

Systemic Unfairness, Access to Justice, and Futility: A Framework

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Abstract – This paper develops a conceptual framework for access to justice as a ground of judicial review in English law. We identify a hitherto undertheorised strand of cases which enable courts to review policy within proper constitutional bounds: the doctrine of systemic unfairness, which focuses on risks inherent in a system as a whole. In the context of access to justice, the relevant systemic risk is one of futility: a rational litigant’s inability to vindicate a meritorious claim. Proving the required facts in the context of judicial review proceedings is not an easy task. Litigants must look beyond the realisation of harm to the mechanisms which put access to justice at risk. It is only where the combined impact or cost of system-level risk is particularly severe that a policy-level challenge will succeed on access to justice grounds.

Keywords: systemic unfairness, access to justice, judicial review, law and economics, court reform, digitalisation

1. Introduction

Access to justice is the bedrock of the rule of law: ‘rights are valueless if they cannot be realised ... it is therefore essential that all ... citizens have fair and equal access to justice.’¹ In English law,

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¹ Lord Neuberger, *Justice in an Age of Austerity* (Tom Sargent Memorial Lecture, 2013) [28], [26].

the constitutional right of access to the courts should ... be understood as a duty, owed by the State, not to place obstacles in the way of access to justice. That it is a constitutional duty there can be no doubt'.²

This duty has become particularly salient in the context of reforms to the justice system undertaken by successive governments since the early 2000s.³ With the onset of austerity policies, the scale and pace of change increased dramatically,⁴ impacting a wide range of jurisdictions in which access to justice concerns are acute: from immigration and housing claims to family and employment law.⁵ 'The rule of law', the Bach Commission concluded in 2017, is 'under attack'.⁶

Further change is on the horizon: the Ministry of Justice's ambitious digitalisation agenda will reshape the UK's justice system for generations. The move to online courts has the potential radically to improve access to justice. 'The modernisation of justice is not simply a technical endeavour to digitise process ... but rather a transformation ... so that new ways of working serve the fundamental aims of administering justice more efficiently and effectively and improve access to justice.'⁷ At the same time, however, there is increasing concern that the implementation process is not living up to this potential. A recent report by the Parliamentary Accounts Committee was surprisingly strident in its criticism of HMCTS's handling of the digitalisation project, expressing concern that 'reforms are being pursued at the possible expense of people's access to fair justice.'⁸

In addition to scrutiny in the political arena, litigants have increasingly turned to the courts to challenge the lawfulness of recent policy reforms. The judiciary has long recognised the central role of judicial review in defending access to justice:

² *Children's Rights Alliance for England v Secretary of State for Justice* [2013] EWCA Civ 34, [2013] HRLR 17 [38].

³ Tom Cornford, Audrey Guinchard, Yseult Marique and Ellie Palmer, 'Introduction' in Tom Cornford, Audrey Guinchard, Yseult Marique and Ellie Palmer (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart 2016).

⁴ Andrew Higgins, 'The Cost of Civil Justice and Who Pays?' (2017) 37 OJLS 687, 689-691 provides a detailed account of 'the scale of the cuts in public funding to the justice system, and its associated costs'; Natalie Byrom 'Cuts to Civil Legal Aid and the Identity Crisis in Lawyering: Lessons from the Experience of England and Wales' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid* (Hart 2017) 221, 226 discusses the 'the contextual factors that made such drastic cuts possible.'

⁵ For a series of cases studies, see the individual chapters in Part II of Cornford et al, *Access to Justice* (n 3).

⁶ Bach Commission, *The Right to Justice: Final Report of the Bach Commission* (London 2017) 5.

⁷ Sir Ernest Ryder, *The Modernisation of Tribunals 2018: A Report by the Senior President of Tribunals* (London 2018) 9.

⁸ House of Commons Committee of Public Accounts, *Transforming Courts and Tribunals* (56th report, 2017-19) HC 976.

‘[a]ccess to a court to protect one's rights is the foundation of the rule of law’.⁹ In practice, however, only a very small number of policy-level challenges have succeeded on access to justice grounds.¹⁰ The threshold is a high one: otherwise successful challenges to governmental policy on rationality grounds have failed on the broader constitutional point,¹¹ and policies which have been found illegally to deny access to justice in individual cases continue to be in force.¹²

There are ‘formidable difficulties to overcome’¹³ in bringing access to justice claims against governmental policy before the courts: how can an ‘inherently ambiguous’¹⁴ norm become a concrete ground of review? ‘[A]ccess to justice defies definition’¹⁵ amidst a vast scholarship exploring competing notions, justifications, and normative underpinnings across multiple jurisdictions,¹⁶ from broad constitutional readings including the rule of law and citizenship through to access to justice as a social right and more ‘pragmatic interpretation[s]’.¹⁷ The ‘nebulous’¹⁸ nature of the concept and the absence of a common metric make the judicial identification of unlawful violations particularly difficult: in order to remain within the proper bounds of judicial review whilst reviewing broad executive policy, the standard of scrutiny must be clear, and the illegality threshold a high one. The

⁹ *Ahmed v HM Treasury* [2010] UKSC2, [2010] 2 AC 534 [146] (Lord Phillips) at as cited by Elias LJ in *R (on the application of Unison) v Lord Chancellor* [2014] EWHC 4198 (Admin), [2015] ICR 390 [24]. cf also *R (ex parte Vijayatunga) v HM the Queen in Council* [1988] QB 322 (QBD) 343: ‘judicial review is the exercise of the court's inherent power at common law to determine whether action is lawful or not; in a word to uphold the rule of law’. See further Jack Beatson, Stephen Grosz, Tom Hickman, Rabinder Singh, and Stephanie Palmer, *Human Rights: Judicial Protection in the UK* (Sweet & Maxwell 2000) 1-11 to 1-13.

¹⁰ Including most recently *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 (‘*Unison SC*’). See Alan Bogg, ‘The Common Law Constitution at Work: *R (on the application of UNISON) v Lord Chancellor* (2018) 81 *Modern Law Review* 509.

¹¹ *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 All E.R. 638 (‘*Law Society*’).

¹² Compare *R (Gudanaviciene & Ors) v Director of Legal Aid Casework & Lord Chancellor* [2014] EWCA Civ 1622; [2015] 1 W.L.R. 2247 (‘*Gudanaviciene CA*’) and *R (on the application of S) v Director of Legal Aid Casework* [2016] EWCA Civ 464, [2016] 1 W.L.R. 4733 (‘*S CA*’). We further explore the relationship between individual and systemic challenges at the end of section 3A, below.

¹³ *R (on the application of Ben Hoare Bell Solicitors) v Lord Chancellor* [2015] EWHC 523 (Admin), [2015] 1 W.L.R. 4175 (‘*Ben Hoare Bell*’) [68].

¹⁴ *KA & NBV v London Borough of Croydon* [2017] EWHC 1723 (Admin), [2017] 7 WLUK 165 [40].

¹⁵ Hazel Genn, *Judging Civil Justice (The Hamlyn Lectures)*, Cambridge University Press 2008) 115; OECD, *Understanding Effective Access to Justice: Workshop Paper*, (OECD 2016) 3.

¹⁶ One of the earliest magisterial overviews is Mauro Cappelletti and Bryant Garth (eds), *Access to Justice, Volume 1: A World Survey* (Giuffrè | Sijthoff and Noordhoff 1978–79).

¹⁷ For a detailed overview, see e.g. Tom Cornford, ‘The Meaning of Access to Justice’ in Tom Cornford et al (eds), *Access to Justice* (n 3) 27, 28ff.

¹⁸ Roger Smith, ‘Justice’ (ILAG Newsletter, March/April 2010), as quoted in A Paterson, *Lawyers and the Public Good: Democracy in Action?* (The Hamlyn Lectures, CUP 2011) 60.

significance of a precise conceptual framework can hardly be understated: in its absence, the constitutional actors most experienced on point will be hampered in their ability constructively and consistently to engage in safeguarding a fundamental constitutional value.

In this paper, we develop an overarching framework for access to justice as a ground of review at the policy level. Building on the terminology of *futility* coined by Lord Reed in *Unison*,¹⁹ we argue that access to justice is at stake where there is a systemic risk that an individual's meritorious claim will not be vindicated: in other words, a *risk* that her claim has been rendered *futile*.²⁰ All legal systems, however, contain such risks: in developing the concept of futility, a further factor is therefore required to determine unlawfulness. This, we suggest, should be the consequences, or *cost*, of that futility: from individual implications, such as a loss of liberty or deprivation of property, to broader societal benefits, including precedent and deterrence.

We propose the *Risk of Futility* as the central framework for evaluating access to justice. Whilst judicial review in English law has traditionally focused on individual erroneous decisions, a recent and hitherto undertheorised strand of cases has opened up the possibility of challenging government policy on a systemic level. By building on the common law jurisprudence on 'systemic' or 'inherent' unfairness, supplemented as appropriate by economic theory and the broader socio-legal literature to demonstrate the underlying mechanisms at play, we identify the requisite features of access to justice as a concrete ground of system-level judicial review.

Discussion proceeds as follows. The next section outlines the development of systemic unfairness as a novel standard of judicial review in English administrative law, and sets out its defining features: instead of targeting individual, aberrant decisions, claimants must point to a mechanism *inherent* in a policy, which gives rise to an *unacceptable risk* of unfairness.²¹ In section three, we argue that this

¹⁹ *Unison SC* (n 10) [96].

²⁰ This has long been recognised as an important consideration in access to justice challenges: *Martin v Legal Services Commission* [2007] EWHC 1786 (Admin), [2007] 7 WLUK 822 [31]ff, citing *Airey v Ireland* (A/32) (1979-80) 2 E.H.R.R. 305. In *Gudanaviciene CA* (n 12) [54], for example, the Court of Appeal relied on *Perotti v Collyer-Bristow* [2003] EWCA Civ 1521, [2004] 2 All ER 189, to establish that the central question should be framed as the likelihood that a litigant will obtain a 'just decision'. See also T Mullen, 'Access to Justice in Administrative Law and Administrative Justice' in Cornforth et al (eds) *Access to Justice* (n 3) 69, 70.

²¹ *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [2005] 1 WLR 2219 ('*Refugee Legal Centre CA*') [7] (Emphasis supplied).

approach is key to defining access to justice as a concrete and constitutionally legitimate ground of policy-level review: it is only through a system-level review of the full run of cases that we can identify the policy mechanism or mechanisms which render claims futile and thus bar access to justice.

As the Supreme Court recognised in *Unison*, however, this is not just a question of understanding the risk of such futility, but also its broader (social) consequences. Subsequent sections turn to a detailed analysis of these elements. In section four, we identify the relevant factors in determining the risk of futility, including both individual incentives to bring claims,²² and system-level incentives to ensure that meritorious claims are processed so as to be able to succeed.²³ Section five explores the cost of futility, comprising both consequences for the individual such as loss of liberty²⁴ and the wider societal benefit of deterrence,²⁵ and explains its role in determining the legality of government interference with the right of access to justice. Section six, finally, assesses the evidence required to prove the factors thus identified. A brief conclusion returns to the broader significance of access to justice as a concrete review standard in the context of on-going reforms to the domestic justice system.

