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Access to Justice: From Judicial Empowerment to Public Empowerment

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I. Introduction

The common law right of access to justice serves as a protective mechanism that facilitates public access to courts while also having wider import for the common law and constitutionalism in the UK. The doctrine's reach and significance are seen in the multiple roles it plays: it serves to ensure individual access to the legal process, as a gateway to development of common law rights and as a tool of judicial self-defence. These roles rest on several rationales that are embedded in the constitutional structure of the state, including respect for the rule of law, judicial independence, accountability and good governance, and enforcement of individual rights and obligations. One path towards the full flourishing of access to justice as a right and a constitutional principle is to de-emphasise the role of the doctrine as a bastion for judicial empowerment and to refocus access to justice as a tool for public empowerment. De-emphasising the institutional empowerment rationale of the doctrine and highlighting its other valuable contributions to the constitution can serve to enhance opportunities for a wider range of communities to access the levers of justice and encourage positive action by the state to reduce limitations on access to justice.

The chapter begins by outlining the current uses and normative value of access to justice. These include access to justice providing a gateway to a larger family of common law rights, a path for vulnerable or marginalised individuals to gain entry to the justice system and a trigger for strong(er) judicial interpretive powers. I then go on to analyse the dominant rationales for access to justice,

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arguing that while there is value in justifying robust protection of access to justice as a concomitant of the judicial function of upholding the rule of law, this vision of access to justice suffers from institutional insularity that side-lines the public-facing element implied in the very idea of access to justice. I argue that the right ought to be reframed as a tool of public empowerment. The term 'public' in this sense encompasses both the individual litigant who benefits from adjudication of her case and the community that benefits from the resulting enforcement of legal norms, accountability and good governance. Public empowerment requires a realistic approach to both economic and status-based disempowerment and exclusion as well as positive obligations on the state to redress limitations on access to justice. A turn towards empowerment through positive obligations would require courts to re-evaluate the traditional common law conception of rights as negative duties. Yet it is by focusing the conceptualisation and rationale of access to justice on public empowerment that the right, its place in the constitutional milieu and its transformative potential can be better developed.

II. The Normative Value of Access to Justice

In UK common law rights jurisprudence, access to justice is understood in terms of access to courts and tribunals.[1] The right surfaces in a multiplicity of ways in the constitutional system, supporting both broader rights protection and constitutional development. This section outlines the value that access to justice adds to common law rights adjudication and discourse. At a basic level, the right functions as a means of accessing other common law rights as it enables individuals to invoke their rights claims before a court of law. In a fundamental sense, this represents the core value of access to justice to both the individual and the edifice of rights protection within the constitution. The constitutional importance of access to justice further contributes to robust claims to strong judicial interpretive powers that test the traditional institutional boundaries within the constitution. Finally, both the practical and more principled facets of access to justice are seen in the opportunities the doctrine provides for the disempowered to engage in the legal system. While the right furthers both individual and institutional concerns within the constitutional state, it is through a focus on the individual – by widening access for the marginalised or disenfranchised – that the current contribution and potential of the right can be fully realised.

[1] See discussion of the meanings and components of access to justice in W Lucy, 'The Normative Standing of Access to Justice: An Argument from Non-Domination' (2016) 33 *Windsor Yearbook of Access to Justice* 231, 234–39.

A. Gateway to Common Law Rights

Access to justice provides a gateway to other common law rights in two respects. First, by accessing courts, individuals are able to advance rights claims and to seek and obtain relief for breaches of those rights. Protection of access to justice is thereby instrumentally supportive of other rights. Judicial enforcement has become a central feature of modern rights protection, providing a means for relief or remedy where other means have failed.[2] The availability of access to the courts therefore emerges as a *sine qua non* of rights enforcement in a more general sense. In this way, access to justice resonates beyond the terms of the right itself; it becomes part of the structure of fundamental rights in the state. Second, from the view of doctrinal development, access to justice is among the most regularly identified and defended common law rights and has facilitated a burgeoning common law rights discourse. It has been said, in this vein, that 'the impetus for constitutional common law rights is rooted in the right of access to the courts'[3] and that access to justice is 'the wellspring for the modern jurisprudence on fundamental common law rights'.[4] Indeed, access to courts largely accounted for the emerging constitutional rights jurisprudence prior to the Human Rights Act 1998 (HRA).[5] Moreover, it was in landmark access to justice cases such as *ex p Witham*,[6] *ex p Leech*[7] and *ex p Simms*[8] that the limbs of the fledgling common law rights movement were advanced. This line of case law cemented fundamental facets of common law rights doctrine, including that a statute will be presumed not to authorise violation of a constitutional right unless clear words are used,[9] that a power conferred by Parliament does not authorise the donee of that power to contravene rights unless expressly permitted by Parliament[10] and that limitations on a right must represent the minimum interference necessary to achieve the claimed objectives.[11]

The gateway function of access to justice has been further bolstered by the substantive and normative force applied to the right through the HRA. The European Convention on Human Rights (ECHR) and the HRA have facilitated

[2] T Ginsburg, 'The Global Spread of Constitutional Review' in K Whittington and D Kelemen (eds) *Oxford Handbook of Law and Politics* (Oxford, Oxford University Press, 2008) 87–89.

[3] R Clayton, 'The empire strikes back: common law rights and the Human Rights Act' [2015] *PL* 3, 4.

[4] T Hickman, *Public Law after the Human Rights Act* (Oxford, Hart Publishing, 2010) 298.

[5] M Elliott, 'Beyond the European Convention: Human Rights and the Common Law' (2015) 68 *CLP* 85.

[6] *R v Lord Chancellor, ex p Witham* [1998] QB 575.

[7] *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198 (CA).

[8] *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (UKHL).

[9] *Simms* (n 8) 131.

[10] *Raymond v Honey* [1983] 1 AC 1 (UKHL) 12–13, 15; *Witham* (n 6) 585.

[11] *Leech* (n 7) 217.

the development of access to justice in several ways. First, by empowering the judiciary to enforce rights through statutory construction, the HRA has contributed to a newly empowered judiciary. The conferral of strong interpretive powers on the courts by section 3 of the HRA, along with section 4's conferral of the power to issue declarations of incompatibility, have been central to the reputed 'juridification' of the UK constitution. By enlarging judicial powers, particularly in assessing government action for rights consistency, the HRA has buttressed and reinforced the institutional capacity of the courts to interpret and adjudicate rights claims.

