the state. The beauty here derives from Goliath himself 'arming' David through the provision of a functioning justice system, which is – at least ideally – open to all. It takes a confident and astute state to understand that it will ultimately govern better if it provides the conditions for a fair fight.

Justice enables a fair and strong society, where the state can be a force for good, supporting people to get on with their lives.

Justice for each, fairness for all

The state contributes daily to the ability of so many to live meaningful and dignified lives through the provision of education, social care, healthcare and much more. The state is also capable of causing or exacerbating great harm, such as when its power is used in an overbearing or an arbitrary manner, or when it unfairly withholds services.

Under a respected, accessible and effective justice system, public law prompts the state to do more good and less harm. This can happen even without any components of that system (such as the courts, the tribunals and ombudsman) being directly engaged, so long as officials expect and are expected to follow public law principles – such as fairness and lawfulness – as they settle complex administrative decisions. Alternatively, it can happen when citizens engage the justice system to review and test particular decisions, or the processes by which they are made. The principles established in those cases can then be applied by decision makers in the future, ideally reducing the need for people to resort to the justice system on the same issues.

This may all sound lofty and remote, so let us take some examples to illustrate the power of accessible justice in our society. 'Claire', Public Law Project's client, a mother to two children, was the victim of prolonged physical, emotional and sexual abuse by her former partner. She was involved in family court proceedings, which required the court to determine the arrangements for the care of their children and what would happen to the family home. She had no income to pay for a lawyer and her only 'capital' was locked up as her share in that home, which was jointly owned by her abuser. Although she could not sell this notional asset, the Legal Aid Agency (LAA) decided that it rendered her ineligible for legal aid. This was a bizarre conclusion. By contrast, the Department for Work and Pensions (DWP) deemed her sufficiently destitute for Universal Credit.

The LAA's decision meant she faced complex legal proceedings against her abuser without any legal support. Claire said, "When I heard his voice it made me physically vomit in court." The harm that Claire was suffering in her private life was palpably being compounded by the state's decision to withhold legal support. It was also a critical test case, because at the time it was heard, one in five women suffering domestic violence could not access legal aid because they were similarly deemed to have 'capital' even if they could not access it.

Claire challenged the LAA through the application of public law principles and was successful, securing legal aid for herself.[1] As a result, she has also ensured that people suffering domestic abuse, most often women, are able to access legal support even when they have such trapped capital. This allows them to navigate the justice system and reach a point where they can live their lives safely. It is often said that order must come before justice, but in this case, we see that justice is needed to enable an orderly existence.

Next, let us take Public Law Project's client, 'K'. She was reliant on benefits and has children with complex care needs who needed her support, which ruled out seeking more paid work. The DWP informed K that she had been overpaid her benefits to the tune of £8,600 and so would need to pay it back. K had been overpaid because of the DWP's own mistake. She had repeatedly checked with the DWP that she was entitled to the money and had been incorrectly reassured that all was fine. Owing that amount is significant for most people. Owing that amount when you are dependent on benefits amid a cost-of-living crisis is devastating. As K put it:

> "When I was told I owed DWP over £8,000 I was in disbelief. Paying it back even at a small amount a month would have taken me years and meant making day to day sacrifices for my family. The worst part was I knew I had done everything right and DWP were in the wrong."

K challenged the DWP's decision, and the court ruled in her favour.[2] She did not have to pay the DWP back. Not only that, but the court's ruling can now be used by others facing similar circumstances.

The welfare system is like an insurance mechanism for every one of us who may end up needing financial support, and so we are all affected when bad decisions undermine the terms of that insurance. As so often happens in these official error overpayments cases, the DWP had made the mistake, but it chose to place the burden on the claimant to sort out the error, thereby reducing the incentive for the department to sort out its flawed systems. K has made a significant contribution in ensuring that responsibility lies where it ought, which has strengthened that safety net for us all.

Without access to functioning justice, Claire would have had to face her abuser and a complex legal system alone. Without access to functioning justice, K's family would have been left making heavy sacrifices due to someone else's mistake. In each of these cases, Claire and K took on systems, in frankly incredible circumstances, and changed them for the better. They were able to use the power of the law to forge pathways to a more secure life for themselves and other people. As each of these cases demonstrates, the law is not obstructive to a well-functioning state, but a precondition for it.

Taking justice for granted

We have taken our justice system for granted for too long. Today, we find ourselves at a pass where it is crumbling everywhere, and in places approaching outright collapse. The government's announcement to put some more money into civil legal aid[3] is welcomed in and of itself, but it also sends a signal – that, despite challenging financial conditions, it is understood that the neglect of accessible justice cannot continue forever. So that is a start. But given where we are, much more must be done.

Far from learning positively from cases like Claire's and the socially valuable results of her efforts, we have been leaving ever-more individuals to fight alone, with neither resources nor support. There has been a marked increase in 'litigants in person', citizens forced to reckon with the complexities of the justice system without any legal representatives. One chilling statistic from the National Audit Office (NAO) revealed how widespread this untutored piloting of cases has become, even in high-stakes contexts. In the first quarter of 2023, the NAO reported, in 40% of family dispute cases *neither* the applicant nor the respondent had legal representation.[4] Claire's case had extreme harm at the heart of it, but even run-of-the-mill family cases will likely have people hurting in some way or another: the pain of divorce; the wrench of separation from a child. It is unconscionable to then compound the misery with the confusion, alienation and lack of voice that can be experienced when there is no one qualified to explain the process, or advise on how to handle it.

Taking another example, a report from Public Law Project[5] evidenced, broadly, that for every 16 immigration legal aid referral attempts, only one was successful. Even focusing more narrowly on asylum applicants – that is, by definition, individuals presenting as being in flight from war, violence or persecution – half are unable to access legal aid representation.[6] Requiring the most marginalised people, not just in our country but in the world, to represent themselves in complex proceedings is absurd and unacceptable in a modern, democratic state. I am proud that people seek refuge in our country. I am ashamed that they are denied the representation to find it here.