2. Systemic Unfairness and the Judicial Review of Policy

Judicial review proceedings in English law scrutinise the lawfulness of ‘a decision, action or failure to act in relation to the exercise of a public function.’²⁶ The traditional focus has been on individual decision-makers’ exercise of discretionary powers,²⁷ with clear consequences for identifiable individuals: as Lord Diplock explained in *GCHQ*, to ‘qualify as a subject for judicial review the decision must have [a defined set of] consequences which affect some person (or body of

²² *S CA* (n 12).

²³ *R (on the application of Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWCA Civ 840, [2015] 1 W.L.R. 5341 (*‘Detention Action CA’*); *R (on the application of Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710, [2011] 11 WLUK 616 (*‘Medical Justice CA’*).

²⁴ *R (on the application of Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244, [2017] 4 W.L.R. 92 (*‘Howard League CA’*).

²⁵ *Unison SC* (n 10).

²⁶ CPR 54.1(2)(a)(ii).

²⁷ *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA) 229. Cf the approach in EU law, which has long been based on reviewing ‘the overall scheme of [a] national legal system’: Case C-432/05 *Unibet v Justitiekanslern* ECLI:EU:C:2007:163 [41]. This is today anchored in Article 19(1) TEU as well as Article 47 of the Union’s Charter of Fundamental Rights: M Bobek, ‘Why There is No Principle of “Procedural Autonomy” of the Member States’ in H-W Micklitz and B de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012).

persons)'.²⁸ This approach poses a number of potential obstacles to policy-level review: it is not always clear in advance who might be impacted, and not all decisions taken pursuant to a policy will lead to unlawful outcomes. When Mrs Gillick sought to challenge the West Norfolk Health Authority's policy on contraceptive prescriptions, she could only do so on the basis that 'the guidance, if followed, would result in unlawful acts'.²⁹

This focus limits claimants' ability to challenge overarching policy, particularly where its impact differs across a group, or where potential harm has not yet materialised. In order to grapple with these challenges, courts have begun to develop the doctrine of systemic unfairness as an additional and complementary ground of review.³⁰ Building on long-standing principles, this new line of cases expands the scope of judicial review to include the risk of harm, rather than its realisation, and asks whether that risk is inherent in an overall policy, rather than an individual decision-maker's exercise of her discretionary authority.³¹

A. The Rise of Systemic Unfairness

In *Refugee Legal Centre*,³² a charity providing legal advice to asylum seekers sought to challenge a pilot fast-track scheme for removal adjudications. Under a new policy instituted by the Home Secretary, detainees were interviewed and a decision (usually a refusal) made within a matter of days, with the entire appellate process exhausted in five weeks. The scheme was designed swiftly to resolve 'straightforward claims', and limited to single male applicants from countries thought not to pose a general, serious risk of persecution. Refugee Legal Centre alleged that the overall operation of the pilot scheme was incapable of providing asylum seekers with a fair opportunity to put their case.³³ In addressing this point, Sedley LJ recognised a new avenue of challenge, *viz*

²⁸ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) 408.

²⁹ *Gillick v West Norfolk Area Health Authority* [1986] 1 AC 112 (HL) 181F (L Scarman).

³⁰ The growth of systemic unfairness is in line with the broadening of judicial review more generally: Rick Rawlings, 'Modelling Judicial Review' (2008) 61 *Current Legal Problems* 95, 103.

³¹ For an early attempt at systematising this line of cases, albeit under the distinct notion of 'structural procedural review', see Frederick Powell, 'Structural Procedural Review: An Emerging Trend in Public Law' (2017) 22 *Judicial Review* 83.

³² *Refugee Legal Centre CA* (n 21).

³³ *ibid* [6].

appropriate relief, following judicial intervention to *obviate in advance a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself*.³⁴

On the facts of the case, the Court of Appeal found no such inherent risk: a detailed flexibility policy allowed officers to remove claimants from the three-day timetable, thus ensuring that the system was not inherently unfair.³⁵

The absence of flexibility was key in the first successful systemic challenge. In *Medical Justice*,³⁶ the Court of Appeal upheld an order quashing Home Office policy which permitted removal decisions with 72 hours' notice. In applying the *Refugee Legal Centre* approach, which was not disputed on behalf of the Home Secretary,³⁷ Silber J had highlighted the lack of adequate safeguards built into the procedure, such as stays for individuals unable to instruct legal representatives in time. As a result, there was 'a very high risk if not an inevitability that the right of access to justice [was] being and will be infringed.'³⁸

B. Systemic Unfairness: Distinguishing Features

A decade on, systemic challenges are firmly embedded within the general scheme of judicial review in English Law,³⁹ whilst operating with a set of distinctive features: '[a]lthough a systemic challenge differs from most judicial review in that it does not focus upon the consequences of unlawfulness for a particular individual ... the basic requirements of a judicial review are still in place.'⁴⁰

Drawing on Lord Dyson MR's summary of the authorities in *Detention Action*,⁴¹ Hickinbottom LJ in *Woolcock* set out the 'clear and consistent approach' at the heart of systemic unfairness challenges.⁴²

³⁴ *ibid* [7] (Emphasis supplied).

³⁵ *ibid* [23]. A subsequent challenge to the fast track detention system found insufficient evidence of that flexibility in practice, rendering the policy systemically unfair: *Detention Action* (n 23). See Charlotte Kilroy, 'Speed Kills' (Legal Action Magazine, September 2015), archived at <https://perma.cc/XL9H-3GLQ>.

³⁶ *Medical Justice CA* (n 23).

³⁷ *R (on the application of Medical Justice) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin), [2011] 8 WLUK 60 ('*Medical Justice HC*') [33]; *Medical Justice CA* (n 23) [25].

³⁸ *Medical Justice HC* [172], as quoted in *Medical Justice CA* [6].

³⁹ Lord Woolf, Jeffrey Jowell, Catherine Donnelly and Ivan Hare (eds), *De Smith's Judicial Review* (8th ed, Sweet & Maxwell 2018) 11-072.

⁴⁰ *R (on the application of Woolcock) v Secretary of State for Communities and Local Government* [2018] EWHC 17 (Admin), [2018] 4 WLR 49 ('*Woolcock HC*') [68(vii)].

⁴¹ *Detention Action CA* (n 23) [27].

⁴² *Woolcock HC* (n 40) [68].

An administrative scheme will be open to a systemic challenge if there is something *inherent* in the scheme that gives rise to an *unacceptable risk* of procedural unfairness.⁴³

These, then, are the two distinguishing features of systemic unfairness: a policy will be struck down if it ‘carries an unacceptable risk of unfair, and therefore unlawful, decision-making’,⁴⁴ and that risk amounts to ‘more than the possibility of aberrant decisions and unfairness in individual cases’.⁴⁵

The emphasis on a risk of unfairness, rather than its realisation, has a number of important implications: it enables challenges to policy, including pre-emptive challenges, without the identification of specific instances where problems have materialised.⁴⁶ This does not mean that the courts are suddenly to try hypothetical cases:⁴⁷ systemic challenges are designed to ‘obviate in advance a *proven risk* of injustice’.⁴⁸ The absence of specific instances of unfairness or unlawful decision-making furthermore requires a significant level of risk before systemic unfairness can be made out: ‘no system can be risk free,’⁴⁹ as a result of which ‘the threshold ... is a high one.’⁵⁰

The risk, finally, must inhere in the policy itself. Demonstrating even a high level of risk is not enough to succeed if it merely reflects ‘the ever-present risk of aberrant decisions’.⁵¹ ‘There is an obvious but important difference between a scheme or system which is inherently bad or unlawful on that account, and one which is being badly operated.’⁵²

That difference, we suggest, is the existence of a policy *mechanism* which drives the risk of unfairness. In practice, identifying such a policy mechanism as the ‘decision, action or failure to act in relation to the exercise of a public function’⁵³ under review requires ‘consideration and analysis of the scheme itself, and the

⁴³ *ibid* [68(iii)] (Emphasis supplied).

⁴⁴ *Howard League CA* (n 24) [5] (Beatson LJ).

⁴⁵ *Detention Action CA* (n 23) [27(ii)] (Lord Dyson MR). Powell, ‘Structural Procedural Review’ (n 31), [29] cites ‘five organising principles’. However, in subsequent case law only the factors identified here are consistently discussed and applied.

⁴⁶ *Medical Justice CA* (n 23); *Detention Action CA* (n 23); *Unison SC* (n 10).

⁴⁷ *Whall v Bulman* [1953] QB 198, 202 (L Denning).

⁴⁸ *Refugee Legal Centre* (n 21) [7]. (Emphasis supplied). See section six for details as to how systemic risk can be proved.

⁴⁹ *ibid* [7].

⁵⁰ *Detention Action CA* (n 23) [27(iv)] (Lord Dyson MR).

⁵¹ *R (on the application of Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014] EWCA Civ 827, [2014] 1 WLR 4620 (*‘Tabbakh CA’*) [34].

⁵² *S CA* (n 12) [18].

⁵³ CPR 54.1(2)(a)(ii).

identification of what, within the scheme, gives rise to the unacceptable risk.⁵⁴ As explored in detail in section six, below, the case law recognises a wide range of potential mechanisms, from fees that lead to negative expected payoffs even for meritorious claimants⁵⁵ and excessively complex forms and procedures⁵⁶ to time limits too short to adduce relevant factual evidence.⁵⁷ Mechanisms cannot be analysed in isolation: what matters is their combined impact on the ability to vindicate a meritorious claim. Factors which increase the risk of a miscarriage of justice, such as very short time limits, may be compensated for by other elements, including flexible case triage or automatic provision of legal assistance.⁵⁸

C. Systemic Unfairness: Relationship with Individual Claims

The rise of systemic unfairness has not supplanted traditional grounds of review centred on realised harm. As Sedley LJ explained in *Refugee Legal Centre*,

Potential unfairness is susceptible to one of two forms of control which the law provides. One is access, retrospectively, to judicial review if due process has been violated. The other [is systemic review]. In other words it will not necessarily be an answer, where a system is inherently unfair, that judicial review can be sought to correct its effects.⁵⁹

Put differently, even a systemically fair policy can lead to individual unfair decisions; at the same time, not all decisions taken pursuant to an unfair policy will themselves be automatically illegal. The crucial difference is one between proven risk, key to systemic claims, and the actual realisation of harm, on which traditional challenges are founded.⁶⁰

The precise relationship between individual and systemic claims is illustrated in a number of cases where litigants have attempted to rely on both avenues. In

⁵⁴ *Woolcock* (n 40) [68(iv)].

⁵⁵ *Unison SC* (n 10).

⁵⁶ *Howard League CA* (n 24); *S CA* (n 12).

⁵⁷ *Detention Action CA* (n 23); *Medical Justice CA* (n 23).

⁵⁸ *Refugee Legal Centre CA* (n 21), *Medical Justice HC* (n 37) [171] (Silver J).

⁵⁹ *ibid* [7] (Emphasis supplied).