Second, litigation and discourse resulting from the HRA have affected the culture of adjudication and review in the UK legal system. Commentators have described the HRA as encouraging a 'culture of justification'[12] through expanded judicial review, under which executive acts are understood to be generally reviewable by the courts and thereby subject to not only administrative but also constitutional – including rights-based – standards. Consequently, the potential impact of engaging the courts has been substantially increased as higher standards of review are applied and a wider range of activities is challenged. Moreover, there has been an evolution of the courts' self-perception and their role in shaping the constitutional conversation and decision-making, due in no small part to the enhanced interpretive and declaratory powers conferred under sections 3, 4 and 6 of the HRA. The HRA powers thereby helped to stimulate discourse about the evolution of the UK Supreme Court into a 'proto constitutional' court, engaged in constitutional review.[13] Lord Steyn has maintained that the 'European Convention on Human Rights as incorporated into our law by the Human Rights Act, 1998, created a new legal order'.[14] In a wider sense, the strong interpretive powers conferred on the courts by section 3 of the HRA have arguably contributed to heightened judicial assertiveness. Judicial experience with interpretive techniques such as the strong interpretive presumption of consistency with the ECHR accompanied by the remedial power to alter the meaning of legislation to achieve consistency,[15] have affected constitutional culture and will likely have lasting impact beyond statute. The effect on judicial culture has been acknowledged by Lord Neuberger, who observed that 'the introduction of the Convention into UK law' has made the judiciary 'more questioning about our accepted ideas and assumptions.'[16] The institutional cultural changes occasioned in part by the HRA

[12] See, eg, M Hunt, 'Sovereign's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Oxford, Hart Publishing, 2003), 342; Lord Steyn, 'The New Legal Landscape' [2000] *EHRLR* 549, 552.

[13] R Masterman and J Murkens, 'Skirting Supremacy and Subordination: The Constitutional Authority of the UK Supreme Court' [2013] *PL* 800.

[14] *R (Jackson) v AG* [2005] UKHL 56, [2006] 1 AC 262 [102] (Lord Steyn).

[15] See, eg, *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 3 All ER 411 (HL).

[16] Lord Neuberger, 'The role of judges in human rights jurisprudence: a comparison of the Australian and UK experience' (8 August 2014) [31].

have the potential to take root in the common law and thereby survive the possible repeal of the HRA.[17]

Third, it is certainly arguable that fair trial rights, as provided under Article 6 ECHR and interpreted by both the European Court of Human Rights (ECtHR) and UK courts, added content to the concept of access to justice that had thus far been expressed in the common law sphere. The reasoning in *ex p Witham* points to a similarity of content between the common law and Convention rights, with both common law courts and the ECtHR holding that there must be an effective right to access the courts and that barriers to court must be justified.[18] However, evidence of the European influence on the mechanism for protecting the common law right has come into sharper focus in recent case law. In *R (UNISON) v Lord Chancellor* Lord Reed makes clear that even if the court finds that legislation expressly authorises an intrusion on the right of access to justice, the extent of the permissible intrusion falls to be determined by reference to a proportionality assessment. Accordingly, the statute will be 'interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question.'[19] As Lord Reed acknowledged in *UNISON*, this language is analogous to the requirements of the proportionality test employed by the ECtHR and, in more general terms, 'the case law of the Strasbourg court concerning the right of access to justice is relevant to the development of the common law.'[20]

Domestic rights jurisprudence both pre-and post-HRA owes much to the concept of access to justice. Doctrinally, it is one of the more fully developed rights at common law, and has been connected to the right of prisoners to contact journalists[21] and the right to access legal advice.[22] Perhaps more significantly, in methodological terms, access to justice case law has shown its constitutional mettle by concretising the judicial method for application and enforcement of constitutional rights. Through the distinctly common law requirement of clear wording to authorise rights infringement and the articulation of an assessment akin to the European proportionality test to determine whether breach of a right is justified, access to justice has led to maturation of the methodology of common law rights and indeed common law constitutionalism. Crucially then, access to justice has been a route not only to doctrinal realisation of a specific right but in various ways, has enabled the very idea and methods of common law rights to flourish.

[17] See the Conservative Party proposals to repeal the HRA: The Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (October 2014).

[18] T Eicke, 'Speaking in UNISON? Access to Justice and the Convention' [2018] *EHRLR* 22, 25.

[19] *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [80].

[20] *UNISON* (n 19) [89].

[21] *Simms* (n 8) 130.

[22] *R v Secretary of State for the Home Department, ex p Anderson* [1984] QB 778 (UKHL) 790.

B. Trigger for Strong Judicial Interpretive Powers

Alongside its operation as a distinct right that can be raised against the state, access to justice also has a broader conditioning effect upon the constitution. Underpinning this wider constitutional role is the conceptualisation of access to justice as 'inherent in the rule of law'.[23] A dramatic constitutional impact of viewing access to justice as a fundamental feature of the rule of law is that threats to access to justice may trigger strong judicial interpretive powers. In this sense, potential contraventions of access to justice are perceived as potential contraventions of the rule of law itself, which therefore provoke controversial judicial interpretations that challenge accepted understandings of the boundaries of judicial interpretation.

The shot across the bow issued by Lady Hale and Lord Steyn in *Jackson*, warning the government and Parliament against broad ousters of judicial review over substantial areas of executive decision-making, have been extensively deconstructed.[24] However, in the context of common law rights, it is worth revisiting the centrality of access to justice to the cautions issued by both judges. Thus, for Lady Hale, heightened interpretive scepticism or legislative rejection by the courts can be provoked by statutory provisions that purport to remove judicial supervision of alleged violations of rights.[25] Similarly, the 'exceptional circumstances' that Lord Steyn envisioned as triggering a judicial reformulation of parliamentary supremacy involved 'an attempt to abolish judicial review or the ordinary role of the courts'.[26]

