

# **The rule of law and access to justice: core ideas from the field of law and justice**

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# Introduction

The Law Society and FrameWorks UK have partnered to develop a robust evidence-based communications strategy to strengthen support for the rule of law and access to justice.

To develop an effective strategy for communicating about an issue, we must first identify what understanding needs to be built. This means identifying the 'core ideas' held by a field of practice - ideas that need to be advanced through their communications. This report summarises the core ideas held by experts across the field of law and justice about the rule of law and access to justice.

The core ideas were identified through an extensive review of relevant literature on the rule of law and access to justice, and 12 interviews with experts in the field between January and May 2023. The resulting core ideas were then tested and refined with staff from the Law Society and in workshops with the wider legal community.

Below the methods are elaborated and then each core idea is summarised. Other reports analyse the current communications strategies being used by the field of law and justice - and assess the gaps between the field's understanding of these issues and wider public understanding.

[Read the summary for year one.](#)

# Methods

Interviews with experts were semi-structured, consisting of a series of probing questions designed to capture understandings about the rule of law and access to justice, their role and function, pressing challenges and emerging solutions.

In addition to pre-drafted questions, researchers repeatedly asked for elaboration and clarification, and encouraged interviewees to expand on concepts they identified as particularly important. In each instance, the researcher conducting the interview used a series of prompts for interviewees to explain their research, experience, and perspectives; break down complicated relationships; and simplify complex concepts.

Analysis of the interviews employed a basic grounded theory approach. Researchers identified and inductively categorised common themes that emerged in each interview and across the sample. This procedure resulted in a refined set of themes, which researchers supplemented with a review of materials from relevant literature. Members of the field then provided feedback on the core ideas that had been identified from the interviews and literature review, and adjustments to those ideas were made according to that feedback.

# Core Ideas

The field and literature provide the following overarching definitions of each concept:

- (i) The rule of law means we all benefit from, and are answerable to, the same set of rules.
- (ii) Access to justice means we can equally enforce those rules.

Within these broad and general definitions four core ideas can be distilled.

## Core idea 1: The rule of law and access to justice ensure equality of all before the law

### **a. The rule of law places limits on executive power - and so preserves individual rights and responsibilities**

The rule of law means we all benefit from, and are answerable to, the same set of rules. All persons and authorities within a state, public or private, have the same set of rights and responsibilities - regardless of power or resource. It is then distinct from rule **by** law - in which the executive unilaterally imposes its authority on citizens.

Experts explained that in order for the rule of law to function, laws must be accessible, clear, and certain. This means “laws publicly and prospectively promulgated and publicly administered”<sup>1</sup> in independent courts. Where the law is complex or otherwise inaccessible, lawyers act as navigators - helping individuals to understand and protect their rights and responsibilities.

### **b. Access to justice enforces limits on executive power - and ensures individual rights and responsibilities are upheld**

Access to justice means we can equally enforce ours and others’ rights and responsibilities. Our legal needs are met. When individual rights are at risk, we have (i) access to the legal system, (ii) access to an effective hearing, (iii) access to a decision made in accordance with the law, and (iv) access to remedy.

Access to justice is particularly important for people who are marginalised or otherwise excluded. Wealth and power can insulate individuals from breaches of their rights - or make it harder to enforce legal responsibilities.

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<sup>1</sup> Bingham, T. (2006) *The Rule of Law*; European Commission for Democracy through Law (2016) *Rule of Law Checklist*; House of Lords Secondary Legislation Scrutiny Committee (SLSC) (2021) *Government by Diktat*

Experts stressed the importance of 'equality of arms': a level playing field in which both sides of a dispute have the same opportunities, resources, and quality of legal representation. For example, *R (on the application of UNISON) v Lord Chancellor (2017)* quashed employment tribunal fees on access to justice grounds.

## Core idea 2: The rule of law and access to justice underpin our social, political and economic systems

### **a. The rule of law provides a framework for social behaviour**

Experts explained that the rule of law is society's vehicle for securing trust between strangers. It sets the rules of the game - namely, that we will all abide by the same laws, known and applied equally. The rule of law is then essential to the functioning and stability of society. It sets our expectations for how we treat others - and how we will be treated in turn. Without it, we would have anarchy.

Access to justice is how we protect and enforce our social framework. It means we have an independent mechanism to resolve social disputes. Without violence or social disorder, and regardless of power or resource.

### **b. The rule of law and access to justice create political legitimacy and accountability**

Experts explained that political legitimacy comes from two sources: consent to the distribution of state power (via democracy) and acting within the limits of that power (via the rule of law). The rule of law protects the former - and in particular, the supremacy of a democratically elected legislature. Experts cited *R (Miller) v The Prime Minister (2019)* as an example of executive overreach quashed by judicial review: preventing the unlawful prorogation of Parliament during Brexit negotiations.

When enforced via the justice system, the rule of law allows us to hold power to account - preventing politicians from acting arbitrarily or without consent. Experts stressed that accountability leads to better decision-making: standards are upheld, responsibility is more clearly delineated, and lessons are learned when improvements are needed.