⁶⁰ There has been no litigation to date exploring the precise relationship between systemic and collective claims, such as those brought under sections 47B and 47C of the Consumer Rights Act 2015. However, the same fundamental requirement was confirmed in the Court of Appeal's recent decision in *Mastercard v Merricks* [2019] EWCA Civ 674, [2019] 5 CMLR 4. Even though certain elements (such as quantifying individual loss) are waived under the statutory provisions, a collective claim still fundamentally relies on demonstrating realised harm (pass-on to consumers): [47].

Gudanaviciene, the Court of Appeal heard a series of cases concerning the refusal of Exceptional Case Funding ('ECF') under LASPO, upholding the majority of successful first-instance claims.⁶¹ In coming to this result, the Court of Appeal applied the traditional approach, looking to whether harm had materialised: in that context, the 'concept of real risk [had] no part to play.'⁶²

The inverse is true where the overarching policy is under scrutiny: despite the fact that one of the claimants in *Gudanaviciene* had already succeeded in demonstrating individual unfairness, the Official Solicitor continued to pursue their claim on the systemic level in follow-up litigation. '[T]he judicial review [thus became] generic: the assault [was] upon the ECF scheme as a whole'.⁶³ Whilst the Court of Appeal (Briggs LJ dissenting) eventually found that the policy itself did not constitute an unlawful denial of access to justice, it was accepted that the proper question here was one of systemic risk, rather than 'proof of a series of individual failures',⁶⁴ and that the principles set out in the preceding section were therefore applicable.

In *R (TN) v Secretary of State for the Home Department*,⁶⁵ finally, the Court of Appeal was faced with an individual claim in the wake of an earlier successful systemic challenge to fast track asylum removals.⁶⁶ The Court rejected the applicants' contention that where a policy had been declared *ultra vires* on the ground of systemic unfairness, an individual decision taken pursuant to that procedure was necessarily to be set aside and treated as having no legal effect.⁶⁷ There was 'a conceptual distinction between holding that the Procedural Rules were *ultra vires* and the question whether the procedure in an individual ... decision was fair'.⁶⁸

3. Judicial Review and Access to Justice

⁶¹ As determined by the Director of Legal Aid Casework: Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'), s 10. Details of the scheme, including explanatory notes and guidance are set out at *Gudanaviciene CA* (n 12) [6] – [23].

⁶² *Gudanaviciene CA* (n 12) [31].

⁶³ *S CA* (n 12) [11].

⁶⁴ *S CA* (n 12) [11].

⁶⁵ *R (TN) v Secretary of State for the Home Department* [2018] EWCA Civ 2838, [2019] 1 WLR 2647.

⁶⁶ *Detention Action CA* (n 23).

⁶⁷ *R (TN)* (n 65) [65]–[67].

⁶⁸ *Ibid* [83]–[87].

Today, systemic unfairness challenges are increasingly relevant across the full spectrum of judicial review proceedings.⁶⁹ Their rise is particularly salient in the context of access to justice. Recent decisions ranging from challenges to council tax enforcement⁷⁰ and legal aid reform⁷¹ to the mechanisms for imposing probationary conditions⁷² demonstrate that it will not always be possible to rely on traditional judicial review mechanisms,⁷³ even where there is a high risk of access to justice violations.⁷⁴ As we argue in this section, systemic unfairness litigation focused on the risk of futility, viz the inability to vindicate a meritorious claim, overcomes these challenges by structuring myriad influences on litigation pathways into a coherent overarching framework.

A. Limitations of the Received Approach

The obstacles posed by the received approach to judicial review in domestic law, focused on aberrant decisions with identifiable repercussions for the claimant, are especially acute in challenging governmental policy for violation of the constitutional right of access to justice. As regards the emphasis on individual decisions, first, barriers to justice will rarely be characterised by a single decision: ‘paths to justice’⁷⁵ are notable for the complex interaction of multiple factors.⁷⁶

In scrutinising governmental policy for violation of the right of access to justice, it will furthermore frequently be necessary to look beyond harm which has already materialised. Given the variability of individual paths to justice, the impact of a new policy will be heterogeneous: not everyone subject to short time limits, for

⁶⁹ Nick Armstrong and Adam Sandell, ‘Unlawful Systems: The Concept of Unacceptable Risk’ (2011) *Judicial Review* 248, for example, also list cases concerning vulnerable adult protection (*R (Royal College of Nursing) v Secretary of State for Health* [2010] EWHC 2761 (Admin), [2011] UKHRR 309) and the DPP’s guidance on child prosecutions (*R (E) v DPP* [2011] EWHC 1465 (Admin), [2011] 6 WLUK 20). They trace the systemic risk point back to Baroness Hale’s speech in *R (Wright) v Secretary of State for Health* [2009] UKHL 3, [2009] 1 AC 739. Cf Powell, ‘Structural Procedural Review’ (n 31), who traces a similar line of cases back to *R (Brooke) v Parole Board* [2008] EWCA Civ 29, [2008] 1 WLR 1950.

⁷⁰ *Woolcock HC* (n 40).

⁷¹ *Law Society* (n 11); *Ben Hoare Bell* (n 13); *S CA* (n 12).

⁷² *Tabbakh CA* (n 51).

⁷³ Not least given the traditional need ‘to operate behind the name of an individual, or “frontman”’: Carol Harlow, ‘Public Law and Popular Justice’ (2002) 65 *Modern Law Review* 1, 6.

⁷⁴ These problems have become increasingly acute as a result of recent reforms: Joint Committee on Human Rights, *The Implications for Access to Justice of the Government’s Proposals to Reform Judicial Review* (13th report of Session 2013-14, HL Paper 174 HC 868).

⁷⁵ Hazel Genn, *Paths to Justice: What People Do and Think about Going to the Law* (Hart 1999).

⁷⁶ An individual may furthermore be able to choose between multiple alternative pathways, not all of which necessarily require access to lawyers or even the legal system: see Rebecca Sandefur, ‘Access to What?’ [2019] *Daedalus* 49.

example, will be exposed to the same risks of unfairness.⁷⁷ There might also be a large number of unidentifiable individuals who are not yet, or will never end up, in the formal justice system.⁷⁸ The consequences flowing from a denial of access to justice, finally, could be so severe that judicial review after the risk of harm has materialised will no longer be able to provide suitable remedies, notably in the case of immigration and asylum claims.⁷⁹

None of this is to say that access to justice challenges are impossible under the traditional approach, or that systemic challenges would subsume individual claims:⁸⁰ limits on journalists' access to prisoners in *Simms* were quashed by the House of Lords as the 'principle of legality' meant that even wide discretionary powers such as those set out in prison regulations could not be construed as authorising 'blanket restrictions which would curtail ... access to justice.'⁸¹ Mr *Simms*' case, however, was still framed as challenging a specific decision, with concrete impact on an identifiable individual.

B. Access to Justice and Systemic Unfairness

Reliance on the systemic unfairness doctrine has enabled courts to overcome these underlying challenges in vindicating access to justice whilst staying within the proper confines of judicial scrutiny. The very features which distinguish the systemic unfairness case law address the fundamental concerns just identified:⁸² a focus on the *system level*, first, moves beyond individual decisions to scrutiny of mechanisms inherent in overarching policy design, thus capturing a much broader set of considerations along the pathway to justice.

⁷⁷ Pascoe Pleasence and Nigel Balmer, 'Justice & the Capability to Function in Society' [2019] *Daedalus* 140 highlight socio-economic disadvantage as a key factor in this regard.

⁷⁸ Genn, *Paths to Justice* (n 75) 9.

⁷⁹ *M v Home Office* [1994] 1 AC 377 (HL).

⁸⁰ Rawlings' 'drainpipe': *Modelling Judicial Review* (n 30) 98. See further Section 2(c) above.

⁸¹ *R (ex parte Simms) v Secretary of State for the Home Department* [2000] 2 AC 115 (HL) 132 (L Steyn). See also *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 (cell-search policy including legal correspondence).

⁸² They have also long been recognised as key elements of access to justice under the European Convention of Human Rights and European Union law. See e.g. *Golder v UK* (1975) 1 EHRR 524; *Airey v Ireland* (n 20); C-106/77 *Simmenthal* [1978] ECR 629. For a full account, see e.g. S Peers, 'Europe to the Rescue? EU Law, the ECHR and Legal Aid' in E Palmer, T Cornford, A Guinchard and Y Marique (eds) *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart 2016) 53.

The recognition of *risk* as a key consideration, second, overcomes the difficulties imposed by the requirement to demonstrate materialised harm. This approach is much better suited to scenarios where policy has heterogeneous impact on claimants, up to and including their complete absence from the legal system, thus making it impossible exhaustively to identify its consequences. It also allows for particularly grave harm to be obviated in advance of its materialisation.

The case law on systemic unfairness, we suggest, is thus key to defining access to justice as a concrete ground of review at the policy level. This point was explicitly recognised in *Unison*, when the Supreme Court quashed the Lord Chancellor’s policy of imposing fees of up to £1,200 on individual claimants before the Employment Tribunals as the order ‘effectively prevent[ed] access to justice, and [was] therefore unlawful.’⁸³

In explaining the reasoning of the Court, Lord Reed drew on the core components of systemic unfairness. Rather than any individual decision to charge fees or grant fee remission, the policy’s overarching design scheme was at stake. The Court was able to quash the policy only upon a detailed review of the mechanisms inherent in the Fee Order, *viz* the significant change in incentives for rational claimants: ‘[t]he problems which have been identified in these proceedings are not confined to exceptional circumstances: they are systemic.’⁸⁴

There was furthermore no need to identify a specific claimant who had suffered as a result: a material risk of unfairness was enough. ‘It follows from the authorities cited that the Fees Order will be *ultra vires* if there is a *real risk* that persons will effectively be prevented from having access to justice.’⁸⁵ Drawing on a wide range of empirical evidence, His Lordship identified the risks of the Fee Order’s deterring claimants, rather than requiring the identification of individual claimants for whom that harm had materialised. An analysis limited to realised outcomes alone fundamentally mischaracterised the operation of the policy given that ‘success can rarely be guaranteed’.⁸⁶ It would not have been rational for a large proportion of claimants, even if able in principle to afford the fee, to enforce their claims, effectively ‘rendering those rights nugatory.’⁸⁷

C. The Futility Framework

⁸³ *Unison SC* (n 10) [98].

⁸⁴ *ibid* [95].

⁸⁵ *ibid* [87] (emphasis supplied).

⁸⁶ *ibid* [96].

⁸⁷ *ibid* [104].

This, then, is the specific systemic risk in access to justice claims: Futility, *viz* a rational litigant's inability to vindicate a meritorious claim. As Lord Reed emphasised in *Unison* 'it is not only where fees are unaffordable that they can prevent access to justice. They can equally have that effect if they *render it futile* or irrational to bring a claim.'⁸⁸ Viewed thus, the *risk of futility* is the uniting theme in access to justice cases brought as systemic unfairness challenges, whether driven by individual incentives or the system's ability fairly to process a claim.