Even when the resources for representation are there, a timely day in court cannot be taken for granted these days. Consider crime. Back in November 2023, the Law Society highlighted a year-on-year increase of 9% in outstanding criminal cases in the magistrates' courts.[7] That sort of growth rate soon compounds explosively, spelling unsustainable backlogs. That's why we get stories like those recently reported on by the BBC: a Manchester sex abuse case where five years of delays led to degraded evidence and witnesses repeatedly answered "I can't remember"; a grievous bodily harm charge in Shrewsbury where six years of uncertainty and drift has led to a self-described "mental breakdown" in one of the accused; and an unprocessed fraud charge from 2019 that has left a man unable to proceed with a divorce, because absent a verdict, nobody knows his economic position, making it impossible to forge a financial settlement.[8]

Without timely criminal justice, neither victims nor suspects can get on with their lives. What is less appreciated and reported on, however, is that very similar problems arise when the civil justice system is overwhelmed and dogged with delays. Both the overload and those delays are frequently getting worse. Turning back to asylum, for example, as Professor Joe Tomlinson has revealed,[9] more haste in other parts of the system translates into more stasis in the tribunals. The recent speeding in the administrative processing of asylum applications has led to an astonishing 264% increase in appeal backlogs in the immigration tribunal. This is effectively, as Tomlinson put it, "the reassignment of a substantial part of the Home Office's asylum backlog to the justice system".

We see similar challenges in other parts of our tribunal system, whether it be employment, special educational needs, or social security: all areas which affect those suffering the greatest disadvantage. In the Social Security and Child Support Tribunal, for example, open cases increased by 19% to 79,000 in one year.[10] People – often desperately cash-strapped people – waited on average 29 weeks[11] for their appeal to be heard. This routinely delayed the arrival of remedies they had every right to: for those whose appeal was decided at a hearing, 62% were successful.[12] That is too long to wait for money intended to keep you above the breadline. When families sink below it, there will often be debts and all the social scars that go with it, scars that might have been avoided if they had simply received their money – or failing that, proper redress – in a timely fashion.

Dying in the dark

These are all alarming nuggets of data, but it is currently impossible to paint a more comprehensive statistical picture. There are many ways in which justice is dying in the dark. I commend the Nuffield Foundation-backed work being conducted by the Institute for Fiscal Studies, which seeks to address at least some of the knowledge gaps following the plethora of recent Ministry of Justice (MoJ) policies.[13] I also commend the MoJ for supporting this project. However, this evidence should have been collected and tracked by government itself. We have been left in a position where we do not even know the full scale of the deterioration of the system.

I am reminded of James Baldwin: "Not everything that is faced can be changed, but nothing can be changed until it is faced." We need to make serious efforts to track and take comprehensive stock of just how broken the justice has become, as well as ensure evidence-based policymaking is embedded in government to ensure we do not find ourselves in this position again.

What we can say with certainty is that we are at crisis point. Too many people are living in limbo while they wait for their day in court; evidence vital to criminal proceedings is deteriorating over time while large numbers of potentially innocent people are being kept incarcerated on remand for too long; stress and anxiety and sometimes physical health are taking a toll while citizens live without services they need, uncertain of even when they will know for sure what their entitlements are; other parts of the state are left picking up the problems the courts cannot resolve in a timely fashion, and are themselves becoming more strained as a result. This is all leading to public trust in institutions eroding rapidly, which has damaging knock-on effects for people's faith in the state, and indeed drains their hope in the very possibility of working together to solve collective problems.

With justice denied to the most marginalised, I am left reluctantly asking whether it is any longer right to call this a 'justice' system at all. The new Attorney General stated at Public Law Project's conference last year, "The rule of law is back". While we breathed a sigh of relief at this sentiment, we had to remind

ourselves that this is no time for complacency. We must invest in the justice system and legal aid, both financially and by giving each the esteem they need. Without investment, the justice system is simply another weapon for Goliath to wield against David: yet another channel for reinforcing and entrenching social advantage and its opposite. The rule of law cannot be said to be truly 'back' in that context, and it will not be back until there is investment, enabling an effective and accessible legal system that is essential for a fair and strong society.

The last bastion of defence

In recent years in particular, the justice system, and public law itself, has proven its vital role in protecting our democratic constitution. Consider two veins of litigation, in which Public Law Project has had a hand. In the first, the Supreme Court found unanimously that the government had prorogued Parliament illegally. The second was the case concerning the Rwanda policy, which ultimately did stop flights from taking vulnerable refugees to a country where they were at risk of refoulement (being returned to the countries from which they have fled where they faced persecution). In each of these cases, the courts checked the excessive and illegal use of power by the state, protecting the sovereignty of Parliament in our democracy and protecting our human rights regime, respectively.

That the courts did so in highly politically charged environments—the Brexit debates and the perennially charged subject matter of immigration—lends more gravity to the conclusions that they reached. It can truly be said that in these cases the courts acted without fear or favour, because certainly they were tested. Remember the images of judges underneath the headline: "Enemies of the People". We have also become increasingly inured to the trope of "lefty lawyers". Such attacks on agents of justice, who are public servants doing their jobs, undermine the rule of law for all.

Ultimately, as well as needing more resources, the justice system requires something else: not support for every decision, but an active restoration of broad respect for its role in society. This would be a priority at any point, but it is an essential investment now. Across the world, the far-right is becoming increasingly adept at gaining power, leading to authoritarian practices including unfair, undemocratic and unlawful state decision-making. In circumstances where political power is taken by individuals with disdain for any rules designed to restrain the mighty, it is the justice system that becomes the last bastion of defence for everyone else. If we, in this country, want to make sure this line of defence will be available to us in the event of authoritarian attacks, we first need to fortify our esteem in justice.

We must not be tempted to look at the rise of the far right globally and dismiss it as something that "couldn't happen here"—although there are worrying signs of exactly that sort of complacency. We have, as a nation, simply stopped talking about the far-right riots that rocked England and Northern Ireland last summer. That makes it difficult to be confident that we are confronting what is clearly bubbling underneath the mainstream of our society. So, let us recall some of the images from those riots: a mob trying to set fire to a hotel housing asylum seekers; a child chanting "Pakis out" with impunity; a Black man being beaten in central Manchester. These behaviours encapsulate the dangers of a repeat – and the responsibility on us to learn from the horror of that period. Yes, the courts played a powerful part in restoring immediate order in that emergency and bringing some individuals to justice. But the social forces that overflowed then have not gone away. In power, they would have the means to systemically target the marginalised and dissolve the principles that underpin a healthy democracy for us all.