### **c. The rule of law and access to justice provide confidence that agreements will be adhered to and upheld**

The rule of law provides the stable, predictable environment needed for long-term investment. Decision makers prize certainty - like known laws, applied equally and independently. The rule of law is then an enabler of economic activity and growth.

Experts stressed that business is ultimately done on trust - and access to justice is the backstop for that trust. For businesses to operate, contracts must be enforced and rights (of property and person) must be protected. This protection is universal: businesses

against government (in the event of corruption), consumers against businesses, small businesses versus larger ones.

## Core idea 3: Government action has weakened the rule of law and access to justice

### a. Legislative hyperactivity

The rapid pace of legislative change - propelled by Brexit and the pandemic - has reduced legal clarity and transparency. Experts identified the increasing use of skeleton bills as a particular challenge. Here Ministers are given broad discretionary powers to fill in detail after an Act is passed - making it harder to know what law Parliament has agreed to and bypassing its full scrutiny. The (now dropped) 'hyper-skeletal' Retained EU Law bill, for example, would have given Ministers the power to keep, amend or repeal over 3,000 pieces of retained EU law by 2024.

It is then harder to act with - or rely on - legal certainty, and harder for individuals and businesses to know their rights and responsibilities before new or amended law comes into force.

### b. Conduct of Ministers

Experts noted that since 2005 (i.e. under the last five administrations), Ministers have repeatedly breached the Ministerial Code or acted unlawfully. Experts repeatedly named multiple high-profile incidents of executive law breaking during the pandemic - including a 'VIP lane' for PPE suppliers with political contacts, 'Partygate' at Downing Street, and then Health Secretary Matt Hancock's breach of social distancing rules.

Consequences for individual Ministers were seen as delayed and/or minimal - despite wider harm done. The majority of PPE supplied by two firms named in *R (on the application of the Good Law Project Limited, Everydoctor) v The Secretary of State for Health and Social Care (and others) (2022)*, for example, was not fit for NHS use despite substantial cost to public finances. Experts identified these discrepancies between harm and consequence as particularly problematic - shaping the perception that, in practice, the rule of law means 'one rule for them and one rule for us.'

Particularly in recent years, Ministers have also attacked the legal profession as biased and incompetent - misrepresenting judicial decisions to the media, and attempting to influence those decisions. Lawyers - including the Leader of the Opposition - have been accused of having a "lefty" or "London" bias or acting against public interest in human rights cases.

Experts stressed that attacks on the legal profession are themselves detrimental to the rule of law and access to justice. Judges subject to political pressure are less able to be

independent. And lawyers seen as incompetent or 'fat cats' are less likely to be sought by the public for help - or supported when asking for investment in legal services.

### **c. Restrictions on the legal rights of groups**

Successive governments have sought to restrict the rights of specific groups - and in particular, their ability to challenge executive decisions via judicial review. This is often through ouster clauses (provisions in primary legislation that ousts court jurisdiction) or proposals in specific bills (like the Bill of Rights (2022-3)) to prevent review on human rights grounds.

Experts identified the treatment of non-nationals as a current flashpoint. For example, under the Illegal Migration Bill (2022-23), individuals who enter the UK illegally - including those trafficked or seeking asylum - will be detained and deported, without the right to bail or suspensive judicial review. The then Home Secretary Suella Braverman was unable to declare the Bill compatible with the European Convention on Human Rights - an international treaty incorporated into UK law via the Human Rights Act (1998).

The removal of rights on a blanket basis from categories of individuals is not compatible with a central principle of the rule of law and access to justice: equality of all before the law. Experts warned of further harm if the executive reneges on its international agreements, it cannot be relied on to provide legal certainty in the UK. And will have little standing to enforce the rights and responsibilities of other nations.

### **d. An underfunded and inefficient court system**

Cuts and court closures resulting from the period of austerity in public spending from 2010 have caused significant case backlogs and 'advice deserts' outside of London.

Attempts to modernise or digitise practice - intended to strengthen the rule of law - have often been rushed, underfunded or made without sufficient consultation. Experts identified staff shortages, a continued reliance on paper-based systems, and delays of up to two years in criminal case hearings.

These factors make it harder to access justice in practice. It is harder to bring proceedings, harder to defend against accusations, and harder to appeal or enforce judgements. For those without deep financial resources: "too often the best course of action is to abandon justice, swallow pride and accept being the victim of the unlawful actions of a more powerful adversary" according to the Bach Commission in 2022.<sup>2</sup>

### **e. Restrictions on legal aid**

Legal aid - both eligibility for and provision of - has been reduced by successive Governments. In the 1980s, 80% of households were eligible - but by 2008, only 29%

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<sup>2</sup> Bach Commission on Access to Justice (2017). The Right to Justice



were eligible. Experts identified a growing 'justice gap' - that is, the number of households unable to afford a lawyer, but unable to qualify for legal aid.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) further narrowed the financial eligibility criteria and scope of legal aid - removing most cases involving debt, clinical negligence, employment, family, housing and immigration - and reduced fees payable to solicitors and barristers.