A vast range of factors determine access to justice: it is therefore essential for the review standard to encompass the entire litigation 'path to justice'⁸⁹ (or system, in judicial terms) as a whole, including the interaction of a large number of different mechanisms.⁹⁰ Drawing on the systemic unfairness case law, as well as the jurisprudence of the Strasbourg court⁹¹ and economic models of choice under uncertainty, futility provides the framework to structure our analysis of individual and system-level factors.⁹²

Before turning to a detailed analysis, it is important to note that not all determinants of access to justice will necessarily be relevant in every judicial challenge. Myriad issues will be relevant in different contexts: court fees will be irrelevant in prison hearings; legal advice might make little difference in simple

⁸⁸ *ibid* [96] (emphasis supplied). On the facts of *Unison*, the system-level mechanisms behind futility were the expected payoffs resulting from high fees and low tribunal award enforcement rates: Abi Adams and Jeremias Prassl, 'Vexatious Claims: Challenging the Case for Employment Tribunal Fees' (2017) 80 *Modern Law Review* 412.

⁸⁹ Genn, *Paths to Justice* (n 75); Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993) 56 *Modern Law Review* 282; Roderick MacDonald, 'Access to Civil Justice' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010).

⁹⁰ An individual may furthermore be able to choose between multiple alternative pathways: Rebecca Sandefur, 'Access to What?' (n 76). See also R Smith, *Justice: Redressing the Balance* (London, Legal Action Group, 1997) 9ff. This observation lies at the heart of difficulties in empirical measurement, and cross-jurisdictional comparisons: see Martin Gramatikov, 'Methodological Challenges in Measuring Cost and Quality of Access to Justice', *Tilburg University Legal Studies Working Paper No. 005/2008*; and more generally, Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems, *A Handbook for Measuring the Costs and Quality of Access to Justice* (TISCO 2009).

⁹¹ This structure is mirrored in European law. As Storskubb and Ziller explain, 'Today, the overarching notion and theme [in EU law] is that of access to justice in which ... the emphasis is on obstacles to achieving redress, whether these obstacles are of a person or generic nature, due to economic or cultural reasons, or perhaps resulting from the complexities of procedural rules.' Eva Storskubb and Jacques Ziller, 'Access to Justice in European Comparative Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (OUP 2017) 185. Cf also the Strasbourg court's recognition of 'Institutional' and 'Procedural' requirements inherent in Article 6 ECHR: Council of Europe, *Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb)* (version of 31 August 2019) 33ff, 54ff; archived at <https://perma.cc/N5FE-7M4C>.

⁹² Andreu Mas-Collell, Michael Whinston and Jerry Green, *Microeconomic Theory* (OUP 1995) ch 6.

factual disputes; and alternative forms of assistance could equally be able to ensure access to justice.⁹³

In determining the relevance of individual and system-level risk factors, it is furthermore important to recognise the interaction or ‘combined effect of a system’.⁹⁴ Any given policy will necessarily involve fundamental trade-offs between different components. As Adrian Zuckerman has long argued, ‘it is simply impossible to achieve perfection in every respect’, as different factors driving access to justice ‘are capable of pointing in different directions.’⁹⁵ Take the planned introduction of continuous online resolution, where tribunal processes are digitalised in their entirety, as an example.⁹⁶ Proponents of this policy have highlighted significant reductions in process time and cost as a potential advantage, whereas critical voices have emphasised the danger of digital exclusion, as well as lower accuracy resulting from litigants’ inability persuasively to make their case.⁹⁷

The advantage of using the lens of futility, broken down into distinct individual and systemic components, is that of having a coherent structure for the judicial recognition of these trade-offs. Understood thus, futility is the key to understanding the role of systemic unfairness in access to justice litigation. It provides a framework to structure our analysis of the myriad influences on litigation pathways, and operates as the gateway to a theoretically robust framework for the empirical evaluation of such claims.

Subsequent sections develop our framework in detail. Section 4 organises the wide range of factors driving the risk of futility into two broad categories, focusing on the individual and the systemic level. The mere presence of these risks, however, is not enough to determine illegality. Procedural requirements cannot be seen in abstraction from the substantive issue at stake: ‘how much process is due is inherently linked to the value of the rights in question ... and the public and private interest in timely and affordable resolution.’⁹⁸ Building on this notion of ‘procedural proportionality’,⁹⁹ section 5 argues that it is only where the impact or

⁹³ *Howard League CA* (n 24) [43], citing *R (ex parte Tarrant) v Secretary of State for the Home Department* [1985] QB 251 (QB) 283 (right to a friend or adviser). As we explain in section six, below, it is up to the litigant to identify the mechanism or mechanisms which drive the risk of futility in any given policy.

⁹⁴ *S CA* (n 12) [77] (Briggs LJ). See also A. Zuckerman, ‘A Reform of Civil Procedure: Rationing Procedure Rather Than Access to Justice’ (1995) 22 *Journal of Law and Society* 155, 157.

⁹⁵ Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd ed, Sweet & Maxwell 2013) 1.61.

⁹⁶ HMCTS, *Reform Update* (London, Summer 2019), archived at <https://perma.cc/3LTY-MPTW>.

⁹⁷ House of Commons Justice Committee, *Court and Tribunal Reforms* (2nd report, 2019) HC 190.

⁹⁸ Higgins, ‘The Cost of Civil Justice’ (n 4) 695.

⁹⁹ Zuckerman, ‘A Reform of Civil Procedure’ (n 94).

cost of futility is sufficiently serious (such as in cases of deprivation of liberty) that a judicial finding of systemic unfairness is warranted.

4. The Risk of Futility

Whilst Lord Reed's analysis of systemic risk factors in *Unison* was primarily cast in terms of monetary cost and benefits, a detailed analysis of the case law on systemic unfairness suggests that there is nothing in English or European law which limits the courts' assessment of access to justice risk to financial incentives. The imposition of short time limits,¹⁰⁰ a lack of representation in hearings requiring the consideration of complex evidence,¹⁰¹ overly complex application forms,¹⁰² and an absence of opportunities to make meaningful representations¹⁰³ are all examples of factors which have been recognised both domestically and in Strasbourg jurisprudence as drivers of the risk of futility,¹⁰⁴ given their impact on claimants' ability to vindicate a meritorious claim.

In unpacking the risk of futility, it is therefore crucial to look beyond monetary considerations,¹⁰⁵ and 'not to underestimate the complex interaction of factors that influence decisions about how to deal with problems raising legal issues.'¹⁰⁶ Depending on the specific context, we suggest, two broad sets of questions will elucidate the risk of futility: first, what are an individual's incentives to launch a meritorious claim? Second, will the system be able to vindicate such actions once launched?

A. Individual Incentives to Launch Claims

At the outset, access to justice requires an appropriate pathway to justice within an individual's choice set: feasible enforcement options have to be available.¹⁰⁷ This

¹⁰⁰ *Detention Action CA* (n 23). cf *Escolano v Spain* (2002) 34 EHRR 24, [36].

¹⁰¹ *Howard League CA* (n 24). cf *Steel v UK* (2005) 41 EHRR 22 [61]-[62].

¹⁰² *S CA* (n 12). cf *Airey v Ireland* (n 20) [24].

¹⁰³ *Tabbakh CA* (n 51). cf *Regner v Czech Republic* (2018) 66 EHRR 9 [146].

¹⁰⁴ A full overview of factors considered by the Strasbourg court can be found in ECHR's *Guide on Article 6* (n 91).

¹⁰⁵ A comprehensive account is given in Martin Gramatikov, 'A Framework for Measuring the Costs of Paths to Justice' (2009) 2 *The Journal of Jurisprudence* 111; and Pascoe Pleasence, Nigel Balmer, and Rebecca Sandefur, *Paths to Justice: A Past, Present and Future Roadmap* (Nuffield Foundation, London 2013).

¹⁰⁶ Genn, *Paths to Justice* (n 75) 10.

¹⁰⁷ Charles Manski, 'The Structure of Random Utility Models' (1977) 8 *Theory and Decision* 229. The same set of considerations applies, *mutatis mutandis*, to interest groups' incentives in bringing judicial review claims.

goes beyond the mere availability of a public system of adjudication and enforcement: access to dispute resolution processes must be ‘practical and effective’ as opposed to ‘theoretical and illusory’.¹⁰⁸

Excessively complex procedural rules, for example, will lead to a high risk of futility, particularly for claimants unable to afford legal advice. One area in which this has been litigated is exceptional case funding.¹⁰⁹ In order to apply for such funding, individuals must complete an application form ‘which is addressed to, and plainly designed only to be completed by, lawyers ... [it] does not therefore even attempt to make the process accessible ... only one litigant in person applicant has ever navigated the scheme successfully’.¹¹⁰ Even though the Court of Appeal found that the overall ECF scheme was not systemically unfair, procedural complexity was explicitly accepted as a crucial factor in determining access to justice.¹¹¹

Another example are circumstances in which early access to legal advice can play an important role in an individual’s ability to bring a claim. This was recognised by the Court of Appeal in *Gudanaviciene*: ‘in some circumstances, legal advice to the litigant in person may be more important than legal representation at the hearing for ensuring effective access to justice’.¹¹²

Once credible options are available, the choice of whether to litigate or not is driven by a claim’s expected payoffs. All costs and benefits ‘incurred on the quest to solve the problem’ must be taken into account,¹¹³ including but not limited to direct financial expenditure, time, delay, and emotional strain.¹¹⁴ The ensuing consideration encompasses both the net benefit from enforcing a claim and the likelihood of success.¹¹⁵ a meritorious claimant will only sue when the benefit she

¹⁰⁸ *Gudanaviciene CA* (n 12) [46]. See also *MacDonald* (n 89) 504. This is particularly acute in jurisdictions where there are no alternative routes beyond the official channel (such as mediation) for pursuing a claim.

¹⁰⁹ *Gudanaviciene CA* (n 12) [6] – [23].

¹¹⁰ *S CA* (n 12) [77] (Briggs LJ, dissenting).

¹¹¹ The majority was persuaded that changes subsequent to a successful individual challenge in *Gudanaviciene CA* (n 12) had sufficiently remedied the earlier court’s concerns: *S CA* (n 12) [54], [79].

¹¹² *Gudanaviciene CA* (n 12) [185], as cited in *Howard League CA* (n 24) [42].

¹¹³ Gramatikov, ‘A Framework’ (n 105) 115.

¹¹⁴ Richard Posner, ‘An Economic Approach to Legal Procedure and Judicial Administration’ (1973) 2 *Journal of Legal Studies* 399; Steven Shavell, ‘Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for Allocating Costs’ (1982) 11 *Journal of Legal Studies* 55. This closely tallies with Lord Hoffmann’s observations on the broader ‘purpose of a fair hearing’ in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269 [72].