Knowing that, it would be an abrogation of responsibility not to mitigate against this possibility before authoritarians gain the levers of power. Investing deeply in the justice system—rearming David—could be the single, greatest way to enshrine a fairer and stronger society for us all, whatever the future might hold.

Endnotes

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10 Ministry of Justice. 2024 Tribunal Statistics Quarterly: January to March 2024. Available from: https://www.gov.uk/government/statistics/tribunals-statistics-quarterly-january-to-march-2024/tribunal-statistics-quarterly-january-to-march-2024#social-security-and-child-support. The open caseload stood at 79,000 at the end of the 2023/24 financial year (March 2024), an increase of 19% compared to the same time the previous year.

11 Ibid. Of those cases disposed of by the SSCS tribunal in January to March 2024, the mean age of a case at disposal was 29 weeks, a 3-week increase compared to the same period in 2023.

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Why care about courts?

Professor Judith Resnik, Yale Law School [1]

I live and work in the United States where, in 2025, courts have a high profile. At issue in dozens of lawsuits are questions about the authority of the President, the role of administrative agencies and the responsibilities of Congress. Those lawsuits reflect that people have been fired, relocated or deported; healthcare programmes ended; scientific research halted and food bank distributions stopped. US federal courts are one venue in which the lawfulness of these actions can be subjected to disciplined discussions about legal rules. The interactions are organised by procedures applicable to all disputants and transparent to everyone. When rendering judgments, courts must explain their reasons, and appeals are available.

These dramatic, painful events in the USA are reminders of why courts are needed in ordinary times, as well as in extraordinary moments. Indeed, the stakes in the US cases – loss of jobs, income, healthcare and food – parallel the problems explored in this suite of essays about everyday life in the UK. The authors document the importance of having access to legal remedies when people try to keep their homes, use social benefits, enforce employment contracts, or buy and sell goods.

The potential for courts to provide redress dates back centuries. Statements guaranteeing "rights-to-remedies" can be found in the Magna Carta. These commitments have been reiterated at national and international levels around the world. However, for centuries, not all people were recognised as eligible to bring claims to courts and hence as having "rights-to-remedies". For example, 19th-century statutes in many parts of the USA prevented married women from owning property and entering into and enforcing contracts. Enslavement put Black men and women outside the circle of rights, and through much of the 20th century, prisoners were "civilly dead" and without legal status.

Equality movements revised those many exclusions, and entitlement to the longstanding government service called 'courts' has expanded to embrace all persons. Before I discuss the challenges of making good on this promise, explanation is in order of why access to courts became a bedrock for democratic orders. That individuals – be they tenants, consumers, employees or family members in conflict – need access to courts is easy to see. The reminder is that governments *need* courts too – so as to demonstrate their power to make and enforce laws.

These interdependent needs were at the centre of the development in the USA of constitutional obligations that courts had, for some kinds of cases, to open doors for people who could not afford to pay court fees. As the Supreme Court explained in a 1971 ruling, the US Constitution required states to waive filing and service fees so that indigent individuals could seek divorces in their courts:

> "Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner."[2]

Governments' legitimacy is bolstered when its residents can participate in adjudicatory processes; showing the ability to maintain peace and security helps to generate government's authority to do so. About 50 years later, Lord Robert Reed (now President of the UK Supreme Court) offered an account that paralleled the US decision. In his 2017 *Unison* opinion, which held unlawful the steep increase in fees charged to use an employment tribunal, Lord Reed explained the contribution of precedents – which articulate legal rules – in everyday life and that such rulings emerge when individuals or business turn to courts, in this context to contest employment decisions.[3] Inside the US and UK decisions are assumptions that government – and its courts – are obliged to be *resources* for the establishment and the preservation of relationships bounded by law.

Aspirations for courts

But why and how? Explanations of adjudication's virtues came from scholars as well as judges. For example, Frank Michelman detailed how access to litigation gives individuals opportunities for participation, for efficacy and for dignified treatment from the state.[4] Jerry Mashaw underscored that disciplined decision-making enabled similarly situated claimants to be treated equally.[5] The argument that Dennis Curtis and I proffered in our book *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* focused on another aspect – that adjudication produces a structured interaction among disputants, governments and third parties that itself is a democratic practice.[6]

When the word 'democracy' is used in the context of courts, many people think about the contribution of jurors. Yet in all kinds of cases, with or without juries, judges are required to provide equal and dignified treatment to everyone involved. Litigants in turn must accord respect to each other. When rendering decisions responding to conflicting claims of right, judges have to explain the bases for their exercise of power. Independent impartial assessments, explained in public, help people see government 'at work', dealing with parties in disagreement. Because courts are open, the public can watch whether, in practice, those obligations materialise. As Jeremy Bentham posited long ago, "publicity" enables what he called the "Tribunal of Public Opinion" to form independent judgments about the quality of government actions.[7] While presiding over a trial, the judge is, to paraphrase Bentham, on trial.[8] It is these egalitarian exchanges demonstrating respect that can – if aspirations are realised – enable adjudication to be understood as a democratic practice, along with voting, seeking elective office, and participating in legislature debates.

The information forced into the public realm by court processes becomes part of iterative exchanges with other branches of government and social movements. On this cheerful account, the interactions in courts can teach the desirability of hearing different views about the impact of legal rules as applied to specific facts. From those many applications, legal norms develop. Moreover, as litigants in various situations raise parallel claims, observers can see the impact of the underlying legal principles. Litigation provides opportunities to confirm extant norms or to press for changes in legal rights.