It is unsurprising that the confrontation between parliamentary sovereignty and the rule of law as envisioned in *Jackson* centred on a possible removal of the power to review governmental activity affecting the individual. There is a history of judicial activity testing constitutional boundaries by appearing to regulate – rather than interpret – constitutional language resting on challenges to judicial review. *Anisminic* stands as a powerful example.[27] A clause in the Foreign Compensation Act 1950 purported to insulate decisions of the Foreign Compensation Commission by providing that 'The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law'. The House of Lords was able to restrict the effect of this section by holding that a 'determination' did not include a decision made outside the Commission's jurisdiction. Such decisions were a nullity and therefore did not constitute determinations. In so holding, the courts retained authority to review 'purported' determinations that resulted from an error of law. The spectre of an administrative agency acting outside its powers and private individuals and bodies having no avenue

[23] *UNISON* (n 19) [66] (Lord Reed).
[24] *Jackson* (n 14). See also ch 10.
[25] *Jackson* (n 14) [159].
[26] *Jackson* (n 14) [102].
[27] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (UKHL).

for relief prompted the court – in the view of some commentators – to frustrate Parliament's intention.[28] *Anisminic* therefore represented an interpretation prompted by 'a particularly strong presumption in favour of securing access to a court for resolution of a legal dispute'.[29]

The Supreme Court furthered this judicial posture in *Privacy International* by restrictively interpreting a provision in the Regulation of Investigatory Powers Act 2000 which stated that 'decisions of the [Investigatory Powers] Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court.'[30] Noting the 'obvious parallel' with the ouster clause in *Anisminic*, the Court concluded that the controlling principle is 'the common law presumption against ouster',[31] which could only be displaced by 'the most clear and explicit words'.[32] The formulation in the statute was again not clear enough to exclude judicial intervention where decisions were based on errors of law. The fact that judicial supervision was retained despite 'a more elaborate attempt to exclude judicial review' has been described as 'challenging the legislature's legally unlimited law-making authority'.[33] Yet, the Court's interpretive approach reflects the constitutional importance of judicial assessment of questions of law and oversight of executive bodies. The normative weight of this principle thereby shifts construction outside the realms of 'ordinary statutory interpretation'.[34]

The constitutional paramountcy of preserving access to the courts similarly triggered strong judicial interpretation in *Evans*,[35] which was also seen as straining the boundaries of judicial power. On its face, the case did not raise access to justice issues. Government departments denied a Freedom of Information request from a journalist for communications between the Prince of Wales and government ministers. Those refusals were upheld by the Information Commissioner, but the Upper Tribunal overturned this decision, finding that public interest weighed in favour of releasing the communications. The Attorney General responded by overriding the Tribunal's decision; in doing so he relied on section 53 of the Freedom of Information Act, which allowed him to override disclosure notices if 'he has on reasonable grounds formed the opinion' that failure to disclose did not violate the Act. It was in the Court's interpretation of section 53 that the access to justice implications of the override became apparent. In concluding that section 53

[28] A Tucker, 'Parliamentary Intention, *Anisminic*, and the Privacy International Case (Part One)', UK Constitutional Law Blog (18 December 2018) (available at https://ukconstitutionallaw.org/); B Schwartz, '*Anisminic* and Activism-Preclusion Provisions in English Administrative Law' (1986) 38 *Administrative Law Review* 33, 48–49.

[29] P Sales, 'The common law: context and method' [2019] *LQR* 47, 65, fn 75.

[30] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

[31] *Privacy International* (n 30) [107].

[32] *Privacy International* (n 30) [111].

[33] M Gordon, '*Privacy International*, Parliamentary Sovereignty and the Synthetic Constitution', UK Constitutional Law Blog (26 June 2019) (available at https://ukconstitutionallaw.org/).

[34] *Privacy International* (n 30) [107].

[35] *R (Evans) v Attorney General* [2015] UKSC 21.

should not be interpreted as permitting override of a judicial decision – including the decision of the Upper Tribunal – the majority of the Supreme Court maintained that the override 'cut across two constitutional fundamentals'. The first was that a decision of a court is binding but the second was 'that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen'.[36] The override was perceived as undermining citizens' ability to avail themselves of the courts; if judicial decisions could be overridden by the executive, the very value of accessing the courts would be rendered nugatory. The Supreme Court's decision that the wording of section 53 was not sufficiently clear to indicate parliamentary intention to allow override of the Upper Tribunal's decision has been described 'as a soft form of judicial strike-down'.[37] Yet, this interpretation can be perceived as further proof that judges will go to great constitutional lengths in order to preserve supervisory jurisdiction and the role of the courts in standing between the citizen and the state.

The line of case law regarding supervisory jurisdiction of the court does reveal some potential for the common law to continue to exert influence on legislation in the event of a repeal of the HRA. The courts' determination to maintain their role as arbiter of rights and mediator between the individual and the state, takes roots beyond the confines of legislative conferrals of judicial power. Judges have founded their role in delivering justice and the individual's access to judicial protection firmly in the rule of law. By further applying these requirements through the common law presumption embedded in the principle of legality, courts have developed a means for the common law to condition the meaning and impact of legislation, even without the textual affirmation of the HRA. It is in the ability to channel traditional acceptance of access to justice through the methodological funnel of the principle of legality that access to justice has a special capacity to flourish. While there is a general criticism that common law method outstrips the development of the content of common law norms,[38] as one of the more commonly invoked rights, access to justice has experienced substantial doctrinal development as well as strong normative application. The extent to which access to the courts is embedded within the constitutional system of the UK, and its ability to challenge traditional institutional boundaries makes access to justice well-equipped to weather legislative changes.

However, this representation of access to justice on the constitutional stage, while enabling citizen action, appears centred on the role of the court within the state. Judicial empowerment emerges as a central theme of the strong interpretive

[36] *Evans* (n 35) [52].

[37] M Elliott, 'A Tangled Constitutional Web: the black-spider memos and the British constitution's relational architecture' [2015] *PL* 539, 549.

[38] R Masterman and S Wheatle, 'Unity, Disunity and Vacuity: Constitutional Adjudication and the Common Law' in M Elliott, J Varuhas and S Wilson-Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford, Hart Publishing, 2018).

powers triggered by governmental (or parliamentary) erosions of access to justice in *Anisminic, Privacy International, Evans* and *Jackson*. Yet, access to justice can- and to some extent does- serve to empower the citizen as well as the institutions of state. The following section highlights the use of access to justice to empower the disempowered.