¹¹⁵ Steven Shavell, *Foundations of Economic Analysis of Law* (Cambridge, Mass: Harvard University Press, 2004) 390.

expects from bringing a claim exceeds her expected cost of doing so, viz when the expected value of a claim is positive.¹¹⁶ If the expected payoff is negative, on the other hand, she will not proceed along the pathway, even if theoretically able to do so: her claim has been rendered futile.¹¹⁷

This argument was at the core of the Supreme Court's decision in *Unison*. Empirical analysis of claimant behaviour demonstrated that once the expected costs and benefits of employment law claims were taken into account, not coming to tribunal was a rational response for a very significant proportion – between 34 per cent and 50 per cent – of meritorious claimants.¹¹⁸ As a result, Lord Reed held, 'the fee will in reality prevent the claim from being pursued, whether or not it can be afforded', thus effectively preventing access to justice.¹¹⁹

B. System-level Incentives to Resolve Claims

Once an individual has launched her meritorious claim, the next question which arises is the ability of the legal system correctly to apply the law to the facts of the case, thus vindicating the claim. Procedural rules play a central role in shaping system-level incentives. As Genn explains,

For Bentham, the power of procedure was in the link between evidence and correct decisions (rectitude) and the role of procedure in achieving accuracy in decision making continues to be seen as central today ... Procedure is the means by which substantive rights are enforced.¹²⁰

Once more, a large number of factors are potentially in play, from the availability and timing of oral hearings through to the role and funding of legal representatives.¹²¹ The core question consistently underpinning recent decisions is

¹¹⁶ This assumes that claimants are averse to risk. See Steven Shavell, 'The Social versus the Private Incentive to Bring Suit in a Costly Legal System' (1982) 11 *Journal of Legal Studies* 333, 338.

¹¹⁷ *S CA* (n 12) [78].

¹¹⁸ Adams and Prassl, 'Vexatious Claims' (n 88).

¹¹⁹ *Unison SC* (n 10) [96], [98].

¹²⁰ Genn, *Judging Civil Justice* (n 15) 13, 14.

¹²¹ The very existence of a tribunal structure in addition to the Courts has also been highlighted as a key 'enabling function': Stewart Wright, 'The Impact of Austerity and Structural Reforms on the Accessibility of Tribunal Justice' in Cornforth et al (eds), *Access to Justice* 135, 138; citing *Kerr v Department for Social Development* [2004] UKHL 23, [2004] 1 WLR 1372 [61] (Baroness Hale).

whether claimants are given ‘a fair opportunity to make meaningful representations’:¹²² if not, the systemic risk of futility will be high.

A first factor to consider are time limits, at the heart of the *Refugee Legal Centre* litigation discussed, above: the ‘abbreviated timetable and curtailed case management’ procedures for asylum appeals were there found *not* to be systemically unfair, given other flexibility mechanisms available in principle. Upon subsequent scrutiny, however, the Court of Appeal in *Detention Action* was ‘unpersuaded that the safeguards are sufficient to overcome the unfairness inherent in a system which requires asylum seekers to prepare and present their appeals within 7 days’.¹²³

The availability of hearings can play an equally important role in mitigating system-level risk: it has long been recognised that ‘while written representations will often suffice, in the light of the facts of the cases and the importance of what is at stake, fairness may require an oral hearing.’¹²⁴ In the context of Parole Board applications, for example, an oral hearing will be required if important facts are in dispute or significant mitigating factors require oral explanation.¹²⁵

In particularly complex cases, a hearing in and of itself will not necessarily be enough: ‘the common law rules of fairness will generally entitle a person to have access to legal advice and to be able to communicate confidentially with a legal adviser as part of the fundamental right of access to justice’.¹²⁶ The conduct of cases without legal representatives ‘runs the risk that a correct result will not be reached because the court does not have the legal assistance of counsel that it should have and the court has no other legal assistance available to it’.¹²⁷ This risk will be particularly acute where claimants lack the capacity meaningfully to engage in the process,¹²⁸ where the resolution of the claim requires consideration of complex

¹²² *Tabbakh CA* (n 51) [35].

¹²³ *Detention Action CA* (n 23) [37].

¹²⁴ *Howard League CA* (n 24) [41].

¹²⁵ *R (on the application of Osborn) v Parole Board* [2013] UKSC 61, [2014] AC 1115 [85], [86].

¹²⁶ *Howard League CA* (n 24) [42].

¹²⁷ *Lindner v Rawlins* [2015] EWCA Civ 61, [2015] 2 WLUK 257 [34] (Aikens LJ), as cited in *MG, JG v JF, JFG (a Child through the Guardian)* [2015] EWHC 564 (Fam), 2015 WL 997488 (‘*Child Maintenance*’). This can be the case even in the context of inquisitorial proceedings, such as certain categories of prison hearings: *Howard League CA* (n 24) [61]-[92]. See also ‘The Indigent’s Right To Counsel In Civil Cases’ (1967) 76 *Yale Law Journal* 545.

¹²⁸ ‘B was wholly unable to represent herself or her other family members. It was not simply that she was unable to speak English but that “[s]he did not have the first clue”’: *Gudaviciene CA* (n 12) [172].

evidential or legal questions,¹²⁹ or where self-representation would be inherently inappropriate.¹³⁰

* * *

The factors just set out are but indicative. Further considerations, such as the correct application of the law to any given set of facts, might be equally relevant.¹³¹ Recent and on-going empirical work continues to develop this list:¹³² the *Handbook for Measuring the Costs and Quality of Access to Justice*, for example, cites over 100 individual metrics.¹³³

5. The Illegality Threshold

A risk of futility is inherent in all complex dispute resolution mechanisms: ‘no system can be risk free.’¹³⁴ Even a considerable risk of futility may therefore not fall foul of the constitutional obligation to provide access to justice: ‘the threshold [for determining illegality] is a high one.’¹³⁵ The courts have repeatedly emphasised that the ‘right of access to justice is not an absolute right to be protected from injustice, which is an altogether different, and probably, unattainable thing’.¹³⁶ As a result, they ‘will be slow to find that a system is inherently unfair and therefore unlawful’.¹³⁷ This is necessary to ensure that access to justice litigation stays within the constitutional bounds of judicial review, avoiding ‘the danger ... that the judge may cross the line between adjudication and the determination of policy’.¹³⁸

At the same time, the high threshold required is tempered by context specificity:

... the unacceptable minimum risk of unfairness ... does not mean that a policy would only be unlawful if it would necessarily

¹²⁹ *Howard League CA* (n 24) [8], [92].

¹³⁰ Such as cross-examination in sexual offence cases: *Q, Q v Re B (A Child), Re C (A Child)* [2014] EWFC 31, [2015] 1 WLR 2040 [65].

¹³¹ For example, in *Woolcock* (n 40), the court came close to exploring (a lack of) magistrate’s training and subsequent (mis-)handling of the law. cf also the Evidence Time Limits in *R (on the application of Rights of Women) v Lord Chancellor* [2016] EWCA Civ 91, [2016] 1 WLR 2543.

¹³² Including, for example, a range of psychometric factors: Pascoe Pleasence and Nigel Balmer, ‘Measuring the Accessibility and Equality of Civil Justice’ (2018) 10 *Hague Journal on the Rule of Law* 255; Tom Tyler and Nourit Zimmerman, ‘Between Access to Counsel and Access to Justice: A Psychological Perspective’ (2010) 37 *Fordham Urban Law Journal* 473.

¹³³ Tilburg Institute, *Handbook* (n 90).

¹³⁴ *Refugee Legal Centre* (n 21) [7].

¹³⁵ *Detention Action CA* (n 23) [27](iv) (Lord Dyson MR).

¹³⁶ *KA & NBV* (n 14) [40].

¹³⁷ *Tabbakh CA* (n 51) [49].

¹³⁸ *S CA* (n 12) [18].

give rise to interference with the right of access to justice or that it would be impossible to operate such policy without causing such interference. The ‘proven risk of injustice’ must depend on the consequences.¹³⁹

Translated into the present framework, this means that we must look not only at the risk that a meritorious claim will not be vindicated, but also the consequences of such a failure: the *cost of futility*. It is only through a combined analysis of these factors that the courts will be able to assess system-level challenges and determine whether a policy has illegally curtailed access to justice. We explore these points in turn before illustrating the overall framework with a detailed case study.

A. The Cost of Futility

In understanding the broad range of factors which influence the consequences, or cost, of futility, it is again useful to structure our analysis into individual and system-level considerations. The cost of futility for the individual, first, will often be relatively straightforward to assess, whether in material and monetary terms, or threats to liberty and life more generally: in asylum cases, for example, the courts have recognised that ‘the consequences ... of mistakes in the process are potentially disastrous. That is why ... justice and fairness should not be sacrificed on the altar of speed and efficiency.’¹⁴⁰ The range of factors to be taken into account, however, is not limited thus: the Lord Chancellor’s LASPO guidance provides further examples of situations where the cost of futility may be particularly high, including ‘issues of life, liberty, health and bodily integrity, welfare of children or vulnerable adults, protection from violence or abuse, or physical safety’.¹⁴¹

A simple focus on individual outcomes, furthermore, is not sufficient in understanding the cost of futility. We must also evaluate the social benefits and public goods that flow from litigation:¹⁴² the ‘public value of civil justice ... comes

¹³⁹ *Medical Justice HC* (n 37) [34]. The Strasbourg Jurisprudence on Article 6 similarly recognises the importance of context, for example when requiring ‘particular expedition’ in child custody cases (*Hokkanen v Finland* (1995) 19 EHRR 139, [72]) or ‘particular diligence’ where the bulk of a litigant’s resources are at stake (*Mocié v France*, Application no. 46096/99, [22]). Guidance Notes on Article 6 (n) 83-4. Cf also in EU law C-279/09 *DEB v Germany* EU:C:2010:811 (impact on litigant of legal aid denial).

¹⁴⁰ *Detention Action CA* (n 23) [49]. In coining the phrase in *Refugee Legal Centre CA* (n 21) [8], Sedley LJ drew on the matrix of considerations set out in Paul Craig, *Administrative Law* (5th ed, Sweet & Maxwell 2003) ch 13.

¹⁴¹ Legal Aid Agency, *Lord Chancellor’s Exceptional Funding Guidance (Non-Inquests)* (Ministry of Justice, London 2018), archived at <https://perma.cc/4A2T-FBH7>.

¹⁴² Steven Shavell, ‘The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System’ (1997) 26 *Journal of Legal Studies* 575, 587.

from authoritative statements of what the law is, who has rights and how those rights are to be vindicated.’¹⁴³ The social benefit of an action adheres in a positive externality – its beneficial effect on other potential claimants, as well as society more broadly.¹⁴⁴ In *Unison*, the Supreme Court explicitly rejected the Ministry of Justice’s assertion that ‘there are no positive externalities [to litigation, as tribunal] use does not lead to gains to society’.¹⁴⁵ If large numbers of claims are rendered futile, these system-level benefits will not accrue.