For example, in recent decades, courts provided a platform for the documentation of the harms of violence against women – once tolerated as part of family life. Social movements pressing women's equality prompted legal reforms naming household violence as an illegal form of subordination. Likewise, in earlier eras, tenants and workers had few rights; lawsuits about apartments that lacked running water and about harassment on the job generated new obligations for landlords and employers to shoulder. Other examples of litigation producing change in the USA include ending discrimination based on race and sex in laws governing marriage, as well as the recent expansion of rights to own guns. Vivid court-based accounts of terrible crimes have helped to propel harsher sentencing laws. Furthermore, conflict does not end once rights are identified. Decades of work at state and federal levels resulted in recognition of a constitutional right to abortion and, in the last few years, the rejection by a majority of the Supreme Court of that constitutional protection. And consumer and employee victories in one arena may galvanise opponents of such rules to push for change on the grounds that the costs outweigh the benefits.

In short, the particular and the peculiar structure of contestation in courts has the potential to empower disputants in disagreement about facts and law. Outcomes may be viewed by some as innovative and others as regressive, and the debates enabled by courts are often continued in proposals for legislation and through social and political movements. Courts on this account are one of several venues that enable individuals to experience the utilities of having functioning governments. When working well,

courts could generate collective narratives of identity and obligation as well as intensifying conflicts about what those identities and obligations ought to be.

The challenges of translating values into practice

Courts are not only a venue for conflict; they are also struggling to make good on their promises. In many parts of the world and inside the USA, paths to legal remedies are non-existent or limited, rationing is commonplace, and calls for reformulation abound.[9] Bentham's imagery of a singular Tribunal of Popular Opinion missed how, as Nancy Fraser explained long ago, no single unified 'public' exists. Given divisions and different points of view, pluralisation – publics – is needed to capture an array of conflicting points of view. Further, given contemporary realities, terms such as "predatory publics" need to become part of the lexicon. Through the internet and more, aggressive appropriation, doxing and trolling have become modes of interaction.[10]

As the essays in this symposium also demonstrate, courts are *themselves* in need of resources and reform. The current challenges stem in part from the transformations of the last century that expanded the ability of people of all kinds to be *in* court. Legislatures recognised new entitlements of employees and consumers, as well as rights to non-discrimination, to safety within households, to a clean environment, and in specified instances, to government assistance. However, the great achievement of the universality of rights of access and remedies becomes illusory when courts cannot meet the demand for their services.

Innovation, as the essays discuss, is needed. New processes and technologies can help, as long as they remain loyal to courts' obligations to provide disciplined, public-facing, explanatory processes. Web-based procedures could not only enhance accessibility and legibility but could also build in paths for observers to watch, as England and British Columbia do for some kinds of cases. Electronic platforms offer the potential for lowering transaction costs and making data analyses more readily available.

Yet, and again, a caveat is in order. As Tanina Rostain has explained, "techno-optimism" can be misplaced. In the USA, many jurisdictions have given over their court-record systems to one corporate actor. Glitches have left people in detention, records unavailable and courts unable to receive case filings. In addition, private providers may impose high costs, charge for making changes, and have each system operate without easily interfacing with other computer-based programmes.[11] These challenges are not limited to the USA. Around the world, court data systems are antiquated, and conversions to electronic systems are difficult and expensive. AI sounds like a panacea. But legal rules and the facts of cases are complex, and translation and analyses require sophistication. To address the many issues, public sector commitments are key. Governments need to take responsibility for building and providing platforms so that, as Eliot Fineberg has explained, the utilities can be made available to all.[12]

Conflicts, commitments and constituencies

More problems exist. The idea of having one's "day in court" has not, as Hazel Genn recounts in her overview of 40 years of reforms in England, galvanised the "non-legal world" to insist on support for more "access to justice".[13] Rather, resources have shrunk. Moreover, a major mobilisation to cut back on access has, in the USA, been underway for decades – often with the US Chamber of Commerce in the lead.[14] The arguments for change include that less-visible dispute resolution is efficient and consumer friendly.[15] Instead of 'wasting' resources in litigation, the promise is to have fewer disputes and cheaper resolutions. For example, in the USA, companies can require users of cell phones or credit cards to go to the dispute resolution provider chosen by the company and to proceed single-file, rather than through collective actions. In 2011, over objections by consumers, the US Supreme Court interpreted a 1925 statute, the Federal Arbitration Act, to permit enforcement of a privately imposed mandate that banned collective redress.[16]

The outsourcing of dispute resolution to private providers has not been accompanied by obligations to provide public access to the processes or accountability for decisions made. Under the rules of major arbitration providers, third parties are not permitted to watch. Further, companies closing off access to courts and requiring use of private systems at times also impose nondisclosure and confidentiality requirements that they justify as facilitating conciliation. In theory, more accessible, lower-cost dispute resolution would prompt use of such systems. Yet data on the numbers of filings demonstrates that in practice few individuals make their way to the arbitration programmes provided by the companies whose behaviours are claimed to be unlawful.[17] Plaintiff-side lawyers explain that that non-disclosure and closed proceedings suppress claims. Some applaud that result. For example, an organisation devoted to "tort reform" uses the label "judicial hellholes" for jurisdictions in which plaintiffs do get into court and prevail.[18]

Devolution, outsourcing and privatisation may also mean that third parties do not have opportunities to watch directly proceedings or to learn about outcomes in the aggregate. Lost is the ability to assess whether procedures and decision-makers are fair, how resources affect outcomes, whether similarly situated litigants are treated comparably, and why one would want to get into (or avoid) court. Instead, a private transaction has been substituted and, unlike public adjudication, control over the meaning of the claims made and the judgments rendered rests with the corporate provider of the service. In lieu of aspiring, as governments did historically, to validate their legitimacy through public practices, these dispute resolution mechanisms increasingly rely on procedures that do not admit of a *need* to show processes to justify the exercise of *authority*.

Zoom out (so to speak) to the larger picture. The obligations of courts to provide services and give subsidies to disputants are exemplary of commitments (if not their full materialisation) to egalitarian regulatory policies – just as the efforts to limit courts reflect efforts to restrict regulation and promote

privatisation. To conceive of disputes as 'private' is to miss that the law that regulates them is 'public' and, as the Supreme Courts of both the USA and the UK have explained, the public needs to know that contracts are enforceable, that negligence is actionable, and that compliance with regulations can be monitored and breaches sanctioned.

In sum, the genesis of rights-to and rights-in courts comes from their service to users *and* to the state. Courts have been part of a model of legitimacy in which governments *depend* on judiciaries to implement their rules, to develop norms, to protect their economies and to prove governments' capacity to maintain 'peace and security'.