C. Access for the Disempowered: Vulnerability, Marginalisation and Exclusion

Disempowerment and exclusion in the social, economic and political spheres create conditions that elevate the necessity for reliance on the legal system. These sources of disadvantage and marginalisation tend to give rise to legal problems in relation to exclusion from majoritarian institutions, provision of public services and provision of services by private persons and bodies. Research has shown, for instance, that those living in poverty 'experience more legal difficulties than the average [person]'.[39] Further, persons who lack socio-economic or political influence are less able to generate private solutions to their problems or prevail upon political bodies to address their issues and protect their interests. They are therefore more reliant on the legal system – including the system of fundamental rights enforcement – which rests on non-majoritarian imperatives.[40] Yet, the very conditions that produce the need for the legal system – exclusion, vulnerability or marginalisation – can also prevent or impede their access to that system.

The crux of defining and protecting access to justice as a right turns on whether there is a hindrance or impediment to access and whether that hindrance is justified. Despite the apparently blanket statement in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* that 'the subject's right of recourse to Her Majesty's courts for the determination of his rights' is 'not by any means to be whittled down',[41] it is clear that not every hindrance in the ordinary sense of the word would constitute a hindrance in the eyes of the law. The necessity for an individual to engage and pay for transportation to law offices or the courts could be seen as an impediment in the ordinary sense of the word. Without the assistance of transportation, she would be unable to attend court proceedings or assist in her legal representation. Yet it is unlikely that the need to pay for such transportation would be deemed an infringement of the right. The cases therefore often turn on what constitutes an *impermissible* hindrance, which includes, first, the types of barriers that can be hindrances and, second, assessment of the extent or impact of the hindrance.

[39] DL Rhode, *Access to Justice* (Oxford, Oxford University Press, 2004) 103; JA Leitch, 'Having a Say: Access to Justice as Democratic Participation' (2015) 4 *UCL Journal of Law and Jurisprudence* 76, 78.

[40] See discussion of the importance of Bills of Rights for political minorities in *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15, 1998 (12) BCLR 1517 (SACC) [25] (Ackermann J).

[41] [1960] AC 260 (HL) 286.

Hindrances may take the form of specific procedural impediments to initiating litigation, the complexity of the legal process, bars to the award of a remedy, financial conditions for the pursuit of litigation and, potentially, the withdrawal of legal aid. The hindrance must not have the impact of completely depriving the individual of the right; the core of the right must be retained. Following a review of the authorities in *UNISON*, Lord Reed devised a three-stage test for determining whether there has been an unconstitutional impediment to access to justice. First, 'any hindrance or impediment requires clear authorisation by Parliament'.[42] Second, even if such statutory authorisation for an impediment exists, the courts will interpret the statute 'as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question'.[43] Third, the measure imposed 'will be ultra vires if there is a real risk that persons will effectively be prevented from having access to justice'.[44]

The vulnerable status of claimants has provided context for judgments rebuffing governmentally erected roadblocks to accessing courts. The *UNISON* case called for contemplation of vulnerability in determining whether the imposition of fees for access to employment tribunals and employment appeal tribunals undermined access to justice. Lord Reed opened the discussion by reflecting on 'the vulnerability of employees to exploitation, discrimination, and other undesirable practices, and the social problems which can result' as the driving force behind the enactment of statutory rights for employees.[45] This mirrors similar concerns regarding workers' rights expressed by Chief Justice McLachlin of the Canadian Supreme Court in *Trial Lawyers Association of British Columbia v British Columbia*.[46] Thus, judges have, with increasing confidence, come to grapple with the economic context of claimants and the impact of government policies on the financial capabilities of potential litigants. However, empowerment must resonate not only in a financial sense but in other important aspects of people's lives.

While access to justice discourse often centres on economic disempowerment, disempowerment and exclusion exist in a variety of forms that resonate in the justice system. Alongside economic disadvantage, disempowerment and exclusion can result from minority status (including ethnic and sexual minority status) and from social and political exclusion (including through refugee, asylum or immigration status). To truly empower the public through access to justice, there must be engagement with a wide range of realistic hindrances to access to justice, through frank acknowledgement of societal identity-based grounds of inclusion and marginalisation. As is discussed in Part III below, while the courts have recognised economic-based disempowerment within access to justice analysis, they have been less responsive to status-based impediments to access.

[42] *UNISON* (n 19) [78].
[43] Ibid, [80].
[44] Ibid, [86].
[45] Ibid, [6].
[46] *Trial Lawyers Association of British Columbia v British Columbia* [2014] 3 SCR 31.

D. Access to What End? The Rationales of Access to Justice

As the normative importance of access to justice manifests in various forms within the constitution, this suggests that the rationale of access to justice is itself varied. Indeed, it suggests a need to inquire into multiple rationales underpinning the right, rather than a single rationale. This part of the chapter examines the rationales of access to justice, noting rationales that highlight institutional imperatives on the one hand and those geared towards public empowerment on the other. I advocate emphasis on a public empowerment rationale, recognising signs that the courts have tentatively taken in that direction and the scope for further orientation towards a public facing vision of the right.[47]

The strength and influence of access to justice lie in part in its multiple rationales and objectives, including pursuit of individual interests and fundamental rights, respect for the rule of law, judicial independence, support for administration of justice and accountability in government. Future development of the doctrine ought to be guided by interrogation of the imperatives protected by these multiple rationales, with thoughtful assessment of the relative importance of these pursuits. In short, we must take stock of why this doctrine matters, whom it serves and how its objectives can best meet the needs of our constitutional democracy. Such a frank assessment should influence the dominant roles played by the doctrine in the future as well as the terms in which courts communicate with the state and the public about access to justice. It is argued that in advancing these rationales, more emphasis should be placed on the public facing imperatives of the doctrine and less on the institutional priorities served by ensuring access to courts. Such emphasis would serve to bolster access to justice as a bastion for defence of individual interests and fundamental rights, and a support mechanism for public engagement in governance. As is argued in further detail below, emphasising public facing rationales has the advantage of highlighting and giving effect to the value of access to courts as a right of and for the public.

III. Institutional Rationales and the Role of the Judiciary

Where the judiciary has sought to explain the foundation and rationale for protecting access to justice, while the interests of the individual do not escape mention, the first port of call is often the institutional interests of the judicial branch of state.