Deterrence and precedent are two of the clearest examples of the positive external benefits of the justice system which are public goods, enjoyed by society at large.¹⁴⁶ One of the principal social purposes of litigation, first, is to serve as a credible threat against unwanted future behaviour: without the threat of enforcement, rights are nothing more than ‘paper tigers, fierce in appearance but missing in tooth and claw’.¹⁴⁷ A lack of access to justice, even in individual cases, can have major cost to society.¹⁴⁸

The second public benefit flowing from individual litigation is the elaboration of the law through its interpretation and the setting of precedent.¹⁴⁹ This should not be mistaken as a mere call for more litigation: the focus ought to be on ‘the mechanisms that exist to propel cases with precedent-setting potential to the appellate courts’,¹⁵⁰ which will include many of the individual and system-level factors identified in the previous section.

B. Risk, Cost, and Illegality

The risk and cost of futility are thus the specific drivers of systemic unfairness in the context of access to justice, as recognised both in systemic unfairness litigation and the Lord Chancellor’s LASPO guidance.¹⁵¹ Whilst the threshold for

¹⁴³ Genn, *Judging Civil Justice* (n 15) 20.

¹⁴⁴ Shavell, ‘The Social versus the Private’ (n 116) 334; Judith Resnik, ‘Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights’ (2015) 124 *Yale Law Journal* 2804.

¹⁴⁵ Ministry of Justice, ‘Introducing a fee charging regime into Employment Tribunals and the Employment Appeal Tribunal: Impact Assessment, IA TS007’ (London, 2012) 41.

¹⁴⁶ Michael Ford, ‘Employment Tribunal Fees and the Rule of Law: R (Unison) v Lord Chancellor in the Supreme Court’ (2018) *Industrial Law Journal* 1, 28.

¹⁴⁷ Bob Hepple, *Social and Labour Rights in a Global Context* (CUP 2007) 238.

¹⁴⁸ *Unison SC* (n 10) [71].

¹⁴⁹ Genn, *Judging Civil Justice* (n 15) 21.

¹⁵⁰ L Mulcahy, ‘The Collective Interest in Private Dispute Resolution’ (2013) 33 *Oxford Journal of Legal Studies* 59, 62.

¹⁵¹ Legal Aid Agency, *Exceptional Funding Guidance* (n 141) 21.

determining illegality has consistently been described as a high one, in *Detention Action* Lord Dyson MR entered a

... crucial note of caution in relation to [the high threshold]. I accept that in most contexts the threshold of showing inherent unfairness is a high one. But this should not be taken to dilute the importance of the principle that only the highest standards of fairness will suffice in the context of asylum appeals.¹⁵²

In determining the legality of policy in the context of access to justice, neither risk nor cost of futility can be considered independently: it is their interaction which determines the expected impact of a systemic risk of futility.¹⁵³ In terms of the present framework, this suggests that the right to access to justice might be violated even where the risk of futility is relatively low (for example, because procedures are not excessively complex), but the potential consequences are severe (such as loss of liberty or property). This was made explicit in *Gudanaviciene*, where the Master of the Rolls explained that courts were to look at

... the particular facts and circumstances of each case, including (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself with legal assistance, having regards to this age and mental capacity.¹⁵⁴

In formal terms, the relationship between illegality and futility can be described as the product of probability (risk) and payoffs (cost), determining expected value (impact):¹⁵⁵

$$\text{Expected Impact}_{(Futility)} = \text{Risk}_{(Futility)} \times \text{Cost}_{(Futility)}$$

Figure 1 graphically illustrates this relationship: the right to access to justice is only violated (red area) when the product of the risk of futility and its cost is particularly

¹⁵² *Detention Action CA* (n 23) [27].

¹⁵³ The interaction of risk and cost as factor relevant in judicial consideration (albeit in a different context) is one of the key examples developed by Justice Stephen Breyer, ‘Economic Reasoning and Judicial Review’ (2009) 119 *Economic Journal* 123, 126.

¹⁵⁴ *Gudanaviciene CA* (n 12) [72], as cited in *Howard League CA* (n 24) [47], [42].

¹⁵⁵ This is a basic application of expected value theory, where the probability of an event is synonymous with the risk of futility, and the payoff is the cost of futility: Mas-Collell, Whinston and Green, *Microeconomic Theory* (n 92) ch 6.

large, i.e. if a policy results in either a high risk of futility, or high cost of futility (or indeed a combination thereof).

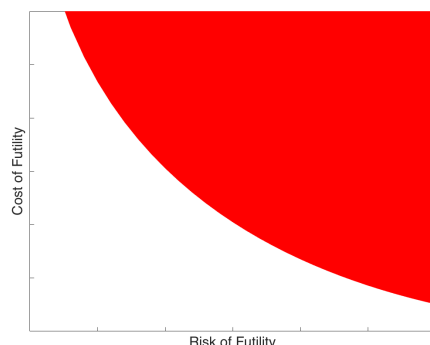


Figure 1: Expected Impact of Futility

The next sub-section provides a brief case study of the framework in practice. Before turning to that illustration, it is important to note that our framework should not be taken as a strict mathematical formula, amenable to exact quantification: it is designed to provide a context-specific organising structure to guide judicial enquiry. Many of its factors elude precise measurement and ‘are not susceptible to hard-edged definition’,¹⁵⁶ be it the deterring effect of complex forms or the value of precedent. As Laws LJ highlighted in *S*, inherent unfairness in the system ‘is in considerable measure a matter of degree, and therefore of judgment.’¹⁵⁷

C. The Framework in Practice

In *Howard League*, a penal reform charity and others providing legal advice and support to prisoners challenged the removal of legal aid from five specific areas of prison law:¹⁵⁸ (i) pre-tariff Parole Board reviews, (ii) high security categorisation reviews, (iii) placement in close supervision centres, (iv) access to offending behaviour programmes, and (v) disciplinary proceedings with minor sanctions. The Court of Appeal scrutinised each of these changes in turn, and found that the first three amounted to a systemic violation of access to justice, whereas the latter two were a legitimate exercise of the Secretary of State’s discretionary powers.

In his analysis of the five categories, Beatson LJ drew on *Gudanaviciene* to consider both the risk and cost of futility, looking at the ‘complexity of the procedural, legal and evidential issues’ as well as ‘the ability of the individual to

¹⁵⁶ *Detention Action CA* (n 23) [29] (Lord Dyson MR).

¹⁵⁷ *S CA* (n 12) [18].

¹⁵⁸ Criminal Legal Aid (General) (Amendment) Regulations 2013, UKSI 2013/9.

represent himself or herself without legal assistance having regard to age and mental capacity' (risk), and 'the importance of the issues at stake' (cost), respectively.¹⁵⁹

In the case of pre-tariff reviews, category A (high security) categorisation, and referrals to close supervision, the risk of futility was high: decisions in these areas were inevitably based on complicated risk assessments, including medical evidence and undisclosed sensitive (national security-related) evidence, which made it 'difficult [for prisoners personally] to grapple' with the review. In the context of tariff reviews and high security categorisation, alternative mechanisms such as representation by prison officers or fellow inmates could furthermore 'not provide sufficient protection in practice'.¹⁶⁰ Whilst the much smaller number of close supervision centre referrals meant that 'more individual consideration' was available to prisoners in category (iii), a lack of independent assistance nonetheless meant that 'vulnerable prisoners and those with mental illness would not be able to participate effectively in the process in the run of cases concerning them.'¹⁶¹

The cost of futility in the first three categories was similarly high: even though neither the Parole Board's decision in a pre-tariff review nor a Category A review was directly determinative of release, the decisions 'affect[ed] the liberty of the prisoner in the sense that they materially affect his or her prospects of release'; in the case of dangerous prisoners' referrals to close supervision centres, 'highly restrictive' conditions were imposed on their daily lives.¹⁶² As a result, 'the high threshold required for a finding of inherent or systemic unfairness' had been satisfied in all three categories.

In analysing access to offender behaviour programmes, on the other hand, the court found that even though a link to liberty had been demonstrated, and the cost of futility was thus potentially high, the programmes were 'only one means of demonstrating risk reduction, and the standard of fairness required must be assessed in the light of that'.¹⁶³ A relatively straightforward process, supported by prisoners' offender managers and with complex evidential issues unlikely to arise, meant that the comparatively low risk of futility did not warrant a finding of systemic unfairness.¹⁶⁴

¹⁵⁹ *Howard League CA* (n 24) [51].

¹⁶⁰ *ibid* [92], [109], [119].

¹⁶¹ *ibid* [121], [126].

¹⁶² *ibid* [92], [109], [118].

¹⁶³ *ibid* [131], [133]: denied participation as an impediment to eventual release.

¹⁶⁴ *ibid* [136], [134], [137].

In the context of disciplinary proceedings, finally, neither the risk nor cost of futility were assessed as particularly high: prisoners were always guaranteed a hearing before the governor, who was furthermore under a duty to permit legal representation in cases including vulnerable prisoners or complex issues, thus providing sufficient safeguards. In any event, the ‘consequences of those disciplinary hearings for which legal aid is no longer available’, including cautions or forfeiture of privileges, were not sufficiently grave to warrant a significantly higher standard of procedural safeguards.¹⁶⁵

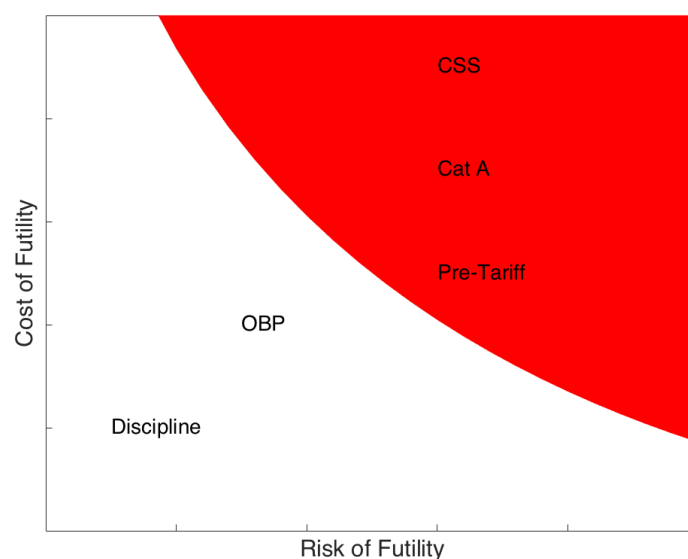


Figure 2: *Howard League*

Figure 2 graphically illustrates this analysis: while the Court had clearly found a non-negligible risk of futility in the removal of legal aid from disciplinary hearings and access to offender behaviour programmes, the consequences of a failure to vindicate a meritorious claim were insufficiently severe to warrant a finding that access to justice had been unlawfully denied. In the remaining scenarios, on the other hand, both cost and risk of futility were of such magnitude that the blanket removal of legal aid from the relevant proceedings had systemically violated the constitutional right.

D. Remedying Systemic Unfairness

¹⁶⁵ *ibid* [143], [142].

The possibility of finding policy to be in systemic violation of access to justice, finally, raises two broader points: first, as to the judiciary's role in scrutinising what might, at first glance, appear to be broader distributional questions; and second, as to the choice of appropriate remedies.