Today's issue is whether courts can be sustained as an exemplar of aspirations for integrity, independence, neutrality and equal treatment. In the USA in 2025, the pressing problem is whether courts' commitments to egalitarian values and constrained power can provide counterweights that survive the assault on their institutional identity. More generally, we face the unravelling of 'the governmental', which puts an array of conventions, practices and rights in jeopardy.

In international law, a phrase 'aspiring states' is used in reference to subnational entities seeking to establish their distinct identity in conflicts within extant governments. That description is apt today for all sorts of polities, beleaguered by internal conflicts, hyper-nationalism, transnationalism, globalisation and privatisation. Some time ago, I proposed adding another term to the lexicon – *'statisation'* – to capture the movement during the 19th and 20th twentieth centuries from activities run by the private sector to the public sector.

A myriad of government-based services came into being during the last centuries.[19] Examples include public roads, schools, police, prisons, armies, postal services, healthcare, parks. Once privately provided, these services have come to be seen (in terms I borrow from US constitutional law) as "essential attributes of government". Yet on both sides of the Atlantic, privatisation and deregulation denude the state of its *identity* (relatively newly forged) as a provider of goods and services, of which courts are but one.

In the spring of 2024, when I was in London, the National Portrait Gallery had a great exhibition, entitled "The Time is Always Now". To paraphrase, *now* is the time to speak up for and to fund courts as one of many facets of functioning, accountable, law-filled and lawful government.

Endnotes

1 Arthur Liman Professor of Law, Yale Law School. All rights reserved, 2025.

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Human experience, the rule of law and justice systems

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This essay is based on a lecture I delivered in the spring of 2025 to students, faculty and civic leaders in Oxford. I said this: We are sitting today in the Victorian splendour of the Exam Schools. Completed in 1882, this is the institution that is remembered by Oxford educated lawyers as the place where the rite of passage that is 'finals' prepares you for your future. A life of exacting preparation and timetables; the ability to construct skeleton arguments or judgments in the most complex, urgent and exacting situations; and the confidence to deliver analysis that is persuasive, accurate, ethically sound and sometimes innovative. The walls depict the old men in scarlet who look the same as the ones I remember in the Royal Courts of Justice. Their state robes and the grandeur of the surroundings were designed to represent the outward manifestation of the legitimacy of the rule of law and, it ought to be said, the patriarchal and hierarchical perceptions of the day. We should not forget, however, that the history of the decade before this building opened included the rationalisation of the delivery of the rule of law that came with the Judicature Acts of the 1870s.

We need nothing less now: a revolution in strategy and delivery and a change that will positively impact on people's perceptions of the rule of law. The exam question is how do we get there? The answer to the question is: that it is in your hands – do not wait for others to get it wrong.

Declining access to justice

Let me fast forward from the optimism of the 1870s to the atomised negativity of 2025.

The media presentation of courts is one of detachment from everyday life. Social media is much less charitable in its opinion. The language, behaviours and process of the courts is regarded as unintelligible to users. The senior judiciary admitted as much when the then Lord Chancellor, Mr Michael Gove, the Lord Chief Justice, Lord Thomas, and I embarked on a £1 billion transformation programme in 2016 known as Transforming our Justice System.[1] That included an, as yet, only partially realised digital or online capability that has its own accessibility issues for the vulnerable and less IT literate.

Save for the excellent judiciary and schools engagement programme teach our citizens much if anything about the rule of law and we don't encourage participation other than through jury service and our dwindling magistracy. The public are estranged, and that is a democratic deficit. The court estate is a national disgrace: in part literally crumbling and more to the point not fit for purpose either from the perspective of those who work in it or the users and victims who have no choice but to be there. In the 10 years up to 2019 more than 50% of all court buildings closed[2] to save money and/or to cross subsidise the transformation programme on the overt and true basis that the system could not afford to run its business as usual without doing otherwise. Meanwhile, the impact of austerity and the change in people's behaviours, as a consequence of the Covid pandemic, have had a serious impact on one of our foundational constitutional principles: access to justice. There are delays and backlogs that are antagonistic to justice. Case volumes are increasing and resolution rates in many jurisdictions are declining.[3] Austerity without strategy brings price rationing which is the antithesis of access to justice.

We are all adversely affected by institutional decline and that is what it is. If you, your family or your friends are in a vulnerable situation, the impact is worse. Consider some of those affected by waiting far too long for a decision: young people removed from the care of one or both of their parents, criminal defendants on remand in jail awaiting trial, autistic children waiting for a special educational need determination, the benefits and asylum support appellants who are destitute, and those in mental health detention. Systemic unfairness – whether as respects sub-postmasters in the Post Office or the subjects of the proliferation of inquiries and judicial review claims – involves real people who have nowhere else to go. And then there is the forgotten world of civil claims where, like most tribunal appeals, there is no legal aid and the individual citizen or small business – that is you and me – has a very serious question to ask about their so-called equality before the law: can I afford to go to court and take the risk? The Ministry of Justice (MoJ) remains a non-priority spending department of government and employees of His Majesty's Courts and Tribunals Service (HMCTS) are some of the most loyal but also the least well-paid public servants that we have. We have justice systems that have a disconnect between strategic direction and delivery because the leaders are given no positive levers to pull, despite their herculean best efforts to do so.

Who then has the courage to identify the problems and find empirically valid solutions? My principal message is it should be academic and civic leaders who have the experience and the knowledge to help our institutions flourish.

Our problematic context

It is important to say that I am writing as a former head of jurisdiction not as a serving judge whose words might otherwise be the subject of adverse comment from those who champion the concept that judges are guilty of overreach in either their interpretation of the common law and statute or their extra-judicial statements. As it happens, I agree with those commentators about the pre-eminent importance of the concept of parliamentary sovereignty – the respect that must be afforded to the legislature, and the executive provided it abides by the rule of law to which it is subject – and the importance of a flourishing political debate about justice and the rule of law. Where I part company with those commentators is when Parliament has itself invested political and judicial leaders with responsibilities, both constitutional and statutory, but has provided no mechanism to make the justice systems they concern work effectively.