[47] The concept of legal empowerment has become ascendant in development literature, and is understood as 'the use of law to specifically strengthen the disadvantaged': Stephen Golub, 'What is Legal Empowerment? An Introduction' in S Golub (ed), *Legal Empowerment: Practitioners' Perspectives* (International Development Law Organization 2013) 13. Crucially, 'the disadvantaged' encompasses the poor, minorities, defendants in criminal cases and other groups affected by societal injustice. See also B Van Rooij, 'Bringing Justice to the Poor, bottom-up legal development cooperation' [2012] *Hague Journal on the Rule of Law* 286.

The current dominant framing of access to justice starts from the centrality of access to justice to the fulfilment of the judicial function. Thus, the celebrated defence of access to justice in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* was arrived at because, in the words of Lord Jenkins: 'I cannot find any sufficient indication that it was intended to oust the jurisdiction of the court.'[48] This dynamic is not limited to the UK and can be seen in the approach of the Supreme Court of Canada. Accordingly, the primary flaw with the hearing fees imposed by the province of British Columbia in *Trial Lawyers Association* was that 'the legislation at issue bars access to the superior courts … by imposing hearing fees that prevent individuals from having their private and public law disputes resolved by the courts of superior jurisdiction- the hallmark of what superior courts exist to do'.[49] The principal concern, as in UK jurisprudence, is with the position and jurisdiction of the court, whereas the rights and engagement of the public appear to be secondary, albeit important.

While access to justice is sometimes presented as being grounded in the rule of law, rule of law justifications for a right of access to courts are themselves often couched in exclusively or predominantly institutional terms. After anchoring the right in the rule of law, Lord Reed's *UNISON* judgment cast the importance of the rule of law in terms of the departments of state:

> At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them.[50]

In this framing, the public are beneficiaries of the protection and defence of the right but they play a secondary role in the narrative; it is the institutions of state that take centre stage. Lord Reed advances a vision of institutional interaction facilitated by the settlement of disputes in courts. The institutional narrative presented by Lord Reed is one of collaboration and mutual problem-solving, rather than institutional confrontation and antagonism. The court must be commended for articulating the challenge before it in these terms, rather than conjuring up the image of a battle. A battle narrative would legitimise the sometimes unspoken assumption of political constitutionalist judicial review sceptics that there is a power struggle between the judiciary and political actors. The undercurrent of battle is, for instance, revealed in Ekins and Forsyth's response to the UK Supreme Court's

[48] *Pyx Granite* (n 41) 304.
[49] *Trial Lawyers Association* (n 46) [35].
[50] *UNISON* (n 19) [68] (Lord Reed).

restrictive interpretation of the Freedom of Information Act 2000 in *Evans*.[51] Ekins and Forsyth characterise *Evans* as an 'expansion of judicial power' and accuse the judges of 'suppressing the Minister's statutory power and undercutting the scheme Parliament enacted'.[52] This posture is maintained in their consequent advice to Parliament to respond to the judgment by enacting legislation expressly conferring on the Attorney General the power to override the decision of the Upper Tribunal and 'standing ready to reverse other judgments that overstep the mark'.[53] The battle narrative is an outgrowth of the debate sparked during the twentieth century between legal and political constitutionalists, which has been criticised for its polarising nature and its slowness to account for new models of inter-institutional exchange.[54] The terms of the political versus legal constitutionalism discourse are emblematic of an adversarial construction of constitutionalism, thereby ignoring the potential for collaborative engagement. This framing ought to be dispensed with, in favour of a more collaborative understanding of constitutional relationships, such as that envisioned by Lord Reed.

A collaborative model of constitutionalism would eschew fixations on duelling legal and political visions of the constitution and, as a result, reject strictly hierarchical institutional orderings.[55] Collaborative constitutionalism, as described by Eoin Carolan, encourages 'fruitful conflict' and mutual constructive engagement between institutions with differing priorities and perspectives. Though conflict remains a feature of constitutionalism under this model, there is no expectation that conflict will result in battle or lead to a final winner-takes-all result. Rather, constitutional collaboration 'discourages the anthropomorphism that sometimes reduces constitutionalism to a conflict between the Politician and the Judge and instead encourages awareness of the role of institutions as transactional sites for interplay between different views'.[56] This proposed reformulation of constitutional interactions would sound in access to justice reasoning by fostering cooperative and participatory language, envisioning public use of the court system as a means of stimulating collaborative problem-solving between the institutions of state. Lord Reed's language in *UNISON* is therefore a step in the right direction, but to be sufficiently collaborative, and more effective at problem-solving, the vision of

[51] *Evans* (n 35).

[52] R Ekins and C Forsyth, 'Judging the Public Interest: The Rule of Law v The Rule of Courts' (Policy Exchange, Judicial Power Project) 5.

[53] Ekins and Forsyth (n 52) 5.

[54] See generally, S Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge, Cambridge University Press, 2013).

[55] E Carolan, 'Dialogue isn't working: the case for collaboration as a model of legislative-judicial relations' (2015) 36 *LS* 209, 224–26. See also A Bogg, 'The Common Law Constitution at Work: *R (on the application of UNISON) v Lord Chancellor*' (2018) 81 *MLR* 509, 514.

[56] Carolan (n 55) 226. See also feminist theory advanced by scholars such as Benhabib and Fredman, which proposes deliberation and participation as pinnacles of democratic constitutionalism. See, eg, S Benhabib, 'Deliberative Rationality and Models of Democratic Legitimacy' (1994) 1 *Constellations* 26, 31–35; S Fredman, 'From Dialogue to Deliberation: Human rights adjudication and prisoners' rights to vote' (2013) *PL* 292, 294–45.

constitutionalism presented by the Supreme Court must also be public-focused, encouraging and highlighting public participation instead of being consumed by institutional interplay. While the court may be moving towards more collaboration between institutions, there remains outsized focus within access to justice reasoning on justifying and buttressing the court's position within the state. The importance of protecting access to the justice system would be better understood in the context of the entire constitutional framework as a route to empowering the public to participate more closely in governance.