In focusing exclusively on justiciable factors, the proposed framework avoids the central criticism levelled in some quarters against the Divisional Court's quashing of court fees in *Witham*,¹⁶⁶ viz that the question of court fees raised there involved the determination of issues of 'relative importance' in the allocation of public funds, and thus 'wasn't a justiciable issue at all.'¹⁶⁷ The factors relevant to assessing the risk and cost of futility, from detailed procedural questions to the implications of deterrence for the rule of law, are at the core of the judiciary's expertise.¹⁶⁸ As Endicott explains, there is a clear link between the judicial protection of access to justice through the review of executive action and statutory instruments and the *Simms* principle of legality:¹⁶⁹ 'where judges can improve administrative decision making by passing judgment on the very questions of substance that the administrative authority had to decide, it is no breach of comity for them to do so.'¹⁷⁰

At the same time, however, the case law on systemic unfairness has explicitly recognised that it can never be the role of the court to 'monitor, regulate or police the performance by [a public authority] of its statutory functions on a continuing basis'.¹⁷¹ There is nothing in the proposed framework to suggest that courts should

¹⁶⁶ *R (ex parte Witham) v Lord Chancellor* [1998] QB 575, [1998] 2 WLR 849 (QBD).

¹⁶⁷ Jonathan Sumption, 'The Limits of the Law' in Nick Barber, Richard Ekins and Paul Yowell, *Lord Sumption and the Limits of the Law* (Hart 2016) 17-19. cf L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353, and, for a full discussion in the context of access to justice and group-litigation driven policy challenges, Harlow (n 73) 10.

¹⁶⁸ *Woolcock* (n 40) [68]: '[w]hether the procedure used is fair is a matter for the court' (Hickinbottom LJ). Cf also Powell, 'Structural Procedural Review' (n 31) [22]: 'The courts have long claimed to be experts on judicial procedures, such as the tribunal system, and the issue of access to the courts is one over which the courts have famously asserted their authority: see *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL).'

¹⁶⁹ Jeff King, 'Three Wrong Turns in Lord Sumption's Conception of Law and Democracy' in Nick Barber et al, *Lord Sumption* (n 167) 141. See also, in the same edited collection, A Kavanagh, 'The Role of Courts in the Joint Enterprise of Governing'. This point is echoed by Lord Neuberger: in overruling the concerns raised by Laws LJ in the Court of Appeal (*R (Public Law Project) v Lord Chancellor* [2016] EWCA Civ 1193, [2016] AC 1531, [44]), His Lordship affirmed the courts' duty to declare *ultra vires* subordinate legislation invalid to prevent 'a member of the Executive form making an order which is outside the scope of the power Parliament has given him or her': *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] AC 1531, [23].

¹⁷⁰ Timothy Endicott, *Administrative Law* (4th ed, OUP 2018) 278.

¹⁷¹ *Woolcock* (n 40) [49]; citing *R (P) v Essex County Council* [2004] EWHC 2027 (Admin), [2004] 8 WLUK 179 [33].

specify precisely how a violation might be rectified. Indeed, our emphasis on mechanisms' interdependence explicitly envisages multiple possible options in response to a finding of illegality: a proven risk of futility can be addressed in several ways, from simplifying forms and procedures through to lowering fees or providing legal advice.

Remedying access to justice will therefore not automatically require financial expenditure: as Higgins has argued, 'there is legitimate scope for the state to make different policy choices about how much will be invested in the [legal] process based on distributive justice considerations'.¹⁷² This is not to say that distributive justice concerns are an irrelevant system-level consideration when evaluating access to justice, or that 'procedural proportionality' could not in principle be accommodated within the overarching trade-offs involved in our futility framework.¹⁷³ a minister might, for example, want to weigh the expected cost of futility against the cost of various remedial measures.

Crucially, however, the introduction of such broader, polycentric, concerns is not one for the judiciary:

[A] compromise has to be struck between accuracy and cost. ... A legislature who cannot afford a limitless investment in the administration of justice, must achieve compromise whereby the level of accuracy that the administration of justice could produce will reflect the level of support that the state can reasonably be expected to give to legal services. It follows that, in devising a system of procedure, the legislature has considerable scope for choice between different ways of balancing accuracy against cost.¹⁷⁴

In responding to a finding of systemic futility, the choice of remedy, or combination of remedies, will always lie within the province of Parliament or the executive. Given the large number of potentially relevant factors identified in the preceding sections, a plethora of design choices will be available in nearly all scenarios: '[t]he real question is whether any given procedural arrangements produce a satisfactory

¹⁷² Higgins, 'The Cost of Civil Justice' (n 4) 696.

¹⁷³ Zuckerman, 'A Reform of Civil Procedure' (n 94) 159. See also Adrian Zuckerman, 'Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments' (1994) 14 *Oxford Journal of Legal Studies* 353.

¹⁷⁴ Zuckerman, 'A Reform of Civil Procedure' (n 94) 161.

compromise.’¹⁷⁵ As a result, it is highly unlikely that the only possible response in the majority of cases will be for the Exchequer to increase expenditure.

The only possible exception to this principle, recognised both in the case law and the academic literature, is the scenario where the state no longer provides sufficient funding to support any legal process at all: maintaining access to justice is a ‘constitutional duty ... owed by the State’, backed up by international legal obligations.¹⁷⁶ Above this lower bound, however, ‘there is legitimate scope for the state to make different policy choices about how much will be invested in the process based on distributive justice considerations.’¹⁷⁷

6. Proving Systemic Unfairness

The ultimate question to be addressed is as to how a systemic risk of futility can be proved in practice. Two crucial steps are involved in this exercise: litigants must first identify a *policy mechanism* which drives futility. They must then adduce appropriate evidence (whether quantitative, qualitative, or hypothetical claimant models) to demonstrate its operation and relevance. This approach is a logically distinct exercise from identifying cases where harm has materialised:

... there is a conceptual difference between something inherent in a system that gives rise to an unacceptable risk of procedural unfairness, and even a large number of decisions that are simply individually aberrant.¹⁷⁸

The evidential requirements are thus fundamentally different from those of traditional judicial review.¹⁷⁹ Successful systemic access to justice claims require ‘consideration and analysis of the scheme itself, and the identification of what, within the scheme, gives rise to the unacceptable risk’: those ‘coy about identifying what, within the scheme, gives rise to the unacceptable risk of procedural unfairness’¹⁸⁰ are bound to fail. This is not an easy task: but it is the logical corollary of the courts’ potential willingness to act upon mere *risk*, rather than materialised harm.

¹⁷⁵ Zuckerman, ‘A Reform of Civil Procedure’ (n 94) 161.

¹⁷⁶ *Children's Rights Alliance for England v Secretary of State for Justice* [2013] EWCA Civ 34, [2013] HRLR 17 [38].

¹⁷⁷ Higgins, ‘The Cost of Civil Justice’ (n 4) 696

¹⁷⁸ *Woolcock* (n 40) [68].

¹⁷⁹ *Refugee Legal Centre CA* (n 21). This includes ‘cases of individual operational failure’: *Howard League CA* (n 24) [69]; *Ben Hoare Bell HC* (n 13) [68]; *Tabbakh CA* (n 51) [38].

¹⁸⁰ *Woolcock* (n 40) [68], [100].

A. Identifying a Mechanism

Systemic challenges focus on the existence of a proven risk inherent in the system at large. The mere enumeration of individual instances in which access to justice has been denied will therefore not be sufficient in and of itself to mount a systemic challenge. ‘That [however] does not mean that consideration of individual cases is necessarily irrelevant’.¹⁸¹ Detailed scrutiny of specific cases will frequently shed light on the operation of a particular policy and its impact on the risk of futility: ‘What matters is not the number of errors, but their character.’¹⁸²

In order to understand the character of an error, we suggest, courts must look for the operation of a specific *mechanism*, viz, a ‘stable functional relationship ... among variables of interest’.¹⁸³ It is only in the presence of such a mechanism or mechanisms that the risk of futility becomes systemic:

Where there are identical, or very similar errors, of practice, that may point to a systemic fault in the design or supervision of the system; where there are repeated, but different, operational errors, it may be impossible fairly to characterise that as a system fault.¹⁸⁴

Translated into the present context, this requires the identification of specific barriers within a litigant’s pathway to justice: the factors driving the risk that her claim may be rendered futile as identified in section four. Not every barrier, however, will constitute a systemic risk factor. Only barriers which create a systematic, or non-random, risk with respect to the full run of cases in the system will constitute a relevant mechanism.

Put differently, a relevant mechanism needs to have a non-random impact on the distribution of claimants unable to vindicate their meritorious claims. In order

¹⁸¹ *ibid* [68].

¹⁸² *R (Scarfe) v HMP Woodhill* [2017] EWHC 1194 (Admin), [2017] 5 WLUK 505 (‘*Scarfe*’) [54]. cf also the heroic individual identified in *S CA* (n 12) as the only person ever to have navigated the ECF application form without legal assistance. The inverse is similarly true: ‘[J]ust as a series of individual misfortunes will not be sufficient to prove that a scheme is unlawful, nor will the fact that a small number of applicants for ECF have successfully obtained it prove that the scheme is fair or lawful, if it is inherently defective.’ *S CA* (n 12) [78].

¹⁸³ Judea Pearl, ‘Reasoning with Cause and Effect’ (2002) 23 *AI Magazine* 97. Valid models need to ‘encode and distinguish information about external changes through an explicit representation of the mechanisms that are altered in such changes’. Whilst the notion originates in econometrics, it is widely used today, notably in machine learning and data science.

¹⁸⁴ *Scarfe* (n 182) [54].

to be able to obviate harm in advance, the existence of clear patterns in the data as seen in the light of a policy mechanism must become ‘entirely predictable’.¹⁸⁵ This requires litigants’ analysis to go beyond the mere identification of statistically relevant correlations in the available data.¹⁸⁶ An explanation for the factors driving a specific risk pattern is as important as a robust identification of the pattern itself.¹⁸⁷

The non-randomness of unfairness with respect to particular policy features and/or characteristics of users is thus the lens through which to identify and evidence the factors within a system that give rise to futility. In *Howard League*, prisoners were potentially faced with complex medical and psychiatric evidence without outside assistance following the removal of legal aid. This had a disproportionate impact on the ability of vulnerable prisoners effectively to put their case, as they were unable to understand and challenge the case against them.¹⁸⁸ Similarly, the tribunal fees in *Unison* did not impact all employees equally: their introduction led to the near-complete absence of a particular set of (low-value) claims from the system.¹⁸⁹ Conversely, a full examination of the mechanisms at play in a particular policy might also identify situations where even in the presence of a serious barrier to justice, the overall systemic risk of futility remains low: the risks inherent in the complex and technical forms for ECF applications under scrutiny in *S* were mitigated by the availability of digital assistance provided by the Legal Aid Authority.¹⁹⁰

B. The Role of Empirical Evidence

In identifying the existence of a mechanism and demonstrating its operation, claimants can draw on a wide range of sources, ranging from qualitative evidence and carefully constructed hypothetical examples to quantitative data analysis.¹⁹¹

¹⁸⁵ *Child Maintenance* (n 127) [15].