The constitutional context of the problem I am describing is important. It is the systemic backdrop to the decline of the rule of law and justice systems as institutions and the question: who has the responsibility to do anything about it? The context is not the cause, but it foreshadows the decision-making vacuum that exists. Between 2004 and 2008, Parliament passed legislation that included the Constitutional Reform Act 2005 and the Tribunals Courts and Enforcement Act 2007. The legislation and the Concordats or agreements that preceded it were part of a broader constitutional settlement that is poorly understood. The then government created the UK Supreme Court and abolished the jurisdiction of the Judicial Committee of the House of Lords. Those reforms were predicated on a principle which is the separation of powers. At the same time, they abolished the Lord Chancellor and then brought back the office as a non-judicial sinecure held by the Secretary of State for Justice. The office holder continues to hold key responsibilities in law but has little or no operational power to effect delivery. The Secretary of State is now an elected politician who does not have to be a lawyer. What was one of, if not *the*, highest office of state – a reflection hitherto of the importance of the rule of law – was changed forever. I do not suggest that the change can now be reversed but it is a fact and there is no person in whom the apolitical conscience of the state is vested.

Alongside that reform came the creation of an executive function for heads of jurisdiction (senior judicial leaders) and statutory and other duties imposed on them to fill the vacuum created by the Lord Chancellor's demise. The chief justices were given the function of being presidents of their courts and tribunals with a wide range of responsibilities for recruitment, diversity, discipline and the efficient delivery of justice.[4] For example, as Senior President of Tribunals, I was charged with the duty to have regard to the need for proceedings to be handled fairly, quickly and efficiently.[5] That would be a near

impossible burden to discharge today. In addition, I had to have regard to the need for tribunals to be accessible, for the members to be experts in the subject-matter and to develop innovative methods of resolving disputes. How is one supposed to deliver those new functions? One should also bear in mind that tribunals, unlike the courts, are a 'managed judiciary' with independent presidents of chambers like tax, social entitlement and mental health. They are supposed to deliver an identified volume of decisions or appeals for the money that government provides.

The new executive functions given to judicial leaders involve a plethora of boards to work in partnership with other chief justices, and to work with civil servants in government departments and agencies who have no direct relationship with you as an executive leader in the way civil servants work to ministers in accordance with the Carltona doctrine[6] [whereby the actions of departmental officials can be treated as having been taken by the relevant minister]. The functions involve engagement in carefully scripted and minuted diplomatic processes of influence using bilateral meetings with select committees and ministers. In my case these were from a range of departments concerned with tribunals business, the Treasury and the Secretary of State – both to try and change their decision-making practices for the better and to obtain enough funding to run the jurisdictions for which I was responsible. That is to be done at the same time as not prejudicing one's role as an independent judge in the individual case, which of necessity at that level can be a case of singular importance.

If one is misled into thinking the statutory protections are sufficient, I can give two easy examples of them going wrong. During the *Miller*[7] case which concerned the need to obtain the consent of Parliament to trigger Article 50, rather than the use of the Royal prerogative to exit from the European Union, the judges sitting in the Divisional Court were described by the Daily Mail as "enemies of the people". The constitutional duty to protect the rule of law is vested by section 1(1) of the 2005 Act in the Lord Chancellor who by sections 3(1) and 3(6) must uphold the independence of the judiciary including by having regard to the need to defend that independence to enable them to exercise their functions. The Lord Chancellor at the time, Ms Truss, was widely criticised for failing to respond in a timely or appropriate fashion. It is easy to forget now the acute attack on the rule of law that this represented.

In relation to the key question about adequate funding of a justice system, there arose in a different government a serious question concerning the legality of the fee structure imposed on the Employment Tribunals for which I was then operationally responsible as part of my executive functions. The new rule created a cost of up to £1,200 in fees to bring a claim to an Employment Tribunal. Whether the fees order was an attempt to reduce backlogs and/or an attempt to increase funding by making litigants who could not afford to pay do just that is not the point. Whatever the rationale, the impact was to deny users access to justice. Despite representations to government and Parliament by the judiciary in their executive roles the issue had to be tested in the courts. The outcome was perhaps the strongest defence of the rule of law delivered in modern times, condemning government for its illegality – delivered by the Supreme Court in the *UNISON* Case.[8] That was a fine judgment but the

systemic protections and structures did not work in either case. If UNISON had not challenged the government, would the judges have been able to do so?

There is meant to be a systemic remedy available to the chief justices for their new executive functions. In each of our geographic jurisdictions there is a framework or service level agreement that is predicated on the new constitutional settlement. The Framework in England and Wales[9] builds on the statutory power given to the heads of jurisdiction to make representations to Parliament. For example, if justice cannot be effectively delivered, one can go to Parliament to be heard. The firing of that Exocet is however a matter of last resort not least because the Framework comes to an end leaving the chief justice with even fewer levers to use. The Framework in England and Wales is widely regarded as inadequate by those senior judges who have toiled hard with their excellent civil service and independent colleagues on the HMCTS Board, year after year, to try and make the funding arrangements work. For the avoidance of doubt, they continue to do so but the funding and delivery arrangements are flawed. Neither the judiciary nor HMCTS are given the levers to make the executive functions work effectively and efficiently and the MoJ, at least in this respect, is not an operational department.

Law in a society of difference

In summary, the system is not designed to deal with business as usual in the context of increasing work, infrastructure demands, and the reasonable expectations of the public. If we suggest that it should also deal with systemic reform, the design and implementation of justice policy and a response to critical events like austerity or the Covid pandemic, then I would suggest these are a bridge too far. These are all challenges that need to be met today.

In that context I wish to briefly address the socio-legal problems that underline the need for systems to work. This is the subject of a different essay but in headline form I want to challenge my colleagues. I began by highlighting people and the impact upon them of both the rule of law and declining institutions, or at least people's perceptions of our institutions.