Since 2008, fees payable for legally-aided criminal defence work have fallen by a third in real terms. Experts described this public service as "on the brink" - with low pay, low morale, and fewer entrants into the profession. Criminal lawyers are instead opting for the higher wages and resources of the Crown Prosecution Service - equality of arms in criminal cases.

Regional disparities are a particular concern. In areas where Law Centres or Criminal Legal Aid Firms have closed due to lack of income, even those eligible for legal aid struggle to access it.

## Core idea 4: Change is needed across policy and practice to strengthen the rule of law and improve access to justice.

### a. Increase the funding and scope of legal aid

The Ministry of Justice should increase the funding and scope of legal aid to pre- LASPO levels for all social welfare and family law. And, at minimum, introduce a more generous means test. Bringing early legal help (advice before representation in court/tribunal is needed) back in scope is a win for access to justice and cost efficiency. Early legal help means disputes can be resolved quickly and before they become costly and complex, or impact on other public services.

The Lord Chancellor should increase criminal legal aid fees by a minimum of 15% per annum for solicitors, as well as barristers. This would help bring more - and more diverse - high quality lawyers into the field. And improve equality of arms (and resource) between prosecution and defence.

Some experts called for a reformed, independent Legal Aid Agency - operating at arms-length from Government and combining civil and criminal legal aid schemes.

### b. Improve and invest in legal services

Future-proof the justice system by improving and investing in legal services. The Ministry of Justice should invest on the basis of need and prioritise funding staff positions, updating outdated facilities and technology - and reversing court closures outside London.

Digital technology should be adopted to streamline processes, reduce costs and clear case backlogs. This means working with experts to minimise digital exclusion and integrate new claims and advice portals with existing court systems - delivering swifter access to justice for all who need it.

Experts also advocated for more affordable and efficient practice within the profession, like online clinics and 'unbundled services' (where a lawyer provides discrete pieces of legal advice). The Civil Procedure Rules Committee should prioritise both efficiency and equality when implementing new practice. For example, experts raised the upcoming extension of fixed recoverable costs as an equality of arms issue - if implemented without (i) efficiencies that make it possible for lawyers to take on complex/longer cases and (ii) rules to prevent abuse by wealthy litigants.

These changes would (alongside an extension of legal aid) deliver long-term cost efficiencies for public services that step in after legal needs escalate. For example, benefits claims after an unfair dismissal (via the Department for Work and Pensions), or healthcare after unsafe housing conditions (via the NHS).

### **c. Build a more collaborative advice sector**

Legal issues rarely occur in isolation - but are instead caused or exacerbated by a failure of public services. Experts emphasised that a more collaborative advice sector could address legal needs in their social context. Commons Law is one example of a collaborative, community law firm that seeks to not only address a client's legal needs - but also their social, health and housing issues.

Legal need exists in a continuum: generalist advice, specialist advice, legal help, and legal representation. Legal providers should work with employment, health, social and welfare services to develop a national advice portal for generalist and specialist advice - empowering people to resolve disputes themselves where possible.

Meeting legal needs early and at scale improves access to justice and has wider social benefits: more people can access aid before crisis point. And with demand for their services reduced, lawyers can focus on cases where legal help and representation is truly needed.

### **d. Build cultural and political buy-in**

Experts advocated for a political reset: an end to attacks on the legal profession, an end to the over-use of skeleton bills, and a public re-commitment to access to justice and the rule of law. Lawmakers should prioritise quality legislation made with full Parliamentary scrutiny and enforced by an independent judiciary.

Ministers should recognise that their legitimacy comes in part from the rule of law. And so - beyond the Lord Chancellor - be vocal in their defence of it. Experts stressed that *defence* does not require *agreement* with particular judgements; citing then First Minister

Nicola Sturgeon on the Supreme Court’s ruling on Scottish independence as a model.<sup>3</sup> Ministers should adhere to the Ministerial Code in full - and be seen to do so - with swift consequences for breaches or law-breaking.

Political parties should prioritise the rule of law and access to justice in their manifestos. This could include support for its practical features (like judicial independence), or specific pledges to increase the funding and scope of legal aid and invest in legal services.

### **e. Improve public legal education**

The Department for Education should prioritise legal education in primary and secondary education. Legal rights and remedies should be a core part of citizenship lessons and build understanding of what the law is. Lessons should focus on law as a public service and how it works in everyday life.

Experts recognised that access to the court and access to justice are not synonymous: for legal needs to be met, we must first recognise them as *legal* needs - and trust that our legal system can provide the right remedy.

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<sup>3</sup> Specifically: “we will respect that judgement. We believe in the rule of law” (October 2022).

# About FrameWorks UK

We collaborate with mission-driven organisations to communicate about social issues in ways that create change.

Our research shows how people understand social issues. And we use this knowledge to develop and test strategic communications to help organisations create change.

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