¹⁸⁶ In standard econometric analyses, statistical tools are deployed ‘to reason correctly about actions while keeping the mechanism implicit. All [that is required is] to specify is the action’s direct effects’: Pearl, ‘Reasoning with Cause and Effect’ (n 183) 101.

¹⁸⁷ In principle, this means that mechanisms which are one-step from an individual’s pathway to justice – such as changes to legal aid funding for litigators and advocates – may still be justiciable. In practice, however, these cases will be difficult to prove, given the potential existence of alternative pathways to justice unaffected by the policy change. The more factors are in play, the harder it will be to prove a material impact on the risk of futility. See *Law Society* (n 11) [125]–[136].

¹⁸⁸ *Howard League CA* (n 24).

¹⁸⁹ Adams and Prassl, ‘Vexatious Claims’ (n 88) 418.

¹⁹⁰ *S CA* (n 12) [98].

¹⁹¹ The fact-finding role of courts in systemic unfairness litigation was first discussed by Katie Sheridan and Joe Tomlinson, ‘Judicial Review, Evidence, and Systemic Unfairness in the UK’ (IACL-AIDC Blog, 3 September 2018), archived at <https://perma.cc/Y4FC-226K>.

Statistics in and of themselves are not sufficient: there needs to be a clear narrative to explain the often complex operation of the justice system.

The mechanism in *Howard League*, for example, was evidenced through qualitative information, including a detailed witness statement provided ‘by Sir David Calvert-Smith, then Chairman of the Parole Board, setting out the Board’s position in relation to those issues ... which have a material impact upon the effectiveness and fairness of parole reviews.’¹⁹² Sir David’s evidence highlighted factors including the particular features of parole board hearings and the prison environment, as well as their influence in practice on the ability of prisoners effectively to enforce their rights. In *Unison*, on the other hand, the claimants succeeded in the Supreme Court by supplementing quantitative and qualitative evidence demonstrating the impact of the fee regime in aggregate with specific calculations based on hypothetical rational claimant behaviour, thus demonstrating the fees’ impact on low-value claims: the mechanism behind the illegal risk of futility was not the introduction of fees in the abstract, but rather the disproportionate level at which they were set, systematically deterring a non-random set of meritorious claimants.¹⁹³

The operation of mechanisms identified in both quantitative and qualitative evidence can be underlined through the careful construction of hypothetical claimant scenarios.¹⁹⁴ Powell identifies three scenarios in which hypothetical cases (‘notional evidence’) might prove particularly useful: they can ‘more directly establish [...] a necessary harm to a class of individuals’, whereas individual evidence will often be too particularised for a systemic challenge; hypotheticals ‘can be easier to obtain in challenges to newly established regimes’ where there is little empirical evidence on the working of the scheme in practice; and they are ‘capable of demonstrating the likely persistence of certain structural flaws, and thereby refuting the claim that they are due to dissolve organically into a well-functioning system.’¹⁹⁵ Hypothetical case studies should nonetheless be approached carefully: the hypotheticals chosen must be drawn from the full run of cases impacted by the policy under scrutiny.¹⁹⁶ Otherwise, they will provide

¹⁹² *Howard League CA* (n 24) [12].

¹⁹³ Adams and Prassl, ‘Vexatious Claims’ (n 88), drawing on *Survey of Employment Tribunal Applications 2013*: Department for Business, Innovation, and Skills: Employment Market Analysis and Research, *Survey of Employment Tribunal Applications 2013* [Data Collection SN 7727] (London, 2015); Tribunal and Gender Recognition Statistics Quarterly: January to March 2015, Main Tables, Table 1.2.

¹⁹⁴ Sara Lomri, ‘Show Me The Evidence’ (*Legal Action Magazine*, February 2019), archived at <https://perma.cc/8RZ6-WK77>.

¹⁹⁵ Powell, ‘Structural Procedural Review’ (n 31) [68] – [70].

¹⁹⁶ *Woolcock* (n 40) [68] (vi).

insufficient ‘evidence to support the contention that [there] is a real, as opposed to theoretical, problem’.¹⁹⁷

Combined with the high threshold required to succeed in systemic access to justice litigation, these evidential and empirical requirements appear to pose formidable challenges for claimants.¹⁹⁸ In practice, however, the courts recognise the constraints under which such claims must be brought:

‘It would be impossible to undertake the research that would be needed to provide a full-blown statistical or socio-legal study as evidence within the time limit for judicial review proceedings. Since the claimants do not have access to [relevant data sources], all they can do is to furnish publicly available material and evidence of examples of how the system has operated ... since [the policy change] and of difficulties that have arisen.’¹⁹⁹

7. Conclusion

‘An unenforceable right or claim’, Lord Bingham explained in drawing the link between access to justice and the rule of law, ‘is a thing of little value to anyone.’²⁰⁰ In a period of ongoing reforms to the domestic justice system, courts will increasingly be invited to adjudicate upon access to justice as a fundamental constitutional principle. Given their particular institutional expertise in the matter, this is to be welcomed in principle – yet also fraught with potential problems, from the precise definition of the concept to the admissibility of empirical evidence. In this paper, we set out to provide a conceptual framework for access to justice as a systemic ground of review in English law.²⁰¹

To date, access to justice litigation before the courts has encountered a number of obstacles to policy-level review, including the received emphasis on identifying

¹⁹⁷ *R (Henderson) v Secretary of State for Justice* [2015] EWHC 130 (Admin), [2015] 1 WLUK 573 [24].

¹⁹⁸ D. James Greiner, ‘The New Legal Empiricism & Its Application to Access-to-Justice Inquiries’ [2019] *Daedalus* 64, 67; see also Laura Abel, ‘Evidence-Based Access to Justice’ (2009-10) 13 *University of Pennsylvania Journal of Law and Social Change* 295.

¹⁹⁹ *Howard League CA* (n 24) [53].

²⁰⁰ Tom Bingham, *The Rule of Law* (Penguin 2011) 85.

²⁰¹ As a framework designed to rationalise consistent strands found in the case law, our account of systemic unfairness challenges is not necessarily confined to access to justice, and can be generalised to other areas of judicial review at the policy level, even though the specific *risk* and *cost* factors under scrutiny may not necessarily revolve around futility.

a specific erroneous decision which has resulted in actual harm to the claimant. In order to overcome these challenges, we identified a hitherto undertheorised strand of cases which enable the courts to review policy whilst staying within the proper bounds of judicial review: the doctrine of systemic unfairness, scrutinising policy for risks inherent in a system as a whole. In the specific context of access to justice, the relevant systemic risk, we suggest, is one of futility: a rational litigant's inability to vindicate a meritorious claim.

This risk of futility is driven by a large number of factors, including both individual incentives to launch claims and system-level incentives to resolve them. The specific factors at stake are context-specific and do not operate independently: it is the combined effect of a system which matters. The risk of futility, furthermore, is not the only relevant factor at play. In determining whether a policy curtailing access to justice is illegal, the risk of futility cannot be seen in isolation from the consequences, or cost, of its materialisation.

Given that a risk of futility is inherent in every legal system, the courts have been rightly reluctant to engage in policy review: it is only where the combined impact of system-level risk is particularly severe that a challenge on access to justice grounds will succeed. Conversely, the right to access to justice might be violated even where the risk of futility is relatively low, but the potential consequences are severe. Proving the required facts in the context of judicial review proceedings is not an easy task: litigants must look beyond the realisation of harm to the mechanisms which put access to justice at risk. Statistical models alone will not discharge that burden: empirical evidence, ranging from qualitative evidence and carefully constructed hypothetical examples to quantitative data analysis, must be adduced to shed light on the mechanisms at play.

The recent changes to the domestic justice system at the heart of the cases surveyed are but the first elements of a potentially fundamental redesign of the Courts and Tribunals of England and Wales.²⁰² The Ministry of Justice and Her Majesty's Courts and Tribunal Service ('HMCTS') have committed to pursue 'an ambitious programme of court reform, which aims to bring new technology and modern ways of working to the way justice is administered.'²⁰³ In determining the success of this reform programme, access to justice is one of, if not the, most

²⁰² Michael Briggs, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales, July 2016).

²⁰³ HMCTS, *Guidance: The HMCTS Reform Programme* (London, November 2018), archived at <https://perma.cc/E5GG-7QQA>.

important metric.²⁰⁴ The potential of digitalisation to revolutionise access to justice is real: ‘its streamlined efficiency can, when used properly, yield effective dispute resolution in massive numbers of low value claims.’²⁰⁵ But so are the dangers of replicating existing patterns of exclusion or creating new barriers for the digitally illiterate.²⁰⁶

Whilst the futility framework developed in this paper is firmly grounded in the principles of judicial review, its structure and features will be equally relevant in the design and evaluation of online courts. The only significant modification required is as to the appropriate threshold: a policy-maker designing system interventions and evaluating different options will need to work with a considerably lower threshold than a judge confronted with a claim for judicial review. Insofar as the initial design process is concerned, for example, the question is not whether the risk and cost of futility have become so high as to be unlawful, but rather how a system should be designed to minimise those risks, subject only to technical constraints.²⁰⁷

In political scrutiny of the government’s constitutional duty to promote access to justice and the rule of law before Parliament,²⁰⁸ on the other hand, measures aimed at mitigating the risk and cost of futility in order to improve access to justice will have to be assessed in the light of competing resource constraints.²⁰⁹ Here, a framework built around individual and system-level incentives can inform considerations about the broader trade-offs involved without raising technical questions of legality.²¹⁰ The risk and cost of futility thus provide clear and principled foundations to structure our understanding of access to justice: the threshold for intervention will be highly context specific – not just across different areas of judicial review, but even more so when futility is applied to inform executive design decisions and their political evaluation before Parliament.

²⁰⁴ Lord Chancellor, Lord Chief Justice, and Senior President of Tribunals, *Transforming our Justice System* (Ministry of Justice, September 2016) 5.

²⁰⁵ Timothy Endicott, ‘The Rule of Law and Online Dispute Resolution’ in Alessia Fachei, Timothy Endicott, and Antonio Estella de Noriega, *Online Dispute Resolution: virtud cívica digital, democracia y derecho* (CEU Ediciones 2017) 21.

²⁰⁶ Tanina Rostain, ‘Techno-Optimism & Access to the Legal System’ [2019] *Daedalus* 93; Amanda Finlay CBE, *Preventing Digital Exclusion from Online Justice* (Justice 2018).

²⁰⁷ For a detailed discussion of design principles, see Ryder, *Modernisation of Tribunals* (n 7) 9–10.

²⁰⁸ Constitutional Reform Act 2005, s 1. In the context of digitalisation, see also the Senior President’s duty in section 2 of the Tribunals, Courts and Enforcement Act 2007, as discussed in Sir Ernest Ryder, *Assisting Access to Justice* (Keele University, March 2018) [15].

²⁰⁹ House of Commons Justice Select Committee, ‘Terms of Reference: Court and Tribunal Reforms’ (Court and Tribunal Reforms Inquiry 2019), archived at <https://perma.cc/3JW6-J5CT>.

²¹⁰ Cornford, ‘The Meaning of Access to Justice’ in Cornford et al, *Access to Justice* (n 3) 39.