In his recent lecture at UCL, Professor Joe Tomlinson argues that the neglected subjective experiences of individuals matter in the formation of their attitudes and behaviours because taken together they shape the outcomes of public action and even what the state may be capable of achieving.[10] What individuals feel about fairness and the legitimacy of authorities affects voluntary compliance with laws because they trust the system not because they fear it. And compliance is not the only outcome; society depends on co-operation for effective implementation of policies. Others suggest that there are three core capacities of the state: fiscal capacity, legal capacity (enforcement, regulation and compliance) and collective capacity (spending that results in value added). I would add governance capacity – that is, fair process, outcomes and perceptions. In the same way that the common law

develops in response to fact rather than abstract principle, the public's perception of fairness is guided by whether the process in question aligns with their sensibilities, not some abstract legal or theoretical definition. It is not only the perception of the individual who is affected by the process but their families, friends and community. Context is everything. As Lord Mustill said in *ex parte Doody*:[11] "The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type". To develop the analysis of human experience, Professor Tomlinson argues that lawyers need greater collaboration with disciplines such as psychology, economics and political science. I gratefully agree with his thesis.

I also happen to agree with the aphorism coined by Professor Hannah Ahrendt that it is in the nature of the human condition that "nobody is ever the same as anyone else who has ever lived, lives, or will live".[12] A pluralism of values in society is in my view the inevitable consequence. That may lead to conflict between communities and individuals because some values are incommensurable or at least there will be conflicting practices and behaviours that cannot be reconciled which need adjudication to prevent conflict.

It is the role of the rule of law institutions (courts, governments and parliaments) to adjudicate that conflict. My experience since leaving the senior judiciary in being both the adviser to the House of Commons privileges and standards jurisdictions which included the contempt hearing and determination against the former prime minister, Mr Boris Johnson, and my role as an independent adviser to the first minister in Scotland on their Ministerial Code, have given me a unique insight into how the three institutions and our representatives and judges work. They need a partnership *in fact*, not just a partnership in constitutional theory, to make sure that we curate our constitutional protections and foster the rule of law.

Society and community life bring us together for all manner of reasons, some rational, others not, but the sociability that exists allows us to acquire and develop narratives or stories that are a representation of something shared. The institutions that provide governance use shared visions in which people can have trust, respect and confidence. Our stories are based at least in part on values and social practices. They give us a deeper identity beyond the narrowness of individualistic identity politics or the fashionable neoliberal assumptions of the right and the left. For example, if we permit external actors with power and/or wealth to reduce standards or act in ways that curtail state sovereignty we will eventually damage democratic accountability. Even those who are wedded to their smartphones and the atomised moralistic norms that are fostered on that media by those with an economic self-interest, will realise that the riot that is the consequence is no substitute for the rule of law. We prosper by living and working together. The sum is greater than the parts. As Professor Amartya Sen said: there is benefit in the analytic power of bringing together diverse insights across cultures.[13] The engagement of a diverse people in and with institutions enables practical wisdom and knowledge to be garnered

for the benefit of the common good and provides a legitimacy to the decisions taken on their behalf by others.

Every culture reflects an imagery, belief systems that give it meaning which are to a greater or lesser extent shared.[14] None of us live without one. Few exist without sharing their beliefs with others significant to them. Our imagery reflects our values and beliefs – without this there is a lack of clarity and certainty, and acceptance or understanding of content. Institutional decline leaves belief and concomitant values unstable with a consequential hollowing out of context or agreed points of reference. Our judgments may well be reasoned in their content but without context or understanding we are left with the outward vestiges of the temple – fine language, robes and courtrooms – without engagement. The very epitome of a theme park that is not even a museum. That has the effect of deculturation of the law without a concomitant acculturation. The risk is that the system cannot respond when a crisis requires it because there is too little connection between the institution and its people.

Legal processes have a purpose in supporting the rule of law but they should not be fossilised or treated as being immutable. There are many different means of inquiry, negotiation, debate or contest (which after all is a form of intellectual disputation arguably derived from the ancient recursive argument techniques beloved of Indic scholars at least from the late 10th century CE[15]). Some are adversarial, others investigative or inquisitorial. Then there is the quality of different forms of reasoning: preventative, consensual or determinative; judgement or interpretation; and deliberation, adjudication or facilitation, all of which should tend to further human understanding and in the process develop legal norms out of disputes which help the social purpose of resolving or at least accommodating difference. The law should never be still. It should take account of changing human experience. The rule of law should provide or at least facilitate that purpose as the glue that holds society together. In the modern era, the adoption and description of human rights have provided a conceptual and supportive vehicle that co-exists with a plurality of values both within and between societies and helps to provide the juridical bridge between beliefs, abstract reason and lived experience – that is, the interactions of people, not simply abstract ideals of reason or natural law.

Diagnosing the decline

So much for a superficial digression into very important questions of political science that I will leave with a plea that they be engaged with not ignored. Psychological and economic analyses provide an equally fertile ground for re-thinking how we deliver the law. For all those reasons and many more, there is no substitute for the rule of law – that is, decision-making in accordance with a transparent, clear, consistent and comprehensible corpus of legislation and precedent that gives us predictability. The rule of law is more than the data that underpins disputes, whatever the reality that data allegedly represents and the value judgements of individuals as moral actors. It is more than the undoubtedly high-quality decisions of its judges in the common law tradition. It is more than the rational, codified determinations

in the civil law tradition. It is more than the specialist administrative re-making of decisions in tribunals. It is about the distribution and control of power between people and the impact of that on people. There are internationally accepted lists of principles which in a reductive form describe it (regularly referred to as the 'I's: integrity, independence and impartiality). There are constitutional principles – such as the sovereignty of the legislature, the separation of powers, the independence of the judiciary, the accountability of ministers to Parliament and the ethical governance of our leaders – that are hard wired into it. Degradation of the institutions that are charged with looking after the rule of law therefore carries major implications for the health of political and social debate and community coherence. If we allow the narrative to be damaged, it is not easy to repair. It has, after all, taken centuries to develop – it is our 'archaeology of knowledge', full of context, cultural allusion and history.