IV. Beyond Judicial Empowerment to Public Empowerment

There are two primary reasons for deemphasising the judicial empowerment rationale in access to justice reasoning. First, the full societal impact of the right of access to justice can be seen more thoroughly through the individual and communitarian objectives it serves, not the institutional benefit it brings to the judiciary. Certainly, judges have stressed that in securing the role of the judiciary in reviewing governmental action and holding the state to account, the courts are thereby ensuring that the state remains within and subject to the law and that the judicial branch serves as a forum for the individual to be heard and have their interests protected.[57] Nonetheless, this is a formulation that pivots around the courts and rule of law concerns in a limiting manner, and sidelines wider reflections on the requirements, objectives and aspirations of constitutional rights. Second, rights are fundamentally about the person, seeking to respect their dignity and enhance their capabilities. Institutional benefits that may accrue in the process of rights protection are secondary. It is this understanding of the rights protection dynamic that ought to inform access to justice reasoning.

Public empowerment has two constituents: the individual and the community. The individual dimension requires that each person can access courts, receive adjudication and rely upon the outcome of that adjudication. Within the individual imperative of the doctrine exists a need to protect the jurisdictional attributes of courts – such as the independence of the judiciary and the impartiality of individual judges – and the finality of the judicial settlement. Understood in this way, the institutional protection offered by access to justice is not the end, but a means to an end. The communitarian dimension exists in the claim that the proper administration of justice and accountability of state organs to the people is served by preserving avenues to the courts. In this sense, the accessibility of the legal process provides a means of holding government (if not the legislature) to account, ensuring a route for the public to challenge and obtain justification for executive

[57] Se, eg, *Jackson* (n 14) [159].

decision-making. The intertwined individual and communitarian imperatives of securing access to courts are well-represented in Lord Diplock's words in *Attorney General v Times Newspapers Ltd* that:

> The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts …, secondly that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias and whose decision will be based upon those facts only that have been proved in evidence before it in accordance with the procedure adopted in courts of law, and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court.[58]

The communitarian import has garnered some recognition in case law. The UK Supreme Court's recent rejection of 'the idea that bringing a claim before a court or a tribunal is a purely private activity, and the related idea that such claims provide no broader social benefit' offers powerful support to a communitarian potential for the right.[59] In finer detail, the social benefits of individual access to courts were identified in *UNISON* as (i) judicial decisions on matters of general importance,[60] (ii) the provision of an impetus for the enforcement of rights and a deterrent to breaches of obligations, buttressed by security in the knowledge of an avenue for protection of those rights and obligations[61] and (iii), which is closely related to (ii), a buffer against the effects of power imbalances which would, if unrestrained, inevitably favour 'the party in the stronger bargaining position'.[62] By highlighting the public good served by access to justice, not only in its individual but also in its communitarian dimensions, *UNISON* marks a welcome turn towards a public empowerment rationale of access to justice. A public empowerment understanding of the doctrine is particularly encouraged by recognition of the social benefit of a 'fair and just system of adjudication'[63] as a bulwark against power imbalances.

There are signs of an emerging public empowerment understanding of the right as courts have become increasingly engaged with, and responsive to, economic hindrances to access to justice. This engagement, which has been fostered by realistic assessment of the impact of governmental policies on 'behaviour in the real world',[64] speaks to the public facing perspective of access to justice. Yet, despite the courts' robust acknowledgement of the social purpose of the right, a public empowerment approach must also address (i) the need for positive action to redress limitations on access to justice and (ii) the need for equality of access across both economic and status-based differences. The following sections discuss the courts'

[58] [1974] AC 273, 309.
[59] *UNISON* (n 19) [67] (Lord Reed).
[60] Ibid, [69]–[70].
[61] Ibid, [71].
[62] Ibid, [72].
[63] Ibid, [72].
[64] Ibid, [93].

embrace of realism but argue that the law should also recognise status-based limitations on access to justice and the need for positive obligations on the state.

V. Realism and the Need for Positive Action

Enhancement of equal access to justice is being shepherded along by a pragmatic approach that assesses individuals within their economic context. This approach is consistent with UK courts' growing preference for realistic over formalist reasoning. The realistic turn in judicial reasoning is seen most resoundingly in *Miller v Secretary of State for Exiting the European Union*,[65] with the Supreme Court rejecting the government's argument that as UK domestic law is the source of EU law within the UK, the status of EU law in the UK does not change without a change in domestic law by domestic actors. The majority considered that in 'a more realistic sense, where EU law applies in the UK, it is the EU institutions which are the relevant source of that law' with the consequence that a notification of withdrawal from the EU would effect a change in domestic law and therefore require prior parliamentary approval.[66] Realism is similarly becoming prominent in the UK's access to justice jurisprudence, in relation to state imposition of financial conditions on access to courts. Early signs of a pragmatic approach to access to justice have been evident since *Witham*.[67] The Court's view that the Lord Chancellor's discretion to set fees under the Supreme Court Act 1981 was subject to fundamental rights, with the effect that he could not 'exercise his power in such a way as to deprive the citizen of … his constitutional right of access to the courts', was fueled by a practical assessment of the potential economic impact of the fees order. A guiding principle has evolved that the impact of disputed measures 'must be considered in the real world', in the words of Dyson LJ in *R (Hillingdon Borough Council) v Lord Chancellor*.[68] Following this principle, the Supreme Court's *UNISON* judgment 'brought a dose of realism to its task',[69] taking stock of statistics reflecting the impact of the fees order. Such data included a 66–70 per cent decrease in the number of claims pursued in Employment Tribunals, evidence of a fall in claims for lower or no financial remedies, and a smaller than expected proportion of claimants receiving a remission of fees. The belief that realism points the way forward for protecting access to justice is mirrored across the Atlantic in the Canadian Supreme Court. In the *Trial Lawyers Association* judgment McLachlin CJ took account of evidence comparing hearing fees with the median incomes of households, to arrive at the conclusion that to bring a claim, many litigants would have to sacrifice

[65] [2017] UKSC 5, [2018] AC 61.
[66] *Miller* (n 65) 61.
[67] Eicke, 'Speaking in UNISON?' (n 18) 24–25.
[68] [2008] EWHC 2683 (Admin), [2009] CP Rep 13 [61].
[69] Bogg, 'The Common Law Constitution at Work' (n 55) 510.