The quality of the rule of law depends in part on the health of the justice systems that deliver it. Those justice systems are the institutions we depend on and they depend on the fundamental concepts of access to justice and equality before the law including the availability of an effective remedy. When the institutions degrade, it is access that suffers and that is a real social and democratic deficit. It undermines trust and alienates people. As Dicey had it, the practice of our courts is the building block of the rule of law, eschewing induction from first principles in favour of deduction from day-to-day experience.[16] We should not be trapped in social or legal structures; we can choose to act in new ways. Leadership involves agency within a community to deliver the collective purpose. We are responsible for that leadership. The health of the whole, including the continued quality of our decision-making, involves us focusing on practices to ensure they remain fit for purpose by restoring belief in and respect for the rule of law. To do otherwise is to accept decline of the institution that is the rule of law and accept conflict as the correlative. Leadership should be our purpose and law is a function of that purpose, an agent capable of transformation.

I suggest that we should focus on the design and delivery of practices that prevent decline and have the tendency to improve and support our justice systems. It is a field of study that is lacking. Government has been promising Commissions of Inquiry into the efficacy of our rule of law arrangements and institutions for as long as I can remember. Promises have come and gone as quickly as our political leaders. Even if they were to be honoured, the long and expensive Inquiry or Commission that would be the result would not in itself be the answer. It may simply add to the many disproportionate inquiries that we already have. It may not regard systemic reform and leadership as a priority.

For this purpose, a diagnosis of decline might include:

- A deficit in the political legitimacy of representative democracy which depends on the rule of law.
- A deliberate or accidental loss of authority in the institutions.
- A lack of coherent and effective leadership of justice systems.

- The lack of financial infrastructure to provide effective delivery.
- The lack of engagement with and support for justice systems by government and Parliament.
- The disempowerment of our citizens both where representative democracy is perceived to have insufficient utility and because it is less attractive than following social media with all the attendant autocratic and malevolent influences that can be the result.

The public can readily see that unconstrained power brings headlines and at least personal gain. If society permits actors with vested interests, the loudest voice and/or the most money, the power to act unethically or in ways that reduce standards that have the effect of curtailing the accepted norms of the rule of law or state sovereignty, then we create structural injustice. If governments withdraw from governance in the delivery of justice people not only lose faith in politics but also the systems designed to deliver justice.

Reverse the trend: leadership and design

In order to better deliver the rule of law, there is a task to develop both leadership principles and design principles in justice systems. There is a role for those who are politically neutral, informed, socially engaged, independent of partisan interest groups, rational, normative, empirical and able to act without fear or favour. The chief justices fulfil that role but they cannot act on their own. Theirs is a partnership with the other limbs of the state to build and maintain effective and efficient, accountable and legitimate institutions that obtain the trust, respect and confidence of those with otherwise irreconcilable values. That necessarily involves functions that cross over into the political and policy spaces, and that requires places in which those discussions can and should occur. The measures of competence described by the duties imposed on our justice leaders are effectiveness and efficiency. In seeking to achieve access to justice and thereby safeguard equality before the law, the institutions and their leaders will necessarily have to consider – alongside clarity, consistency and comprehensibility – the effect of cost, inequalities, disadvantage, discrimination and vulnerability on justice systems and the users of those systems. And this is not an exhaustive list!

Elsewhere[17] I have described leadership principles for the judiciary and perhaps these should be re-examined by reference to all those involved. They include in no particular order:

- Coherent governance.
- Access to justice.
- Civic engagement.
- Evidence-based quality outcomes.

- Evidence-based innovation.
- Diversity and inclusivity.
- Specialism and expertise.
- Localism and relevance.
- Speed and efficiency of process.
- Financial transparency.

The design principles are agreed: to secure the rule of law through accessible and accountable justice systems that are open to the public and the media. They must be led, organised and managed coherently and effectively and they must be efficient, that is, cost effective and timely. They should involve democratic legitimacy through civic participation and through scrutiny and debate.

In other jurisdictions there are joint committees of the legislature and chief ombudsmen or commissioners whose role is to highlight what has not been done and what should be done. There are innovative and interesting ideas that foundations, think tanks, interest groups and commentators regularly publish. I declare an interest, but perhaps greater attention should be paid to the work funded by the Nuffield Foundation and the reports published by Justice, to mention just two. Nuffield is funding a strategic programme of research[18] to examine justice inequality and outcomes, as well as conducting its own ambitious project[19] to recommend transformation that can be achieved by reference to empirical data. There are solutions used by other jurisdictions who have pioneered de-criminalisation and non-adversarial process for regulatory questions, and procedural reform across a wide range of jurisdictions – including less serious crime – with more involvement of the public, just as lay members sit with judges in the tribunals. There are more cost-effective and user-friendly processes that can be used for disputes that do not require adversarial protections where support for litigants in person and online process can deliver real benefits. The United Kingdom tribunals have, in this respect, a great deal of experience to offer. Small civil claims could follow their lead and be, as a consequence, so much faster, proportionate and cost effective.

Wouldn't it be good if someone had the over-arching non-political role of identifying to Parliament and government unfairness that ought to be redressed. Someone who could bring together the conclusions of ombuds in relation to maladministration, the systemic unfairness uncovered by judges and the recommendations of inquiries that have been accepted but never acted upon. Someone who could identify solutions to delay, unintelligible process and, most importantly, circumstances where people are unequal before the law and have no access to justice.

Talk to our students in this university and they will use the words I have captured without embarrassment. They have hope, vision and ability and they are not alone. For my part, I would involve the public in the

delivery of justice in ways that go beyond our present imaginings. The rule of law is after all for them and their perception of it matters, from school to college, employment, family life and into entrepreneurship, national and international relations.

There is a need for a new partnership: a better way of working.

Let me conclude with a challenge to our leaders. I have ridden at speed across the specialist research of my colleagues. In my time here and in the other place, as well as on the bench, I have had the privilege of discussing with some of our finest minds the problems and solutions that could transform our justice systems. It is time to bring that together. Neither government and Parliament nor the judiciary can do it alone. As one example, Oxford University should re-instate its Professor of Justice Systems. It has an excellent chair in civil justice systems and so there is both a history and an existing model to build upon. There should be a centre that brings us all together with a bold public agenda. A place that sustains the rule of law by regenerating our institutions with innovative but principled ideas. A place that can have debates in depth from profoundly different perspectives and derive new ideas. The delivery of hope and imagination is a vision that we should deliver, but the time to act is now.

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