'reasonable expenses'. The hearing fees were accordingly deemed unaffordable for middle-income households and an unconstitutional barrier to access to the courts.[70]

Though barriers to access to justice are being challenged by the judiciary's willingness to take account of economic realism, the full potential of the right is nonetheless hampered by the traditional common law conception of rights as negative. Thus, in traditional common law theory, rights are understood as freedoms from state power and intrusion and do not readily encompass positive demands on the state to take action that protects fundamental rights.[71] Indeed, the exhortation in *UNISON* regarding access to 'a fair and just system of adjudication' and enforcement of rights and obligations has been described by one commentator as reflective of the 'common law's concern with freedom as independence'.[72] The idea of freedom as independence reflects an embedded negative conception of rights, which prioritises governmental restraint rather than governmental action. Accordingly, to perceive access to justice as a representation of freedom as independence is to conceive of access to justice in purely negative terms without the space for positive obligations on the state.

The traditional reluctance to interpret the fundamental right of access to justice – and fundamental rights in general – as capable of imposing positive obligations on the state is also bound up with the view that public spending priorities are par excellence executive and legislative decisions that require deference on the part of the courts. Accordingly, in the context of governmental regulation of the justice system, a lack of legal aid funding is a softer target than the imposition of court fees and charges. For instance, despite the robust account in *UNISON* of the public good served by access to justice, the Court avoided any intimations that the state had a duty to fund access to justice for persons who could not otherwise afford it.[73] In both *ex p Witham* and *Public Law Project* Laws LJ was more explicit on the boundaries of positive obligations and resource implications; in the latter judgment, he explained that:

> there is a profound difference between on the one hand the state's duty to ensure fair and impartial procedures and to avoid undue legal obstacles to access to the courts, and on the other a putative duty to fund legal representation. In *R v Lord Chancellor, Ex p Witham [1998] QB 575*, 586 in the Divisional Court, in a judgment with which Rose LJ agreed, I said:
>
> > "Mr Richards submitted that it was for the Lord Chancellor's discretion to decide what litigation should be supported by taxpayers' money and what should not.

[70] *Trial Lawyers Association* (n 46) [52]–[59].

[71] P Bowen, 'Does the Renaissance of Common Law Rights mean that the Human Rights Act 1998 is now Unnecessary?' [2016] *EHRLR* 361, 369.

[72] Bogg, 'The Common Law Constitution at Work' (n 55) 513.

[73] A Higgins, 'The Supreme Court turns the judicial rhetoric on access to justice up to 11 as it strikes down unaffordable and disproportionate employment tribunal fees, but key questions about the funding of civil justice remain: *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51' [2018] *Civil Justice Quarterly* 1, 9–10.

> As regards the expenses of legal representation, I am sure that is right. Payment out of legal aid of lawyers' fees to conduct litigation is a subsidy by the state which in general is well within the power of the Executive, subject to the relevant main legislation, to regulate. But the impost of court fees is, to my mind, subject to wholly different considerations. They are the cost of going to court *at all*, lawyers or no lawyers. They are not at the choice of the litigant, who may by contrast choose how much to spend on his lawyers."
>
> If I may say so that still seems to me to be correct and I am not aware that it has been contradicted.[74]

The resource allocation implications in *Public Law Project* therefore led Laws LJ and the remainder of the Bench of the Court of Appeal to uphold the Lord Chancellor's proposed amendment to the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The amendment would have excluded those who failed a residency test from eligibility for civil legal aid under the statute, except in exceptional circumstances. The Supreme Court maintained wider access to courts by reversing the Court of Appeal decision, but did so on the ground that the order was ultra vires the statutory power to 'vary or omit services' as it sought to limit legal aid on bases 'which have nothing to do with the nature of the issue or services involved or the individual's need, or ability to pay, for the services'.[75] In arriving at that conclusion, the Justices skirted the issue whether and in what circumstances access to justice can necessitate changes in government spending priorities.

If the negative view of access to justice holds, the common law right falls short of fair trial obligations under the ECHR. The ECtHR's ruling in *Airey v Ireland* set a standard that even in civil cases, where there is no express Convention right to legal assistance, 'Article 6(1) may sometimes *compel* the state to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court.'[76] The significance of the *Airey* ruling must not be overstated; it does not require states to provide a legal aid system and does not require legal aid or representation in all cases.[77] Yet the *Airey* conceptualisation of access to courts undoubtedly goes further than the view of the right espoused by Laws LJ, as the Strasbourg Court was guided by the principle that 'fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State' and that in such cases '"there is … no room to distinguish between acts and omissions"'.[78]

A change may, however, be on the horizon. On the issue of legal aid, the traditional reluctance to derive positive obligations from the right of access to justice gave way to a broader conceptualisation in *The Law Society v The Lord Chancellor*.[79] The High Court's judgment in that case accepted that 'the right of those accused

[74] *R (Public Law Project) v Lord Chancellor* [2015] EWCA Civ 1193 [44].
[75] *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39 [29] (Lord Neuberger).
[76] *Airey v Ireland* (1979) 2 EHRR 305 [26] (emphasis added).
[77] J McBride, 'Access to Justice and Human Rights Treaties' (1998) *Civil Justice Quarterly* 235, 259–62.
[78] *Airey* (n 76) [25].
[79] *The Law Society v The Lord Chancellor* [2018] EWHC 2094 (Admin).

of criminal offences to be given publicly funded legal advice, assistance and representation when they cannot afford to pay for such services, if the interests of justice require it' forms part of Article 6 ECHR and should also be seen as part of the common law constitutional right of access to justice.[80] While ultimately concluding that, applying the *UNISON* test, the evidence did not establish a real risk that defendants would be denied access to justice, the embrace of positive duties arising from access to justice is significant. It remains to be seen whether higher courts will adopt this position as an extension of the turn towards realism in access to justice claims. However, movement in this direction would be consistent with related case law such as *Howard League for Penal Reform v Lord Chancellor*, which holds that the common law duty of fairness in proceedings may require the provision of legal aid.[81] The Court of Appeal in *Howard League* held that regulations removing legal aid for certain categories of prisoners were unlawful as they created an inherently unfair system.[82] While *Howard League* was concerned with the fairness of legal proceedings rather than access to court, the Court of Appeal's approach should be relevant to determining whether the very avenues to court have been foreclosed by the unavailability of legal aid.

The *Howard League* and *Law Society* cases might herald a new direction in access to justice case law. Indeed, recognition of positive duties arising from the right of access to justice would accord with both the realistic turn in access to justice case law and the embrace of ECHR influence. For this new approach to become accepted and established, it would however, have to overcome the traditional common law reticence towards positive duties.

VI. Status-based Exclusion and Access to Justice

As a further extension of the realistic approach, meaningful realisation of the full potential of the right of access to justice must respond to both economic and status-based disempowerment. Through taking account of financial as well as identity-based grounds of marginalisation and disempowerment, access to justice has the potential to perform an empowering and equalising role. Certainly, these bases of disempowerment are intersectional and there is a strong likelihood that financial barriers to accessing courts would have a more deleterious impact on already disempowered status groups. One way of understanding this differential impact is that persons disempowered due to their identity are likely to be over-represented in groups disempowered by reason of socio-economic status. Evidence of such impact appears in witness statements referred to in the Justice Committee's report on *Courts and Tribunal Fees*, which spoke to the special impact

[80] *The Law Society* (n 79) [129].
[81] *R (Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244; [2017] 4 WLR 92.
[82] *Howard League* (n 81) [98]–[109].

of employment tribunal fees on pregnant women and new mothers.[83] Yet, despite the *UNISON* Court's pragmatic examination of the impact of employment tribunal fees, hints of intersectional and contextual reasoning in *UNISON* featured not in analysis of the right of access to justice, but in analysis of discrimination on the ground of protected characteristics under the Equality Act 2010. Lady Hale's conclusion that levying higher fees for discrimination claims is indirectly discriminatory against women and others with protected characteristics who bring such claims was not seen to influence the determination of the access to justice issue.[84] Such dissociation between the two lines of analysis misleadingly suggests that analysis of the access right is complete without attention to the implications for discrimination on identity grounds. Decoupling status-based marginalisation from economic marginalisation removes some of the useful context that should inform understanding of the impact of governmental policies on access to justice. Treating access to justice separately from identity-based disempowerment would also limit the avenues to obtaining legal remedies for persons who fall outside the protected characteristics of relevant discrimination legislation.

While there are statutory protections for equality and non-discrimination – including the Equality Act 2010 and Article 14 ECHR as applied through the HRA – these statutory protections are attended by limitations on their effectiveness and reach. For instance, the right to non-discrimination under Article 14 ECHR can only be successfully claimed if it engages another Convention right. While Protocol 12 to the ECHR makes the right to non-discrimination a free-standing right, the UK has not ratified the Protocol, and its absence from Schedule 1 to the HRA means that it falls outside the corpus of rights protected by that legislation. Moreover, reliance on equality legislation to protect against status-based exclusions or differential hindrances to access restricts courts to the protected characteristics specified in the legislation. This inhibits an evolving realistic appreciation of the actual ways in which policies in the justice sector may affect different groups in society. In this light, one of the benefits of using common law rights is the adaptability of the common law to changes in society and changing conceptions of justice. This adaptability would enable judges to acknowledge discriminatory impact on groups identified by characteristics not listed in equality or human rights legislation.

A more fulsome approach to access for the disempowered would be informed by both attention to economic vulnerability, as in *Unison*, and consideration of wider contextual factors as done by the Court of Appeal in *R (Medical Justice) v Secretary of State for the Home Department*.[85] At issue in that case was the reduction of a standard 72-hour notice period between notification of an order of removal from the country and the actual removal. The Court of Appeal endorsed

[83] House of Commons Justice Committee, *Courts and Tribunal Fees* (HC 167, 2016) 28.
[84] *UNISON* (n 19) [132]–[134].
[85] [2011] EWCA Civ 1710.

the view that a person served with an order of removal from the UK would, under the constitutional right of access to justice, 'need to have a reasonable opportunity to obtain legal advice and assistance if they wished to do so'.[86] Critically, in determining whether a reasonable time was available, the Court noted that English will not be the first language of many returnees and that they will often be restricted by being held in detention.[87] This approach incorporates concerns arising from status-based disadvantage into a claim of unconstitutional limits on access to justice. The case, admittedly, does not engage with familiar protected characteristics or specifically address discrimination as a sub-concept within access to justice. It does, however, contribute to the doctrine by applying a realistic assessment to non-economic disempowerment, and in that sense, it is a welcome step in the right direction.

The pragmatic or realistic ethos in access to justice reasoning has the potential to foster a turn towards a public empowerment understanding of the right at common law. A public empowerment framing of access to justice would encourage greater reflection on the public benefits accruing from the right and its importance to the public – in both its individual and communitarian dimensions. Such a shift in focus would also move the discussion away from the power that defence of access to justice either grants or removes from the organs of state. There are some hints of a public facing orientation – interspersed with the traditional institutional orientation – of the right in the approach of the Supreme Court in *Unison*. However, to fulfil its public empowerment potential, access to justice adjudication ought to address access in a holistic sense. This requires attention to the full range of restrictions on access – whether arising from economic or status-based concerns – and the steps necessary to make access to justice effective- including positive obligations on the state.

VII. Conclusion

As a right that has been central to the growth of common law rights in the UK, access to justice serves multiple constitutional imperatives. It offers a bridge to other common law rights, by preserving avenues for the public to lay claim to fundamental rights in courts and by furthering the doctrinal and methodological development of common law rights adjudication. Through access to justice, the disempowered or marginalised in society have a route to defend their interests, make their voices heard and hold the state to account. In the institutional sense, access to justice has repeatedly been a trigger for controversially strong powers of judicial interpretation. This is bound up with the focus on institutional dynamics

[86] *Medical Justice* (n 85) [20].
[87] Ibid.

as the dominant rationale of access to justice. The right is commonly justified by courts on the basis of the core judicial roles of resolving disputes, interpreting the law and upholding the rule of law. This leads to a conceptualisation of access to justice as a judicial empowerment doctrine.

There are some indications of a turn towards a public empowerment rationale, which highlights the public good that access to justice serves for the individual and the wider community. However, remaining constraints on the full blossoming of the public empowerment rationale lie in a failure to account for status-based restrictions on access to justice and the need for obligations on the state to take action to remove limitations on access. If the traditional divide, or perception of a divide, between negative and positive duties continues to restrict access to justice jurisprudence, the pragmatic approach necessary for fulfilment of equal access will be stymied. Similarly, the public empowerment goal of equal access to adjudication to enforce rights and obligations cannot be achieved without attention to a broad range of bases of exclusion and disempowerment.